## Dr Reid

## Explanation of drugs prescribed – Statement from 4/10/2004

1. (S)(2) You state that none of the drugs listed on the prescription sheets were prescribed by yourself or on your advice or instruction. There is however one possible exception which is Amiloride. Why do you feel you should state this? When you saw my Mother on the 25th, you examined her and looked at her prescription sheet – if you felt the drugs were inappropriate surely you would have advised differently? Is that not you responsibility as a consultant?
2. (S)(3) You state that my Mother took her Thyroxine up until the 17th November and you assume that my Mother's condition after this time had become such that she was no longer able to take this drug orally or was refusing to take drugs orally. You fail to mention that on the 17th she took her Amiloride orally without a problem.
3. (S)(3) You state that Frusemide was given daily from the 21st October and that the dosage was the most usual starting dose. My Mother had been on Frusemide for a lengthy time. Why was she kept on this drug and taken off her Amiloride?
4. (S)(3) You state that Temazepam was also written up on the 21st October, but was only administered once; at 0115 on the 11th November. This is remarkable when you consider the alleged aggression and restlessness.
5. (S)(4) You state that Oramorph was written up on the 21st October for pain, 10mg. Even though my Mother had no requirement for a pain killer in her time at the QAH, not even a paracetamol you agree that it is appropriate to prescribe this strong an opioid. Further to this on the 18th when my Mother was allegedly in such pain as to require a fentanyl patch she still had not received any of this?
6. (S)(5/6) You state on the 11th my Mother was prescribed and administered 200mg Trimethoprim once daily, for 5 days; which in your opinion is an entirely correct dose and length of treatment. This is incorrect, my Mother was administered 200mg twice daily; in your opinion would this they be double to usually prescribed amount? This was for a urinary tract infection which my Mother did not have. Why would this drug commence prior to the results? And why when the results were available was the drug not ceased? Dr Barton states that this drug was never administered, but the prescription sheets state differently.
7. (S)(6) You state that this drug was compatible with the other prescriptions taken daily at this time. You take into account that this drug is not compatible in people with Kidney disease but fail to mention that in fact causes a reversible rise in Creatinine. Which links to my Mother's sudden rise from 200 on the 9th November to 360 on the 16th after the course of this drug? You state that it needs to be monitored. How was it monitored at the GWMH?
8. (S)(6) You state that on the 11th Nov Barton prescribed, as required Thioridazine 10mg. This is a strong anti-psychotic to treat schizophrenia, ACUTE restlessness, agitation and confusion. The nursing notes do not reflect my Mother's condition becoming acute – nor did any member of my family who visited. You do not state on this occasion that this drug is also not compatible with people whom suffer kidney disease and in fact causes a rise in creatinine and CRF.
9. (S)(8) You state that on the 18th my Mother is administered Fentanyl; you state that according to her medical record she made no complaint of pain and you justify its use by stating that my Mother was unable to communicate the pain and that the

in the ITU in December 1997. That last finding is a finding of primary fact based expressly upon the judge's impression of the claimant in the witness box. It is fatal to a finding of liability in negligence. If no amount of warning would have kept the claimant away until she actually suffered her attack, then the failure to warn her cannot have caused it to happen.

31. The judge did not deal with Morriston's liability under the regulations. This is a more difficult question. Total prevention of exposure, for the reasons already given, was not reasonably practicable. It is difficult to say that the exposure was adequately controlled in the circumstances, because there were other less latex laden environments to which she might have been transferred, however unwillingly. The regulations may impose a stricter duty on employers even if the employee is willing to take the risk and may be prejudiced by compliance. The difficulty as we understand it is that the risk of an anaphylactic attack would have remained wherever she had been. In the circumstances, it seems to us difficult to hold that any breach of the regulations was causative of her attack.

32. We would therefore dismiss the claimant's appeal against Morriston. They would in any event only be liable for the pain and suffering arising out of that attack. All the claimant's damage flowed from the sensitisation for which Singleton are responsible. We would allow the appeal against them.

