

Herbert George Snell and others v Robert Young & Co Ltd (and others)

1996-S-No-6

High Court of Justice Queen's Bench Division

31 July 2001

2001 WL 1903392

Before: Mr Justice Morland

Tuesday 31st July 2001

**Organophosphate Group Litigation— Part 24 Applications
Representation**

- Mr John Melville Williams QC and Mr John Bates (instructed by Gabb & Co.) Appeared on behalf of the Claimants with the exception of Mrs Eaglestone. (by Thompsons).
- Mr Jeremy Stuart-Smith QC and Mr Neil Block (instructed by Messrs Beachcroft Wansbroughs) appeared on behalf of the Defendants, Turneys and John Turner Ltd. and (instructed by Cartwrights Insurance Partners) appeared on behalf of Gloucester County Council.
- Mr Shaun Ferris (instructed by Kennedys) appeared on behalf of the defendants Ciba Geigy Plc and Novartis Ltd.
- Mr James Medd (instructed by CMS Cameron McKenna) appeared on behalf of the Defendants SP Veterinary Ltd and Mallinckrodt/Coopers Animal Health.
- Mr Julian Matthews (instructed by Messrs Vizards Staples & Bannisters) appeared on behalf of the Defendants Robert Young & Co Ltd; Young's Animal Health Ltd; Young's Pharmaceuticals Ltd and Grampian Pharmaceuticals Ltd.
- Mr Charles Gibson QC (instructed by Davies Arnold Cooper) appeared on behalf of the Second Defendant Bayer Plc.
- Ms Anna Guggenheim QC (instructed by Elborne Mitchell) appeared on behalf of the Fifth Defendant, The Wellcome Foundation Ltd.
- Mr Charles Feeny (instructed by Berrymans Lace Mawyer) appeared on behalf of Clwyd County Council. Daily Transcription by John Larking Verbatim Reporters.

JUDGMENT

MR JUSTICE MORLAND:

The main application that I have to determine is an application on behalf of all the defendants that I should strike out all the remaining claimants in this group action, because to allow the action to continue would amount to an abuse of process. It is said that all the remaining claims are unviable and continuance of the action would involve serious injustice to the defendants who have already incurred substantial costs, and would incur even more substantial costs if the action proceeded further with no prospect of recovering those costs.

A secondary application is made on behalf of individual defendants in respect of the claims of each of the eleven remaining claimants. The submissions are that each claim has no realistic prospect of success and should be dismissed.

The toxic effect of **organophosphates** has been well known for over fifty years. Extracts from Government information are helpfully set out in file 4, pages 1 and 2, from which I make quotations.

1985 — Health and Safety Executive: A Guide to Poisonous Substances in Agriculture Regulations 1984:

"The repeated use of pesticides, even in small quantities, may have cumulative effects which may not be noticed until dangerous amounts have been absorbed. This applies particularly to chemicals in the **organophosphates** group."

1996 — Department of Health Pesticides Poisoning Notes for Medical Practitioners:

"The first symptoms of poisoning are usually a feeling of exhaustion, weakness and mental confusion. General muscle weakness ensues. Neuro-behavioural symptoms including depression, irritability, confusion, chronic tiredness, apathy, headache, dizziness and emotional mobility have been associated with repeated symptomatic exposure to OPs."

2000 — Cott Report.

"The balance of evidence supports the view that neuro-psychological abnormalities can occur as a long-term complication of acute OP poisoning. Such abnormalities have been most evident in neuro-psychological tests."

2000 — MAFF Research Requirements; 2000 to 2001—

"Chronic Effects of OPs on Human Health:

It is well-established that acute effects on human health can arise after exposure to a sufficiently high dose of OPs, although such cases are rare in the United Kingdom. It is recognised that these short-term effects may sometimes be followed by long-term, chronic, neuro-toxic effects. More recently, it has been conjectured that long-term adverse effects on human health may result from the exposure of low levels of OPs which, in themselves, do not produce symptoms of acute toxicity."

In general, the eleven claimants, who undoubtedly suffer ill health, attribute it to repeated exposure to **organophosphates**, at low levels, over a period of years. They have all been involved in farming and, in particular, sheep farming and sheep dipping, which commonly includes, as a constituent, **organophosphate**. Their symptoms of ill health are commonly suffered by members of the general population. Long-term, low-level, exposure to **organophosphates** leaves behind on the victim no identifying fingerprints.

I suspect that, one day, it will be established scientifically, and accepted generally, that much of the ill health, feelings of malaise, flu-like symptoms and depressive illnesses experienced by the farming community are caused by their repeated exposure, over years, at low levels, to a variety of toxic chemicals, including **organophosphates**.

