

B3/2005/0831, Neutral Citation Number: [2006] EWCA Civ 169

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIS HONOUR JUDGE REID QC
GUILDFORD COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 8th March, 2006

B e f o r e:

LORD JUSTICE BUXTON
LORD JUSTICE JONATHAN PARKER
AND
LORD JUSTICE WALL

DENTON HALL LEGAL SERVICES & ORS

Appellants

– v –

KATHRYN HILARY FIFIELD

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Jonathan Waite QC and A. John Williams (instructed by Messrs Halliwells, Solicitors) for
the Appellants

Mr Allan Gore QC and David Sanderson (instructed by Messrs Charles Russell LLP,
Solicitors) for the Respondent

J U D G M E N T

Lord Justice Wall :

Introduction

1. With permission granted on paper by Clarke LJ (as he then was) on 1 July 2005, Dentons (as the judge, without objection, collectively described the appellants despite their four different manifestations on the pleadings) appeal against an award of damages made against them on 22 March 2005 by His Honour Judge Reid QC sitting in the Guildford County Court in favour of Mrs. Kathryn Fifield, the claimant before him and the respondent to this appeal.
2. Mrs. Fifield's claim was for personal injuries in the form of a work-related upper limb disorder incurred during the course of her employment as a secretary by Dentons, and brought about, on her case, by the latter's negligence and breach of statutory duty. The judge found that Mrs. Fifield's claim succeeded on both heads. The total sum he awarded her was £157,341, more than half of which related to loss of future earnings. It is, however, unnecessary to examine the breakdown of the damages, since the appeal goes to liability only, not to quantum. Dentons properly accept that if the appeal on liability fails, then the amount of the damages awarded by the judge is not open to challenge.
3. The judge also ordered Dentons to pay Mrs. Fifield's costs, subject to a detailed assessment on the standard basis if not agreed, and with a payment of £100,000 on account to be made by 19 April 2005. As is already apparent, the judge refused permission to appeal.
4. Mrs Fifield was employed by Dentons as a secretary for some 19 years. She joined the firm in July 1980, when she was rising 24, and her employment ceased on 16 July 1999, when she was rising 43. At that point she was a senior secretary or "key operator", who could advise other more junior staff about their work. She was the secretary to one of the firm's partners, Mr. Kenneth Dearsley. It was common ground that she was good at her job and a hard worker. She regularly received good annual assessments from the partners for whom she worked, including Mr. Dearsley. The judge also found that she had a good health record until the summer of 1999, taking only short periods of maternity leave following the births of her two children and

with few other absences for ill-health. She was, as Mr. Dearsley accepted, and the judge found, "a useful calming influence in times of apparent crisis".

5. Mrs. Fifield's case, in a nutshell, was that, although she had from about 1989 suffered intermittent pain in her wrists, it was from about 1998 onwards that she slowly developed a build up of pain in her hands, mostly in the morning, and that this caused some difficulty typing. The pain also moved up to her elbows and shoulders, and eventually to her neck. She is right handed and the symptoms were worse on her right side.
6. It was common ground that in early 1999, Mrs Fifield's workload increased substantially. She put the increase at 50%, but the judge preferred Mr. Dearsley's evidence that the increase was in the region of 25% to 30%. Mrs Fifield's case was that her symptoms became more severe and more frequent in early 1999, and that on 17 February 1999, she consulted her general practitioner, Dr. Victor Montegriffo. Dr. Montegriffo referred her to a rheumatologist, Dr Andrew Young at the local community hospital. Dr Young recommended physiotherapy, which Mrs. Fifield began in June 1999. This did not, however bring any relief, with the result that she was signed off work for two weeks on 16 July 1999. In the event, the symptoms did not resolve during that fortnight, and Mrs. Fifield has not worked since 16 July 1999.

The issues in the case

7. Dentons ran three defences before the judge. The first was that Mrs. Fifield was suffering from a somatoform disorder, and that the pain and disability she appeared to suffer were psychosomatic in origin. That defence was based on psychiatric evidence called by Dentons which the judge rejected. There is no appeal on this part of the case.
8. Dentons' second defence was that Mrs. Fifield's symptoms were not work related. The third defence was that, even if the injuries were work related, they were not caused by any negligence or breach of statutory duty on Dentons' part. On the pleadings, Dentons denied any breach of statutory duty, but asserted, in the alternative, that if and to the extent that they were in breach of their statutory duties towards Mrs. Fifield, any such breach or breaches were not causative of Mrs. Fifield's injuries. The judge's rejection of these two defences form the bedrock of this appeal, and the nine grounds of appeal which encompassed them were skilfully developed in oral argument by Mr. Jonathan Waite QC.

(1) The first limb of the appeal: were the injuries work related?