ORDER: The appellants' appeal against the first respondent is allowed, but her appeal again the second respondent is dismissed. The first respondent shall pay all the costs of the appellant's action against it both here and below. The second respondent shall recover its costs of the action against it and the costs order below in relation to the second defendant is undisturbed. The first respondent's application to appeal to the House of Lords is refused.

(Order does not form part of the approved judgment)

continued aggression, confusion and restlessness was due to this pain. Clearly, as you state the Thioridazine had not really worked – strange since my Mother was not even administered upto the dose range laid out by Barton, which was up to 3 times daily. In fact on 16th and 17th which being the days before the need to administer fentanyl she was only given 1 dose of Thioridazine – clearly there was no concern at this time of increased aggression or restlessness. In the nursing notes it states that my Mother slept well on the 16th and on the 17th slept well, went to the toilet twice and Thioridazine was not required. As for my Mother being unable to complain about her pain, she complained of a sore mouth. On the 15th she was given a bath, on the 16th she had another bath and hairwash and on the 17th she had another bath and hairwash – which according to Jill Hamblin (as per the Independent Review) my Mother requested – you don't do that when you are in pain. Fentanyl is the strongest opioid (approximately 80 to 100 times the potency of morphine and is available as a transdermal drug-delivery system (Duragesic) [245] . Because peak delivery does not occur until 12 hours, an alternate analgesic must also be given initially

10. I would like to state here that still not one member of the family had been informed of either my Mother's decline or her prescription change.
11. (S)(9) You state that on the 19th Barton prescribed Chlorpromazine, 50mg, which was administered at 0830. You state that this is the upper end of the normal range. This is true of adults, and it should be even lower for the elderly. Chlorpromazine may cause heart failure, sudden death, or pneumonia in older adults with **dementia-related conditions. Do not use chlorpromazine** if you have brain damage, bone marrow depression, or are also using large amounts of alcohol or **medicines that make you sleepy**. e.g. Fentanyl Interaction(s) found: Chlorpromazine and fentanyl; MONITOR: Central nervous system- and/or respiratory-depressant effects may be additively or synergistically increased in patients taking multiple drugs that cause these effects, especially in elderly or debilitated patients.
12. (S)(12)Barton then administers 40mg Diamorphine and 40mg Midazolam via syringe driver.
    a. You state that the 40mg of Diamorphine was appropriate for the 25milligram of fentanyl. But the fentanyl was already in my Mother's system, the equivalent of 135mg Diamorphine. Thus at this time my Mother was trying to cope with 175mg Diamorphine,.
13. (S)(12) Barton then administers 40mg Midazolam - you say here that the normal starting dose is 10-20mg, yet in the Independent review the 40mg was recorded as the correct dose?
14. Final Observations
    a. You state that the Chlorpromazine was of the upper range.
    b. You state that it would have been more appropriate to have administered individual sub-cutaneous injections of diamorphine over 24 hours to assess its effect.
        i. Here I would like to state that fentanyl was only licensed at this time to be administered to cancer patients in the terminal stages

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2004 WL 1054942 (CA (Civ Div)), [2004] 3 All E.R. 348, [2004] P.I.Q.R. 5, (2004) 148 S.J.L.B. 416, [2004] 1 W.L.R. 2683, (2004) 101(17) L.S.G. 30, 4-02-2004 Times 1054,942, 3-30-2004 Independent 1054,942, [2004] EWCA Civ 373
**(Cite as: [2004] 1 W.L.R. 2683)**

***2683** Gaca v. Pirelli General plc and others

Court of Appeal

CA (Civ Div)

Brooke, Mummery and Dyson LJJ

2004 March 10; 26

Damages--Personal injuries--Insurance benefit--Employee injured in course of employment receiving payments from insurers under policy paid for by employer-- Whether payments from insurers deductible from personal injury award payable by employer--Whether such payments falling within benevolence exception or insurance exception

