

## CIVIL EVIDENCE

### 41. Admissibility—Medical reports—Personal injury claim—Life expectancy evidence based on lifestyle not injuries—Admissibility of evidence

The applicant (H) applied for an order allowing admission of a report from a life expectancy expert in an action brought by the respondent (T) for damages for personal injuries sustained in a road traffic accident in October 2002. T had suffered severe spinal injuries and required care and physiotherapy for life and had special accommodation needs. H's insurers had admitted liability. After filing an allocation questionnaire suggesting that a life expectancy expert would be required, H's insurers had obtained a "desk top" expert's report in November 2004 which suggested that T would have a reduced life expectancy as she had been a smoker for most of her life. The report highlighted T's pre-accident respiratory problems and her failed attempts to give up smoking and suggested that T had suffered chronic obstructive pulmonary disease. However, the expert had not examined T or taken any X-rays and although T's medical records identified a sporadic history of occasional coughs, every time her chest had been examined or X-rayed, it had been clear. H had made an unsuccessful application in June 2005 for admission of the life expectancy evidence. Refusal was on the grounds that questions of life expectancy could be put to the spinal experts. H's spinal expert had advised that chest and respiratory issues were outside his field of expertise and T's spinal expert had suggested that the Ogden Tables already took account of the general population covering individuals with a variety of lifestyles. Accordingly, discount had already been factored into the tables for lifestyle choices such as smoking and it was inappropriate to seek further expert evidence on life expectancy unless an identifiable disease or impairment to health was established. In the absence of evidence of lung cancer or any other disease, the established discount provided for within the Ogden Tables was sufficient. Two months before trial, H again applied for permission to admit the report of the life expectancy expert.

*Held*, refusing the application, that (1) H could not point to a specific problem that T had other than being a smoker. Past general examination had not identified any particular chest or lung difficulty related to her smoking. There appeared to be a lack of any specific medical complaint arising from T's use of cigarettes and if the application were allowed, it would be open to a defendant in any case to raise the instant issue without pointing to any specifics. (2) The court was under a duty to ensure that expert evidence was limited to that reasonably required to resolve the proceedings and the overriding objective required the court to do justice. The instant application was made very late in the context of the proceedings and although H had obtained its expert's report before proceedings were issued, it had not been served until very late and not before the first unsuccessful application for permission. Given the difference between H's experts' opinions, it would have been expected that permission would have been sought earlier. Further, the trial judge would necessarily have to

consider whether periodical payments or a lump sum should be ordered and if the former, then life expectancy became less of an issue. Also, the trial judge could yet take account of the issue by hearing evidence from the spinal experts on life expectancy during the trial and by considering the possibility of a periodical payment order.

*TOLLEY v HERSHAW*, February 14, 2006, District Judge Kirkham, QBD. [*Ex rel.* Brian Cummins, Barrister, Old Square Chambers, 1 Verulam Buildings, Grays Inn, London].