9. The argument on this aspect of the appeal depends critically upon the judge's finding, based on what he held to be agreed medical evidence, that for Mrs. Fifield's injuries to be work related, there needed to be a temporal connection between the change in Mrs. Fifield's workload in early 1999 and the severe symptoms of which she then complained. The witnesses to whom the judge refers in the extract from his judgment which follows are Dr Martin Seifert (a rheumatologist instructed by Mrs. Fifield) and Mr. Rupert Eckersley (a hand surgeon instructed by Dentons) whose evidence I will have to discuss in detail. The judge said:

"75. Thus by the end of their evidence, I was left with the position that it was common ground that, if there was a temporal association between the change of activities and the symptoms, on the balance of probabilities the change was the cause of the symptoms. Thus, if there, the big increase in work in late 1998 and / or in early 1999 and the first relevant attendance on her doctor was in February 1999, the increase in work was on balance likely to be the cause, and a build up of work (as opposed to a sudden increase) could achieve the same result.

76. Mrs. Fifield's case is that there is a close temporal relationship between the increase in workload and the development of the symptoms. Mrs. Fifield had had long standing symptoms in her arms which had not been sufficiently severe to take her to the GP between 1993 and 1999, though she had been taking some medication (presumably pain killers) at the time of her work station assessment. During 1998, her workload increased when Mr. Dearsley joined the Management Board and took over Chairmanship of the PAC (Dentons' Partnership Admissions Committee). Her symptoms increased somewhat. In January 1999 there was a significant increase in workload when the 1999 PAC round commenced and Mrs. Fifield was required to do all the PAC secretarial work in addition to her normal workload. She began to experience more serious symptoms which took her to the GP in mid-February 1999. The increased workload as a result of the PAC continued until March or April 1999, but the symptoms worsened in May and June 1999 and became chronic over the summer. The onset of the more serious symptoms in February 1999 and the deterioration in May and June 1999 therefore had a close temporal association to the significant increase in work over the period January to April 1999. ***The onset was during the period of increased workload and the deterioration was within 1 or 2 months of the conclusion of that period. The period of 3 to 4 months prior to December 1998 was not therefore the relevant period in the light of that history.*** (italics mine)

77. On this basis the balance of probabilities (subject to any question that the pain is the result of a somatoform disorder) must be that the condition is work related. I note that three doctors who saw her at the time all took the view at the wrist pains had arisen in consequence of her work ×.."

10. I have italicised the final sentence of paragraph 76 of the judgment because it formed the starting point for Mr. Waite's submission that the judge had been wrong to find; (1) that the onset of more serious symptoms occurred in February 1999 and not in 1998; and (2) that there was a close temporal association between the alleged onset of more serious symptoms in February 1999 and the significant increase in work in the period from January 1999.

The developments of Mrs. Fifield's symptoms

11. Both the development and any analysis of Mr. Waite's submission require a detailed examination of the written and oral evidence. In her particulars of claim, the onset of Mrs. Fifield's symptoms was described in paragraphs 14 and 15 in the following way:
—

"14. From about 1998, the Claimant slowly developed a build up of pain in her hands, mostly in her wrists. She noticed stiffness in the small joints of the hands, mostly in the morning and this caused some difficulty typing. The pain also moved up to her elbows and shoulders and eventually to her neck. The Claimant is right handed and the symptoms were worse on her right side.

15. The symptoms were intermittent, but from the (sic) beginning of 1999 the pains became more severe and more frequent."

12. We were not referred to Mrs. Fifield's two witness statements in the proceedings. They are, however, in the bundle. For present purposes it is sufficient to record that, unsurprisingly, neither is inconsistent with her pleaded case. The first, made on 27 March 2002 deals with the onset of symptoms, and gives details of Mrs. Fifield's first significant visit to her general practitioner on 17 February 1999. The second confirms what was not in issue namely that there was a significant increase in Mrs. Fifield's work load in early 1999.

13. We were taken by Mr Waite QC to the note made by Dr Victor Montegriffo, Mrs. Fifield's general practitioner, of the consultation on 17 February 1999, which reads: —

"Dr. Young. ? RSI (symbols indicating more in the right than the left) wrist uses mouse to type more when stops typing Mother OA."

14. Mr. Waite relied particularly on the fact that on the left hand side, under the date of the consultation, the doctor had written "6/12+". Mr Waite invited us to infer that this meant Mrs. Fifield had been suffering the symptoms she was describing to the doctor for more than six months. That inference appears to be justified, since the somewhat Delphic nature of the GP's note is clarified by the letter which he wrote the following day, referring Mrs. Fifield to Dr. Andrew Young, a rheumatologist at the Potters Bar Community Hospital. This reads: –

"Thank you very much for seeing this patient who works as a secretary to a legal department in London and does a considerable amount of typing and uses her mouse for the computer. For about six months to one year she has been experiencing more and more pain in both wrists especially the right and she wonders whether she would have a repetitive stress injury, interestingly when she stops working the pain tends to get worse."