The claimant, who was employed by the defendants, was seriously injured in an accident at work. Following a long absence, his employment was terminated on grounds of ill health. During the period when he was absent from work, but before his employment came to an end, the claimant received payments from insurers totalling £34,167.18, under a group personal accident insurance policy provided by the defendants, for "temporary total disablement" in respect of the period from the accident until termination of his employment. Following termination, the claimant received an ill-health gratuity payment of £10,000 from the defendants, and a further payment from insurers of £88,620 under the terms of the insurance policy for "permanent total disability". The claimant brought proceedings claiming damages for personal injury. Liability was admitted by the defendants and judgment entered for the claimant with damages to be assessed. On the trial of a preliminary issue, the judge held that the payments from the insurers fell within the "benevolence exception" to the general principle that a claimant was entitled to recover no more than the full extent of his net loss, and were not deductible from damages. On the defendants' appeal, the claimant also raised the "insurance exception" as an alternative foundation for exemption from deduction from damages.

On the defendants' appeal--

*Held,* allowing the appeal, (1) that ex gratia payments made to victims by tortfeasors did not normally fall within the benevolence exception, even if it could be shown that they were made from motives of benevolence; that there was a fundamental difference between payments made by an employer to his employees to compensate them for the consequences of injuries suffered in an accident, whether made directly or indirectly by means of an insurance policy, and payments made to victims of accidents by third parties out of sympathy for their plight; that a payment should only be treated as analogous to a benevolent payment by a third party if the case for doing so was clearly made out, having regard to the rationale for the existence of the benevolence exception; and that since the relevant payments were made by the defendants through a policy which formed part of the claimant's employment package and were not equivalent or analogous to payments made by third parties out of sympathy, the benevolence exception did not apply (post, paras 30-31, 35-37, 39-40, 60-63).

McCamley v Cammell Laird Shipbuilders Ltd [1990] 1 WLR 963, CA not followed.

(2) That the existence of the insurance exception was not in doubt but it was clear that it must be the claimant, and not the tortfeasor, who had paid the applicable premiums; that such payment would not be inferred simply from the fact that the claimant was an employee for whose benefit the insurance had been arranged; and that since there was no evidence that the claimant had paid or contributed to the cost of the insurance policy, the insurance exception did not apply and the payments from the insurers must be deducted from the award of damages (post, paras 41, 53-54, 56, 59-62).

***2685** Parry v Cleaver [1970] AC 1, HL(E) and Hussain v New Taplow Paper Mills Ltd [1988] AC 514, HL(E), applied.

Bradburn v Great Western Railway Co (1874) LR 10 Ex 1 and Wells v Wells [1999] 1 AC 345, HL(E) considered.

**The following cases are referred to in the judgments:**

Bradburn v Great Western Railway Co (1874) LR 10 Ex 1; 31 LT 464

ii. Why would you use diamorphine and not oramorph? My Mother was drinking Tea on the 18th with my ex-sister in law (Sandra Briggs) who visited my Mother, she reported no distress or pain.
iii. Why not contact the family to explain the situation so that they may be able to talk to my Mother about her alleged refusal of oral medication?

c. You state that it would probably have been more prudent to have started with a diamorphine dose of 20-30mg; However according to the NHS Mersey side; Using the conversion scheme, convert the fentanyl patch dose to the equivalent 24 hour oral morphine dose. Use the lower end (or less) of the suggested equivalent range, as advised by the palliative care specialist. Divide this oral morphine dose by three to give the equivalent diamorphine dose for subcutaneous infusion over 24 hours. **Start the syringe driver 12-18 hours after removing the patch**. Make sure appropriate breakthrough analgesia is prescribed and available for the period of patch removal and after the syringe driver is set up.
   i. My mother was not opioid tolerant and her alleged behaviour of getting dressed, getting someone out of bed and throwing two nurses up against a bookcase. This sort of behaviour could be seen as an overdose.

d. You state that in your opinion 20mg of Midazolam would have been a more appropriate starting dose; and that nothing was written on my Mother's medical file to show a reason for doubling this starting dose. You state that this can cause sedation in the first few hours. My Mother was sedated to her death.