To succeed in a claim that he has suffered injury from exposure to a toxic chemical, the claimant does not have to establish, as a matter of scientific proof, that his injury was caused by that exposure, but he has to prove, on the balance of probabilities, that the particular injury to his health from which he suffers was caused by exposure to a particular toxic chemical, in this case, **organophosphate**. He does not have to prove that the **organophosphate** in question was the sole cause, but he has to prove that the **organophosphate** was a material cause of a particular injury to his health. Assuming that the claimant is able to prove, on the balance of probabilities, that the particular injury to his health was caused by an **organophosphate** to which he was exposed, he then has to prove that a defendant, whom he has sued, was responsible for that exposure.

Assuming that the claimant is able to prove that a particular defendant was responsible for that exposure, to succeed in his claim, he must then prove that the particular defendant was guilty of negligence, or otherwise in breach of duty or, the Consumer Protection Act 1987 entitled the claimant to damages.

Thus it can be seen that the claimant has a number of hurdles to surmount. Further hurdles may arise. Even if the **organophosphates** may be responsible for some features of his ill health, other features of his ill health may have other causes for which a defendant would not be liable.

If a claimant has suffered ill health as a result of **organophosphate** exposure, it does not follow that all his loss of earning capacity, or all the reduction of the profitability of his farming activities, are attributable to the ill health caused by **organophosphate** exposure. His financial losses may have other causes, such as the general decline in agricultural profitability, BSE and Foot and Mouth disease.

Although the amounts of some individual claims are alleged to total many hundreds of thousands of pounds, I consider that the size of the claims are very speculative.

Claims in negligence in respect of injury to health have to be brought within three years of a claimant having the requisite knowledge that he may have a claim against the defendant, unless it is equitable to extend the three year limitation period. I would not be surprised if this further hurdle faces some claimants in this case.

The greatest problem facing the claimants in this case has been their inability to obtain evidence from the appropriate experts that their ill health has been caused by exposure to **organophosphates**. Although I have a hunch that, in the cases of some claimants, part of their ill health is likely to be attributable to repeated exposure to **organophosphates** at a low level over a period of years, a hunch is not proof, not even on the balance of probabilities, whether it be the hunch of a judge or a

sympathetic general practitioner, such as Dr Myhill, who has a special interest in the effect of **organophosphates** on the health of the farming community. Until a late stage during the four day oral argument before me last week, I had hoped to be able, consistent with my duty, to give the claimants a further, and last, opportunity to obtain the evidence necessary to make their claims viable. I discussed the possibility of adjourning the defendants applications for six to nine months to give the claimants this opportunity. Having considered all the submissions of counsel, and read over the weekend the whole of the transcripts of those submissions, I have reached the firm conclusion that I would be failing in my duty if I did not bring this group litigation finally, and immediately, to an end.

Although I have reached this conclusion with some misgiving, because I am sympathetic to the farming community, whose health is likely to be adversely affected by repeated, low-level exposure to toxic chemicals, I am sure my decision is right. To adjourn the applications would raise false hopes, and result in the incurring of further great expense with no probable prospect of a worthwhile return.

Already, well over £1 million has been spent in legal aid in funding the claimants and the group litigation. On their behalf, a pilot, scientific study was carried out at huge expense. It produced no reliable, positive findings in their favour. Their case still remains unviable.

The defendants have also expended many hundreds of thousands of pounds in investigating into the claims, and have indeed been particularly co-operative in granting the claimants extensions of time.

In my judgment, it would be oppressive to the defendants to allow the group litigation to continue. In reality, the group has ceased to exist. The claimants are a group of eleven disparate claimants, with claims of varying degrees of weakness, but all facing immense difficulties.

This judgment is an introductory judgment towards my final judgment, but it is a final decision. I shall, in the late autumn I hope, be able to hand down a written judgment dealing, in some detail, with the whole history of the group litigation, and the cases of the eleven remaining claimants.

The history of this litigation goes back to, at least, 1993, when the Law Society convened a meeting of all plaintiffs solicitors involved in the UK sheep dip litigation. On 30 January 1997, the Legal Aid Board granted a generic contract to Dawbarns, whose partner, Mr Richard Barr, had the conduct of the group action thereafter. The generic contract was transferred to his new firm, Hodge, Jones and Alan until legal aid was withdrawn last year following advice from experienced, and very able, leading counsel, junior counsel and solicitors, who considered the matter in detail with all the experts then available to them. That decision to stop public funding was communicated in a statement to the media. The statement was published in December last year.