15. The chronology of Mrs. Fifield's consultations with medical (as opposed to mental health) doctors after the referral to Dr. Young is as follows. On 29 April 1999 Mrs. Fifield saw Dr. Forman, the general practitioner to whom Dentons referred employees. Dr. Forman referred her to Dr. Ann Fingret, an occupational health doctor at the Finsbury Circus Medical Centre, to whom Dentons delegated their occupational health responsibilities. Dr Fingret saw Mrs. Fifield for the first time on the 12 May 1999. There were further consultations with Dr. Fingret on 23 June 1999, 7 July 1999 and 15 August 1999, when Dr Fingret referred Mrs Fifield to Dr Roger Wolman, a consultant in rheumatology and sports medicine. On 8 November 1999 there was a consultation with Dr. Harvey, who had taken over from Dr. Fingret at the Finsbury Circus Medical Centre.
16. On 2 December 1999, Dentons wrote to Mrs Fifield advising that a claim should be made on their permanent health insurers. An insurance claim was duly made by Dentons: forms were completed by Mrs. Fifield, Dr Andrew Grafton (another general practitioner from the practice attended by Mrs Fifield) and Dr. Harvey. That claim was accepted in April 2000. On 23 November 2000, Dr. Grafton sought a second opinion on Mrs Fifield's condition from Dr Caroline Smith at the Potters Bar Community Hospital. Dr Smith referred her to the Chronic Pain Management Programme at the Middlesex Hospital, and on 26 March 2001 she had a consultation there with Dr. Shipley. On 26 November 2002, Kate Ridout, consultant clinical psychologist at the Programme wrote to Dr Grafton advising that Mrs Fifield would not be offered further formal group review sessions, but that Mrs. Fifield might wish to contact the clinic again when she felt ready to work on more specific exercises for her arms and hands.
17. I shall return to examine the relevant aspects of this body of evidence in due course. For present purposes, I record that in addition to Mrs. Fifield's description of the onset of her more serious symptoms to Dr. Montegriffo, Mr. Waite relied in particular on Dr. Forman's note recording Mrs. Fifield's description of her symptoms on 29 April 1999, in which he recorded her as complaining of painful wrists (the

right being worse than the left) over a period of two years. She had described the symptoms as intermittent symptoms, with no difference at weekends. The symptoms had worsened over the last three to four months.

18. Mr. Waite also relied on Dr. Fingret's notes of the consultation on 12 May 1999, which were carefully summarised by the judge in the following passage of his judgment: –

"19. Dr Fingret took a detailed history. There was pain in the sides of both wrists, the right more than the left. The pains also shot up into the forearm on the radial side and into the thenar eminence (the base of the thumb). The symptoms were experienced mainly at work and could result from lifting boxes as well as keyboard work. The problem had become continuous, but disappeared after 2 days rest. "

19. For the purposes of the proceedings, there was both medical and psychiatric evidence. As indicated in paragraph 9 of this judgment, the medical evidence was provided by Dr. Seifert and Mr Eckersley. The former's first report is dated 3 April 2002. Dr Seifert took a history from Mrs. Fifield, the relevant extracts from which are as follows: –

"2.1 From about 1998 her workload gradually increased and she slowly developed a build up of pain in her hands, mostly in both wrists. Her hands never swelled but tended to ache after a long period of work in the office. She is right handed and the right hand was the most affected. She noted stiffness in the small joints of her hands, mostly in the early morning and this caused some difficulty in typing. The pain also moved up to her elbows and shoulders and eventually her neck. By then she was using a mouse a great deal at her workstation, using this with the right hand×..

2.5 Gradually the pressure of her work increased as the partner for whom she worked took on more responsibilities within the firm and in addition to her secretarial work, sometimes in the region of 50% was administration but this most involved the use of the keyboard as well. This was made even worse by 1999 when the managing partner's secretary went on maternity leave, and she took over additional administration.

2.6 By mid February she was experiencing quite severe pain in her wrists, particularly on the right side and visited her general practitioner, who referred her to Dr. Adam Young, consultant rheumatologist at St Albans City Hospital (sic)."

20. Dr Seifert's opinion was that Mrs. Fifield had a work related upper limb disorder. He stated that "before the increase in her workload there were no symptoms" and that "the increasing pressure at work caused her arms to become painful and develop these

symptoms". In his opinion, she would "never be able to get back to work as a legal secretary".

21. Mr. Eckersley saw Mrs. Fifield on 21 May 2003. He reported Mrs. Fifield's symptoms in the following terms: –

"Mrs. Fifield told me that her symptoms started in the early 1990s when she developed pain affecting both her wrists. She told me that this lasted a few weeks and she then became better. She said she saw her GP sometime and was treated with Ibuprofen. Mrs Fifield said she continued to have symptoms on and off through the 1990s with her wrists being sore, with a sharp feeling. She said the symptoms used to resolve themselves when she took pain killers. Mrs. Fifield said in late 1998 the symptoms seemed to be spreading more up the arms affecting her shoulder and her neck as well as spreading into her fingers. Mrs. Fifield said in early 1999 she went to see her GP who referred her to Dr. Young (Consultant Rheumatologist)."