a. (S)(15)Finally you conclude that palliative care in my Mother's case would have been to relieve her symptoms of confusion, restlessness, aggression and distress – none of which the family witnessed or the night nurses recorded. You state that his was on the background of her rapidly declining renal function, which was only noted on the 18th at Lunchtime – AFTER the administration of the Fentanyl patch. No-one took into account the rise of creatinine as drug induced, my Mother showed no symptoms of CRF or Glumerulonephritis.

see 155 —

i. Blood in the urine – which my Mother didn't have dark brown-colored urine (from blood and protein)
ii. sore throat – which my Mother only complained of a sore mouth of after the drugs were administered
iii. diminished urine output – which my mother didn't have
iv. fatigue – which my mother didn't have
v. lethargy – which my mother didn't have
vi. Increased breathing effort – which only developed in the last days of her life due to the respiratory depression of the drugs
vii. headache – which my mother didn't have
viii. high blood pressure– which my mother didn't have
ix. seizures (may occur as a result of high blood pressure) – which my mother didn't have
x. rash, especially over the buttocks and legs – which my mother didn't have
xi. weight loss – which my mother didn't have

26 March. The following judgments were hand down.

*The facts*

**1** On 7 August 1998, the claimant, Mr Jan Gaca, was seriously injured in an accident at work. The defendants, Pirelli General plc and others, were his employers. As a result of the accident, he was unable to return to work. His employment was eventually terminated on 19 March 2000 on the grounds of ill health. Whilst he was off work, but before his employment was terminated, he received sick pay from the defendants. He also received payments (total £ 34,167.18) pursuant to a group personal accident insurance policy for "temporary total disablement" from Europ Assistance for the period from the accident until the termination of his employment. Following the termination of his employment, he received: (i) an ill-health gratuity payment of £10,000 from the defendants themselves; and (ii) £88,620 from Europ Assistance under the terms of the insurance policy for "permanent total disability".

**2** The claimant issued proceedings in June 2001. The defendants admitted liability and judgment was entered in favour of the claimant with damages to be assessed. The defendants contended that the proceeds of the insurance (£122,787.18) should be deducted from the damages awarded to the claimant. The claimant contended that they should not be deducted. A preliminary issue was ordered to be tried. In a careful judgment, given on 29 August 2003, Mr Recorder Gibbons QC held that the insurance payments were not deductible. The defendants appeal against that decision with the permission of Sedley LJ. An important issue that arises on this appeal is whether the decision of this court in McCamley v Cammell Laird Shipbuilders Ltd [1990] 1 WLR 963 can be properly distinguished, or whether it should no longer be followed in the light of decisions of the House of Lords.

**3** By the terms of the insurance policy, the defendants were "participating companies" and the claimant an "insured person". The "operative times of cover" in relation to the claimant was "whilst in pursuit of normal occupational duties on behalf of the insured or whilst travelling directly between residence (normal or temporary) and place of work". The ***268**7 schedule identified the "benefit descriptions". These included: "personal accident"; "sickness"; "medical expenses"; "baggage and personal effects"; "money"; and "personal liability". In relation to "personal accident", the schedule described six "items" of benefit, including "permanent total disablement" (item 4) and "temporary total disablement" (item 5). The "sums insured" for a person in category B (such as the claimant) were 400% of annual salary for permanent total disablement, and 100% of annual salary for temporary total disablement. "Salary" was defined to mean "the total gross amount of remuneration paid to an insured person exclusive of overtime, commission and bonus payments".

**4** The claimant's contract of employment was contained in a handbook issued by the defendants. The introduction to the handbook included:

> "Welcome to Pirelli Cables Ltd. The purpose of this handbook is to provide you with information about your employment with Pirelli. Section 3 sets out the main terms and conditions which, together with those in your offer letter, form your contract of employment with the company. Other sections outline the benefits which are available to you as well as explaining the working arrangements which exist in the interests of fairness, safety, security and good relationships."