"Most clients will have heard by now that the generic legal team has advised that the **organophosphate** sheep dip 5 litigation does have not reasonable prospects of success, and that the issue of sheep dip cases should therefore be discontinued.

The sheep dip litigation has been financed almost entirely by public funds made available by the Legal Aid Board, now the Legal Services Commission. Lawyers acting for legally aided clients have a duty to review, at regular intervals, the merits of the case, and apply stringent cost benefit formulas in order to justify whether the case should continue.

The sheep dip litigation involved allegations about the safety of **organophosphates** used in sheep dip. Many different types of sheep dip were used over the years, so there were over twenty manufacturer defendants in the action, as well as the Ministry of Agriculture, Food and Fisheries and employers of farm workers.

Despite the fact that many thousands of dippings take place every year, carried out by many farm workers, the number of claims presented to the court by August 2000 was only twenty-five.

We have great difficulty in obtaining convincing evidence to link the farmers symptoms with the **organophosphates** in question, and with such small numbers of cases, and the very large costs of the investigation and trial, the generic team felt that further expenditure of legal aid or private funding would not be justified.

The sheep dip litigation proceeded at fast pace after January 2000, when the court began to issue directions for the progress of the litigation, ordered plea of all cases by March 2000, and serve medical reports in support of each claim-this was done.

The defendants response in July 2000 was to issue applications to strike out most of the issued cases. We received the defendants evidence in support of their strike-out applications in August 2000, and discussed this evidence at a series of meetings with experts. Regrettably, taking into account all the evidence, we have come to the conclusion that the strike-out applications could not be defended.

There were three main reasons for our decision: One, in no case were we able to find convincing evidence from experts to definitively meet the claimants symptoms with **organophosphates**. In many cases, there were confounding factors, such as a previous head injury or accident. In all cases, it could not be ruled out that the symptoms were caused, or contributed to, by exposure to other chemicals encountered on a farm or in other work done by claimants.

We had a meeting with the generic team of counsel, various neurologists, neuro-physiologists and neuro-psychologists to discuss some of the medical and scientific issues in detail before the statement of case was drafted. In the end, the medical experts were unable to attribute any abnormalities in long-term, low-level **organophosphate** exposure in general, or to specific exposures in particular.

Two: As yet, there is little published scientific research which strongly supports a link between low-level **organophosphates** exposure and clinically significant, long-term effects at any time. This was a significant hurdle to be overcome and, at the present time, the balance of evidence does not support such a link. Some research does indicate an association between **organophosphate** exposure and effects on function of the nervous system, but the measured deficits recorded are generally subtle and do not translate into symptoms.

The Committee on Toxicity's report on **organophosphates** concluded that the link was unlikely, although the report stated there was insufficient evidence to allow for useful conclusions to be drawn about psychiatric illness. The report identified a gap in knowledge relating to the possibility that **organophosphates** caused disabling illness in a small subgroup of exposed persons. The Government has now commissioned further research specifically to look at this issue and whether there is any relationship between low-level exposure and long-term illness. That research is unlikely to reach conclusions and be published before the year 2002, at the earliest.

Three: The small size of the co-group of cases could not justify the continuing large expenditure on litigation. About twenty-five cases have been issued in the High Court, but the generic team found that most of these cases were unsustainable because of confounding factors such as earlier accidents or other medical conditions.

We very much regret having to advise that the **organophosphate** sheep dip litigation be brought to an end. We are well aware that many farmers are ill and we accept their symptoms may have been caused by exposure to **organophosphates**. Unfortunately, however, there is, at present, insufficient, supportive, scientific evidence for any likelihood of success at trial. The range of symptoms and illnesses suffered by claimants are relatively common in the general population, and have many possible causes, including exposure to chemicals other than **organophosphates**.

There is no definitive fingerprint effect of **organophosphates** which would allow the symptoms to be attributable to exposure.

It may be that further research will establish that there is a link between low level exposure of **organophosphates** and long-term effects. Even if this were the case, however, the problem would remain that each claimant would have to link their own symptoms, on the balance of probability, to identifiable **organophosphates** and rule out any other possible confounding cause. This is a considerable hurdle to overcome. We have consulted many medical and scientific experts in the hope of receiving the support depending on this issue but none could assist us, either on the whole group action or on a case-by-case basis. In the end, our duty is to ensure that public money is spent wisely, and we could not justify further public expenditure on the sheep dip litigation."