22. In his opinion and prognosis, Mr. Eckersley stated: –

"Mrs. Fifield seems to have developed non-specific musculo-skeletal symptoms affecting her arms and neck, over a period of several years, according to her history. This is noted in the medical records by the various people she has seen. The GP records suggest that the symptoms became bad enough to mention on a regular basis from February 1999 onwards. Before then Mrs. Fifield attended the GP on a very regular basis for a number of different problems, although there are musculo-skeletal symptoms mentioned in the records, these are not mentioned regularly. The records show that Mrs. Fifield has been examined by four rheumatologists, none of whom have identified any objective findings and simply record tenderness in various areas with differing movements of the neck and arms. Mrs. Fifield has had a number of treatments from her GP and courses of physiotherapy none of which have proved to be of any benefit. She was referred to a chronic pain management programme and it would appear that this was helpful in controlling the chronic pain that Mrs. Fifield perceives.

There is therefore no specific diagnosis to be made. Mrs. Fifield does not have any recognisable condition such as carpal tunnel syndrome, de Quervain's disease, tenosynovitis, arthritis, lateral epicondylitis, or any pathology in the shoulder. Mrs. Fifield has musculo-skeletal pain which has no identifiable cause.

I can see no reason why, from the medical records that I have read and from her description of the work she was undertaking detailed in the records, as to why her work should be considered as the cause for the development of these symptoms ×..

In conclusion, my opinion is that Mrs. Fifield does not have any recognisable work related upper limb disorder. I can see no evidence that her work has caused her to develop any work related upper limb disorder."

23. In accordance with CPR 1998 rule 35.12, Dr. Seifert and Mr. Eckersley were instructed to discuss their differing conclusions in an attempt to identify and reduce the points of difference between them. This led, firstly, to a further report from Dr. Seifert in which he recorded a telephone discussion which had taken place on 12 November 2003. This contains the following important paragraph: –

"6. Mrs. Fifield has a long history of musculo–skeletal symptoms that stretch back from 1982 to the present time. If it is shown that Mrs. Fifield's work changed significantly in the 3–4 months leading up to the start of the symptoms in December 1998 then Dr. Seifert and Mr. Eckersley agree that on the balance of probabilities the work has caused the symptoms to develop. If, on the other hand, the work did not change during this period they both agree that the work is unlikely to have been the causative factor."

24. This paragraph led to further questions addressed to the two doctors from the parties' lawyers. For current purposes the first two are relevant. They were: –

(a) Please explain why you have chosen the date of December 1998 as the date for the start of the symptoms. Please explain your choice of the date in the light of the medical records and / or the history obtained by each of you and set out in your reports.

(b) Please explain why you have specified a period of 3–4 months leading up to the start of the symptoms as the relevant period during which the court should consider whether Mrs. Fifield's symptoms changed significantly?

25. After an exchange of correspondence between them, Mr. Eckersley and Dr. Seifert produced a further joint statement dated 14 July 2004. It was drafted and signed by Mr. Eckersley: he then sent it to Dr. Seifert, who also signed it. The material parts of this joint statement read: –

"We have both had the opportunity to review this case by re–reading our respective reports and the medical records.

(1a) The reason we both agreed on the date of December 1998 as the start of Mrs. Fifield's symptoms is that we noted a long history of musculoskeletal symptoms leading up to this time, but the deterioration in her symptoms appeared to occur in early 1999. In addition, Mr. Eckersley noted in the history Mrs. Fifield gave to him that her symptoms got worse in late 1998 and in the history taken by Dr. Seifert that it was about 1998 with a slow build up with aching in the hands and wrists. We both agree that as the symptoms appear to be worse in 1999 that if work was to be the causative factor then it would mean the symptoms deteriorated as a result of problems in late 1998.

(1b) We both agree that as musculoskeletal symptoms are common within the population that for a specific activity, whether this is work, leisure or an activity at home, to be a specific cause of a condition then there should be a temporal association between the development of those symptoms and the activity in question. We both agree that in our experience a period of three to four months is the maximum period of time for this temporal relationship to be certain. We therefore agree that this is the period of time that the court should consider when looking at whether Mrs. Fifield's work is the cause of her developing worsening symptoms in 1999."

26. The production of the joint statement of 14 July led to an immediate query to Dr. Seifert from Mrs. Fifield's solicitors. The reason is not far to seek. In his reply, dated 23 July 2004, Dr. Seifert stated that he had not altered the opinion he had formed after meeting Mrs. Fifield on 3 April 2002 and as set out in his subsequent report. He continued : –

"At that time, I also had a copy of her witness statement dated 27 March 2002. From the history I took and from my examination of the papers then before me, I concluded that her upper limb disorder had been caused by her work. On reflection, it was therefore inaccurate of me arbitrarily to agree a date with Mr. Eckersley of December 1998 as the start of Mrs. Fifield's symptoms, and to refer to a four month deterioration leading up to that date.