**5** Section 2 of the handbook was entitled "Benefits and facilities". Between pp 6 and 10 of the handbook there were mentioned the various benefits and facilities which were available to employees. These included, under the heading "Personal accident/travel insurance": "The company operates a personal accident and travel insurance scheme, which covers personal injury, loss and/or damage to personal property whilst on company business."

**6** Section 3 of the handbook was entitled "Terms and conditions of employment". It stated: "The following 'Terms and conditions of employment' (pp 10-18) together with the terms and conditions in your offer letter constitute your contract of employment." There was no reference in section 3 to the personal accident/travel insurance scheme referred to in section 2. There was, however, a reference to a separate scheme for sick pay operated by the defendants themselves.

**7** The judge held:

> "The provision of the permanent health insurance for the benefit of

xii. joint pain – which my mother didn't have (only in her knee which she was due to have a replacement on)
xiii. pale skin colour – which my mother didn't have
xiv. fluid accumulation in the tissues (edema) – which she had had for years and was never proved to be a result of glumerulonephritis.

15. On the 19th my Mother received, 175mg of Diamorphine, 50mg Chlorpromazine, 40mg Midazolam. All with CNS depressive effects and all to be used with caution in kidney impaired patients. I would like to understand how she was ever going to survive.

> the defendants' employees was not a contractual entitlement under their contracts of employment, nor did the claimant and his fellow employees make any direct contribution to the premiums. The defendants' only contractual liability to a sick or injured employee was under the wholly separate scheme for sickness pay where the payments came from the defendants themselves."

**8** There is no challenge by the defendants to the judge's finding that the provision of permanent health insurance was not a contractual entitlement.

**9** Although the judge made no finding on the question whether the claimant was aware of the insurance policy, it is not disputed on behalf of the claimant that he must be taken to have been aware of its existence and terms. The terms of the policy were reviewed by the defendants from time to time, and documents that we have been shown indicate that their employees and representatives of the trade unions were informed about the terms of the ***2688** policy whenever it was reviewed. It is not clear to what extent, if any, the terms of the policy were taken into account in negotiations between the defendants and the unions.

*Introduction to the issues*

**10** It has been stated repeatedly that the fundamental principle is that a claimant is entitled to recover the full extent of his net loss, and no more. As Lord Reid pointed out in Parry v Cleaver [1970] AC 1, 13:

> "Two questions can arise. First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages."

**11** It has never been in doubt that, if the injured claimant continues to receive his wages, whether under the name of sick pay or otherwise, these sums fall to be deducted from the damages for loss of earnings: see per Lord Bridge of Harwich in Hussain v New Taplow Paper Mills Ltd [1988] AC 514, 530D. It has also been stated on a number of occasions that there are two classes of payment to a claimant as a result of an accident which are not required to be brought into account in the assessment of damages. These are often referred to as the two exceptions against the rule against double recovery of damages. They are: (i) payments made gratuitously to the claimant by others as a mark of sympathy ("the benevolence exception"); and (ii) insurance moneys ("the insurance exception").

**12** In the court below, it was submitted on behalf of the claimant that the proceeds of the insurance policy that were received by him in the present case should not be deducted from his damages on the grounds that they came within the ambit of the benevolence exception. The judge accepted that submission. On this appeal, the claimant has served a respondent's notice and contends that the judgment should also be upheld on the grounds that the proceeds of the policy fell within the insurance exception.

*The benevolence exception*

*Review of the authorities*

**13** In Parry v Cleaver, Lord Reid said that he knew of no better statement of the reason for the benevolence exception than that of Sir James Andrews LCJ in Redpath v Belfast and County Down Railway [1947] NI 167, 170 A-D. In that case, the defendant company sought to bring into account sums received by the plaintiff from a distress fund to which members of the public had contributed. Sir James Andrews LCJ said that the plaintiff's counsel had submitted:

> "that it would be startling to the subscribers to that fund if they were to be told that their contributions were really made in ease and for the benefit of the negligent railway company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar ***2689** character would be that the springs of private charity would