However, the eleven claimants before me were granted limited legal aid for the sole purpose of resisting the defendants strike-out application. The difficulties facing the

claimants is well-illustrated by the claim of Mr Ernest Sayce, now aged 53. He was born and brought up on a family mixed farm in Hereford, taking over the farm, in partnership with his brother, when his father retired in 1970. He worked the farm with his brother until 1993. They had sheep, cattle, and crops. Over the years, Mr Ernest Sayce has been exposed to about 130 different agricultural chemicals, including over twenty different **organophosphate** products.

He commenced proceedings against twelve different drug companies, legal aid being granted on 24 August 1998. On 29 August 2000, his claim against three of the defendants was discontinued, but on terms that he bore their costs and his own costs of suing. Those costs can be set off against any damages that he might recover from the remaining claims, substantially reducing his net award, if any.

Mr Ernest Sayce used Coopers fly dips between April 1974 and May 1981, when dipping the sheep, and metasystox between 1975 and 1982, as a crop spray for cereals and sometimes potatoes. The defendants, Wellcome Foundation, are manufacturers of Coopers fly dip, and Bayer, of metasystox. They are only two of over twenty different products containing **organophosphates** to which Mr Sayce was exposed.

As Mr Sayces exposure to Coopers fly dip and metasystox was so long ago, he cannot pray in aid the Consumer Protection Act 1987, but must prove negligence on the part of the manufacturers of Coopers fly dip and metasystox, and that those two have **organophosphates** contributing materially to his ill health. In the pilot study, under the heading, Suitable/possible **organophosphates** caused ill health, Mr Sayce was given a question mark.

Dr Halstrom, a psychiatrist, in a report dated 9 May of last year, said that Mr Sayce has never been effectively treated with antidepressants and does now have significant depressive symptoms. Although he does not fulfil the diagnostic criteria for major depression, the depression itself has been notably absent from his complaints throughout the years. His conclusion is in these words: Mr Sayce appears to have a chronic fatigue syndrome of an unknown cause. It seems to be cyclical. In the absence of a cause, **organophosphate** poisoning remains a possibility.

Dr Julie Clark, a clinical neuro-psychologist, in a report dated 28 September 1999, said:

"The physiological and cognitive symptoms reported by Mr Sayce form part of a cluster of symptoms recognised as features of OP poisoning. OP poisoning is also associated with changes in emotional state. Symptoms of anxiety and depression are most frequently reported and are consistent with what is known about the cholinesterase inhibiting properties of OPs and the impact of OPs on other neurotransmitters in the brain."

Neither of those reports provide the necessary, basic, expert evidence on causation required by Master Miller, who was responsible for managing the group litigation. On behalf of many claimants, reports were obtained from a consultant neurologist, Professor Langton-Hewer. His reports are models of thoroughness and objectivity. However, unfortunately for the claimants, time and again, all he was able to say was what, for example, was said in relation to Mr Snell, a 60 year old farmer I quote file 8. In a report, dated 28 June of last year, Professor Langton-Hewer said this:

"Diagnostic Possibilities many of the OP claimants have been diagnosed as having chronic fatigue syndrome. Mr Snell does have some apparently diminished problems eg, having to come in every hour and a quarter during the day for rest. There is no clear-cut evidence of chronic fatigue syndrome here. However, does he suffer from chronic OP poisoning? There is reasonably good evidence of exposure to OPs over a long period of time. Symptoms appeared to come on quite rapidly in the early 1990s. The symptoms are somewhat non-specific and do not really implicate any particular organ or organ system. The possibility of cerebral, peripheral nerve damage has been mentioned. I find it difficult to come to a definite conclusion about this case. As things stand at the moment, I put him in an uncertain category."

With regard to the individual applications to strike out claims because they have no realistic prospect of success, I have come to the certain conclusion that the claims of Messrs Bruce, Sayce, Stoker and Tyrer fall into that category. Therefore, I can strike out those claims on that ground.

The remaining seven claims are, at present, unviable due to the absence of appropriate expert evidence to establish causation. Moreover, each of these seven claims have significant innate weaknesses rendering little prospect of worthwhile success. However, I do not strike them out as having no realistic prospect of success because I cannot rule out the possibility that, if their claims were somehow provided with funding, disclosure of documents took place, and expert evidence of causation were obtained, and if the other weaknesses surmounted, they might become viable. In my written judgment (which, as I have said, I hope to hand down in late autumn) I shall review the facts and problems of each of the eleven claimants in some detail but I shall not be trying the individual claims on paper. It is as a result of highlighting the different facts and problems of the individual claims that I reach the conclusion that this group litigation should end forthwith and, by an overview, that the claims both individually and as a whole are unviable.