Accordingly, contrary to what has been included in the joint statement, I conclude that if Mrs. Fifield's witness statement dated 27 March 2002 is accepted, then, on the balance of probability her work was the cause of her developing her symptoms. Regrettably, before signing the joint statement of 14 July 2004 I did not properly check the wording of that document, which was prepared for me to sign by Mr. Eckersley following a pressured telephone discussion. I now wish to retract that statement as I dissent from the views drafted and expressed by Mr. Eckersley.

I appreciate my overriding duty is to the court and to provide the judge with my honest opinion without showing favour to any particular party or interest. I apologise to the court for the confusion that has arisen."

27. Dr. Seifert's retraction of his agreement to the joint statement of 14 July 2004 plainly damaged his credibility as an expert witness, all the more so when it transpired that there had been no "pressured telephone discussion" prior to the production of the joint statement of 14 July 2004, but an exchange of correspondence. At best Dr. Seifert had been careless: at worst he ran the risk of being accused of tailoring his evidence to fit in with Mrs. Fifield's case.
28. In the event, junior counsel for Dentons did not, at the hearing before the judge, put the latter allegation to Dr. Seifert in terms, although he protested vigorously during Dr. Seifert's examination in chief at what he described as "a wholesale re-writing of this doctor's evidence". After the judge had agreed, counsel added: –

"×.. the evidence is being used to fit the chronology, and it is simply not acceptable. If he has a different postulation to give, an opinion to give, then it should have been reduced to writing. I have allowed some latitude with my learned friend, but this is the second time I have had to object in the last ten minutes.

Judge Reid:

I think that is right. We are departing fairly substantially from what we should have heard, which is the case as set out. I must say I have got difficulties about allowing the expert evidence to be adjusted in this way at this late stage when the defendants have not had the chance - firstly, of course there has been no opportunity for the two experts to meet together and the defendants have had no chance to get their experts to deal with the current variant on the claimant's medical case."

29. Counsel for Mrs. Fifield then referred the judge back to Dr. Seifert's original report, and, after a pause, the judge commented: –

"I think the simplest course is to allow this to go on and see where we get to, but I have no doubt that a good deal is going to be said about the way in which the goal posts appear to be moving."

30. In cross-examination of Dr. Seifert, counsel for Dentons pointed out that the description of Mrs. Fifield's symptoms deteriorating in 1998 had come from the history she had given Mr. Eckersley. The following exchange then occurred:

Counsel: That is how it got into your first joint statement.

Witness: Right.

Counsel: It was not just plucked out of the air. What if it was late 1998, what then is your opinion?

Witness: Well, she had symptoms in late 1998 -

Counsel: A deterioration of symptoms in late 1998.

Witness: Okay. We had stated that she had various problems with her tendons and so on that had got worse in 1998, and became even more of a problem in 1999.

Counsel: What if the change in her working practices did not occur until early 1999, the increase in workload?

Witness: It is difficult. I assume she was obviously beginning to feel symptoms, and when in 1999 her workload increased these symptoms became very much more prominent and much more obvious for her.

Counsel: But the history is late 1998.

Witness: Yes, but as I say, this is gradually increasing. Presumably she had had it for some years, aches and pain, which, as I said before, is quite common in secretaries. My secretary gets it all the time. And towards the end of 1998, this happened to be getting worse. She gets, I assume, much more work to do in 1999, and the thing blows up and becomes much more of a problem.

31. There is one further exchange during Dr. Seifert's cross-examination which should be recorded: –

Counsel: I just want to know what your opinion is in this case.

Witness: As I said, my opinion is that she had discomfort in her joints and these had got worse as her workload increased.

Counsel: Let me ask you specifically about the sentence ×..

"We both agreed that if the case is that the symptoms gradually developed over a longer

period of time then work is not the causative factor for these symptoms".

Do you retract that sentence or not?

Witness: In this context, yes, I would retract that.

Counsel: How do you square that with your opinion that it is appropriate and proper to look for a temporal association between the symptoms and the activity in question?

Witness: There is always a temporal association between symptoms and activity. I do not think there is any contraindication to say that having retracted that particular sentence.

Counsel: I want to ask you why you retract that particular sentence?

Witness: In the light of further reading of this case I suppose it seemed appropriate to retract it.

Counsel: Why?

Witness: I cannot give you an answer to that.

32. Mr. Waite also referred us to both the written and oral submissions of junior counsel for Dentons. In the former, counsel submitted that the joint statements of Mr. Eckersley and Dr. Seifert indicated that work was implicated as a causative factor only if there was a temporal association between a change in workload and the reported deterioration of symptoms. The written submission then identified Dentons' key argument, namely: "If the deterioration occurred in late 1998, the aggravation of the claimant's condition cannot have been caused by her work".
33. It was also plain that in his oral submissions, counsel for Dentons complained about Dr. Seifert's conduct, and the attempt by counsel for Mrs. Fifield to obtain from Dr Seifert an opinion "based on a factual scenario different from those which he had accepted and agreed in the two statements". He submitted this was an attempt "to re-write the case, and to achieve a situation ×..where the expert evidence supports a revised case in circumstances where it did not support×. the case as originally contemplated in the pleadings".
34. Although I have set out the material in some detail, Mr. Waite's submission in relation to it was simple. He said that the judge was plainly wrong to find as a fact that the onset of Mrs. Fifield's more serious symptoms coincided with her visit to her general practitioner in February, and was equally wrong to find a close temporal association between the alleged onset of more serious symptoms in February 1999 and the significant increase in work in January 1999. Mr. Eckersley's chronology

makes it clear, he argued, that the deterioration occurred in 1998, well before the increase in work in January 1999. The judge should not have found the temporal connection established. The deterioration in 1998 was unconnected with any increase in Mrs. Fifield's workload: it followed that the symptom which emerged in 1999 were likewise not work related. The judge should have accepted the opinion contained in Mr. Eckersley's first report. Dr. Seifert's opinion was contaminated by his unprincipled change of stance. Mrs. Fifield had simply failed to establish that her injuries were work related.

Discussion

35. Meticulously as the argument on this part of the case was advanced, I am wholly unable to accept it for a number of reasons. Firstly, I do not think the judge's findings are inconsistent with Mrs. Fifield's pleaded case. Secondly, Mrs. Fifield was plainly a witness whose credibility was not seriously impugned. Thirdly, the onset and nature of Mrs. Fifield's symptoms were ultimately matters of fact, not of opinion for the doctors. But above all, what in my judgment prevents this aspect of the defence succeeding is that it omits any reference to the oral evidence of Mr. Eckersley.
36. Dr. Seifert's evidence, had it stood alone, might well have been fatally tainted by his at worst unprincipled, and at best somewhat thoughtless, change of stance. However, during the course of his evidence, Mr. Eckersley clearly acknowledged that it was not possible to be dogmatic about the precise timings of the temporal connection between the manifestation of the symptoms and the changes in Mrs. Fifield's workload, with the consequence, in my judgment, that the judge was fully entitled in paragraph 75 of his judgment (set out at paragraph 9 of this judgment) to conclude that there was common ground between the doctors on this critical aspect of the case.
37. For Mrs. Fifield, Mr. Gore QC took us to two passages in Mr. Eckersley's cross-examination. In the first, counsel puts to Mr. Eckersley paragraph 6 of the first joint statement, which is set out in paragraph 23 of this judgment. He invites Mr. Eckersley to consider it, leaving out the date. He then says: –

Counsel: Now, turning to the date, the date we know that she first presented at the general practitioner with symptoms is the 17th February 1999. If her work changed significantly over the - and for the continuum of the six weeks immediately before the 17th February 1999, do you accept that work in those circumstances is within the three to four month periods that you have postulated in that paragraph?

Witness: Yes, if that is the sole period of time but, as we have discussed before, there appears to be evidence that there were symptoms well before that.

Counsel: Not significant symptoms on your analysis because they did not take her to the general practitioner. Is that not right?

Witness: Certainly, she had not reported to her GP until February 1999.

38. Counsel then takes Mr. Eckersley to his consultation with Mrs. Fifield on 21 May 2003, and to the history which he took. The dialogue continues: –

Counsel: And what you record her as saying, and I am not going to dispute it because this may be what she said on that occasion, that in late 1998 the symptoms seemed to be spreading more up her arms into her shoulders and neck, as well as spreading into her fingers, and Mrs. Fifield said in early 1999 she went to see her GP who referred her to Dr. Young, consultant rheumatologist. Mrs. Fifield's history is that she did have pains, as we have heard, over a number of years, but that during 1998 these symptoms seemed to have got worse but not so much worse that they took her to the general practitioner, and over that time her work was increasing gradually. Now, would you accept that if her work was increasing somewhat during 1998 and her pains increased somewhat during 1998, there might at least be a connection between those two facts?

Witness: Yes. You can construct it precisely like that, and it is not an unreasonable thing to say.

Counsel: If the work then changes really quite significantly further at the beginning of 1999, so that she goes six weeks later to the general practitioner with a complaint of pain that extends back beyond the beginning of 1999, but is first serious enough to take her to the general practitioner on 17th February 1999, would you accept that if a work change was established during that period of time that that is, on the balance of probabilities, what took her to the GP on the 17th February?

Witness: Yes, I think that is a very reasonable proposition to put forward. Equally, if you are saying that the symptoms were gradually going to build up in any event then she would have seen her GP at some point in the future irrespective of that.

39. At a later point in his cross-examination, Mr. Eckersley makes the same point. Counsel summarises Mrs. Fifield's medical history from 1994, and then puts to him: –

Counsel: Now, if she establishes to his Honour's satisfaction that there was a big increase in the level of work that she was doing from the beginning of 1999, and we know as a fact that she first presents to the doctor on the 17th February 1999, do you accept that that big increase in work is, on the balance of probabilities, what took her to the doctor on the 17th February?