"Mr Bates, I do not know when I will hand down my detailed judgment. It will probably be handed down in Liverpool, but it would not be necessary for anybody to appear in Liverpool other than a solicitor. Berrymans Lace Mawer have an office in Liverpool, and it might be that they could be the solicitors representing both sides merely to formally receive copies of my detailed judgment.

I would have thought that when that judgment has been considered, together with this one, if there are any applications for permission to appeal, they can be dealt with then, or any applications in relation to costs.

I would suggest that that hearing takes place in January/February of next year, the reason being that, at present, I am booked to sit in the Court of Appeal the whole of the second half of the Michaelmas term, so I might be able to hear the matter between 12 November and Christmas—perhaps on a Friday afternoon at three o'clock. Do you have anything to say about that suggestion?"

MR BATES: First of all, your Lordship talks about applications for leave to appeal and costs —

MR JUSTICE MORLAND: An order for costs. I know Mr Stuart-Smith said there were going to be some applications but, so far as costs are concerned, if any order is to be made, it could be an agreed order. I would have thought that so far as the recovery of costs is concerned, it would be academic.

I think I am right in saying that the last union supported claimant, Mr Eaglestone, entered into an agreement for discontinuance. Probably, it is all academic.

MR BATES: As I understand it, my learned friends were talking about applications in respect of wasted costs.

MR JUSTICE MORLAND: Which would be unlikely to succeed. I hope everybody understands that I have an open mind until I finally make up my mind but, I would have thought, certainly by the tenor of the judgment I have just delivered, it is unlikely that a wasted costs order would be successful. That must not be said to inhibit any defendant who wishes to make an application for a wasted costs order. We will have to wait and see about that.

MR BATES: The point is that that would be unlikely to be dealt with on a Friday afternoon at three o'clock.

MR JUSTICE MORLAND: Any application for a wasted costs order would almost inevitably require short directions, first of all, to identify the people against whom a wasted costs order is sought, to give them an opportunity to call doctors I do not know or to be separately represented if it applies. If there were to be any application for a wasted costs order, there would have to be a directions hearing. I do not know when I would be able to take any subsequent application. I do know that I am completely booked up until 14 February and out of London. I could hear the wasted costs application wherever I am sitting.

MR BATES: One solution possibly occurs that if your Lordship is in Liverpool, and there is going to be someone from Berrymans there, perhaps the parties could submit, in outline, their proposals on a time basis only. Obviously, they will not know the details.

MR JUSTICE MORLAND: I do not think anything like that should be done until my judgment is considered. I do not think people should rush off within twenty-four hours of a judgment and apply for a wasted costs order. What I would probably put in the handed down judgment is how any applications arising out of this litigation or out of

this judgment will be dealt with. The parties will be given twenty-eight days or something like that to consider the judgment before submitting, initially in writing, any application they have. That would be sensible.

MR BATES: Yes.

MR ROGERS: My Lord, I wonder if we could draw up a formal order dismissing the group action with the question of costs to be adjourned.

MR JUSTICE MORLAND: Certainly. Mr Stuart-Smith and, I think, also Mr Gibson, were in favour of no formal order being made today but, as I have said — I think it is important that the public know this — this is a final order, and the only order I would make today is that the group action is dismissed, and the claims of Mr Bruce, Mr Sayce, Mr Stoker and Mr Tyrer are struck out and dismissed. Those are the individual claims of those four.

MR ROGERS: My Lord, so far as the individual claims are concerned, the solicitors can agree the terms of the order and submit it to you for approval. In relation to the group action, that would be a general order which would dismiss the group action, and all other matters and questions of costs would be stood over to another day. I would ask to have that order sealed.

MR JUSTICE MORLAND: All applications of any kind, in relation to the group action or the claims of individual claimants, shall be stood over until twenty-eight days after my written judgment is handed down. Any application arising out of my judgments, or in connection with the group action or individual claims, shall initially be made to me in writing. Also, when the judgment is handed down, which will probably be in Liverpool, only one solicitor for all parties, including claimants and defendants, need attend formally to receive copies for all solicitors on the record in the group action. Do you have any other suggestions?

MR ROGERS: Will you be in London for the rest of this week if we have an order drawn up?

MR JUSTICE MORLAND: I will be here until one o'clock tomorrow. Mr Bates, would it be possible to print out a judgment and send it here?

MR ROGERS: We have offices around the court, and I am sure that can be done. I have, in contemplation, a very simple order dismissing the action.

MR JUSTICE MORLAND: I think it should include what I said about one solicitor and the twenty-eight days for any application arising out of the group litigation. Thank you.