Witness: Yes, I think the way you put it, I would totally agree with that.

40. Shortly after this exchange the judge intervenes to say:

Judge: At the end of the day it is for me to decide what the facts in reality were. We have got I think a considerable degree of common ground between the doctors as to where the balance of probabilities lie on any given set of facts.

Counsel: Your Honour, yes.

Judge: The problems that we have got are what no doubt will be said by the defendants as to the inconsistencies in the way in which the factual basis for the claimant's case has been put, and no doubt it is going to be said that there has been some opportunistic shading of the factual case, but that is something I am going to have to deal with. But how far apart are the medics really?

Counsel: I think, as a result of the concessions that Mr. Eckersley - if they are concessions, but anyway as a result of the evidence that Mr. Eckersley has given this afternoon it seems that they are not -

Judge: I am not sure I see anything in the way of new concessions, you know. I think this is what he had been saying all along.

41. As I have already stated, the evidence, in my judgment fully entitled the judge to reach the conclusion expressed in paragraph 70 of the judgment that, eventually, "there was no great disagreement" between Dr. Seifert and Mr. Eckersley. He commented that "there were considerable problems on the way" because of the joint statement signed by the two doctors on 14 July 2004. The judge, by inference at least, acquitted Dr. Seifert of any attempt to tailor his evidence. He referred to Dr. Seifert

"inadvertently" agreeing the date of December 1998 as the start date of Mrs. Fifield' symptoms and a four month deterioration leading up to it. From Dentons' perspective that is, no doubt, both a charitable and a mistaken view, but the judge heard Dr Seifert's evidence and was in a position to make an assessment of him in the overall context of the case.

42. In my judgment, the judge was fully entitled to say what he did in paragraphs 73 to 74 of his judgment, when leading up to his conclusions on the point in paragraphs 75 to 76 which I have already set out. Having summarised the respective written opinions of the two doctors in their original reports, the judge says –

"73. They (Dr Seifert and Mr. Eckersley) were therefore agreed as to the absence of any identifiable physical cause for the pain. Equally they were agreed as to the reality of the pain: she had chronic pain syndrome. Each of them in oral evidence accepted that if there was a significant change in her work activities in the period leading up to the development of the pain, then on the balance of probabilities it was that which took her to her GP. In the light of this agreement the debates over whether Mrs. Fifield fulfilled the diagnoses for De Quervain's Tenosynovitis or Lateral Epicondylitis and whether those conditions are caused by typing is academic. Dr. Seifert believes that those conditions were present and were caused by the typing. Mr. Eckersley accepts that typing can cause the onset of chronic upper limb pain and that work is the probable cause if there is a sufficiently close temporal association between a significant change in the work and the onset of the symptoms.

74. Each of them was prepared to accept that if there was a build up of work, there could be an aggravation of and change in the symptoms. They also accepted the reasonableness of linking a substantial increase in work with her pain if the increase preceded the pain."

43. Speaking for myself, I am reinforced in the view which I have taken of the evidence of Mr. Eckersley and Dr. Seifert by other medical aspects of the case. I referred in paragraphs 15 and 16 of this judgment to the various consultations which Mrs Fifield attended, and to the fact that an insurance claim was made by Dentons on her and their behalf. The judge's conclusion that Mrs. Fifield's injuries were work related seems to me to be strengthened by a number of the medical reports in the papers which pre-date the litigation. Thus, for example, Dr Wolman reported to Dr Fingret on 7 October 1999 that in his opinion Mrs Fifield "seems to have a quite resistant upper limb work related disorder". Dr Harvey on 9 March 2000 told Mrs. Fifield's GP, Dr. Grafton that Mrs. Fifield had developed "an intractable work related upper limb disorder". It is also noticeable that when Dr. Fingret saw Mrs. Fifield for the first time on 12 May 1999 she wrote a letter on the following day to the Personnel Officer at Dentons advising a reassessment of Mrs. Fifield's workstation and proposing that she should not undertake more than four hours' keyboard work daily.

44. Furthermore, when Dentons made the permanent health insurance benefit application; (1) Mrs. Fifield described her condition as "Repetitive strain injury"; and (2) the doctor who completed the Occupational Overuse Syndrome Medical Questionnaire on 25 February 2000, Dr. Grafton, answered question (3) "Is this condition thought to be work related?" by ticking the "yes" box and stating that she had seen an occupational physician and a rheumatologist. Question (4) on the form asked: "If so, has contact been made with your patient's occupational health department or has a work place analysis taken place?" Dr. Grafton again ticked the "yes" box and referred to Dr. Fingret and Dr. Harvey. Although he says he has no report from them, he comments: "Apparently agreed work related symptoms". Finally, although it is not a medical document, the letter of 2 December 1999 from Dentons' personnel officer to Mrs. Fifield advising a PHI claim begins with these two paragraphs: –

"Further to our telephone conversation I confirm that the latest report we have received from the Occupational Therapist at Finsbury Medical Centre diagnoses a long standing work related upper limb disorder, the symptoms of which he feels will prove difficult to control. He confirms that you should not be considered for any role involving the use of a keyboard and in view of the fact that you experience pain with minimal activity at home, he does not recommend that you carry out any tasks of a repetitive or manual nature.

In view of Dr Harvey's diagnosis, we feel the best option to consider now is a PHI claim on your behalf on the basis that we have no suitable vacant positions at present which do not involve the use of a keyboard or work of a repetitive or manual nature."

45. In my judgment, therefore, the first limb of the appeal fails. The evidence that Mrs. Fifield's injuries were work related is overwhelming, and it is unsurprising that Dentons identified and relied upon such injuries when making the PHI claim. On any view, therefore, and to put the matter at its lowest for the purposes of this appeal, there was abundant material upon which the judge could properly reach his conclusion that Mrs. Fifield's injuries were work related.
46. Before leaving this part of the case, some criticism was directed at paragraph 24 of the judgment, in which the judge said, in relation to Mrs. Fifield's medical history: –

"24. One of the oddities of the various histories recorded by the various doctors is that they appear, taken at face value, as being inconsistent. There are inconsistencies in the length of time the symptoms are said to have subsisted. There are differences as to the description of the work load and the nature of the work. In my judgment this is because the doctors were not concerned to extract a detailed story of what occurred in the same way as the parties have been in the course of these proceedings. The notes are in general very brief and it is

impossible to know what questions were put to elicit the information as it is recorded."

47. In my judgment, any criticism of this paragraph is misplaced. Firstly, the judge was plainly entitled to express the views contained in it. Secondly, the implication behind what the judge is saying is that what matters is what the symptoms were and when they manifested themselves, not what the doctors may or may not have reported Mrs. Fifield as having told them. Thirdly, in so far as any inconsistencies in the medical notes go to Mrs. Fifield's credibility, it is plain to me both that she was a witness of truth, and that the judge's findings are, in broad terms, wholly consistent with her pleaded case. Finally, given the agreement between Dr Seifert and Mr. Eckersley that it was impossible to be precise in dating the onset of symptoms, such inconsistencies cease to have any evidential significance.

The second issue: were there causative breaches of the relevant Regulations?

48. Once it is established Mrs. Fifield's injuries are work related, it is plainly more difficult for Dentons to argue that any breaches by them of the applicable Regulations were not causative of those injuries. Mrs. Fifield relied on regulations 2(1), 2(3), 4 and 6 of the Health and Safety (Display Screen Equipment) Regulations 1992 (hereinafter the "DSE Regulations") together with the Guidance published by the Health and Safety Executive in November 1992. She also relied on regulations 3 and 5 of the Management of Health and Safety at Work Regulations 1992 (hereinafter the "MHSW Regulations"). The judge found that Dentons were in breach of the DSE Regulations and that there was also a consequential breach of regulation 5 of the MHSW Regulations. The judge went on to find that Mrs. Fifield's working practices would have been materially altered if she had been properly trained and had risk assessments been performed competently and with proper frequency. Her injuries were, accordingly, a consequence of Dentons' breaches of the Regulations. Breach and causation were thus both established.
49. I will set out the Regulations *in extenso* later. It is, I think, sufficient at this point to adopt the judge's summary of the way Mrs. Fifield put her case. In paragraphs 32 and 33 of the judgment he said: –

"32. Under the (DSE) Regulations, in the submission of counsel for Mrs. Fifield, Dentons should have carried out a suitable and sufficient analysis of her workstation and assessed the health and safety risks to which she was exposed in consequence of its use (Regulation 2(1)). There was a duty on them to have reduced the risks identified in consequence of the assessments to the lowest extent reasonably practicable (Regulation 2(3)). Further, Dentons should have planned Mrs. Fifield's activities at work such that her daily work on display screen equipment was periodically interrupted by such breach or changes of activity as to reduce her workload at that equipment (Regulation 4). There was also a duty on Dentons to have provided adequate health and safety training in the use of

any workstation upon which she may have been required to work (Regulation 6).

33. Paragraph 19 of the Guidance to the Regulations draws attention to the dangers of using display screens: "Possible risks which have been associated with display screen equipment work are summarised at Annex B. The principal risks relate to physical (musculoskeletal) problems, visual fatigue and mental stress. These are not unique to display screen work nor an inevitable consequence of it, and indeed research shows that the risks of the individual user from typical display screen work is low. However, in display screen work as in other types of work, ill-health can result from poor work organisation, work environment, job design and posture and from inappropriate working methods".

The judge's findings on the Regulations

50. Having summarised the Regulations, the judge recorded that when they came into force, Dentons, in common with many other businesses, went to outside contractors in order to implement a system for the protection of their employees. In Dentons' case, the outside contractor was an organisation known as Matthew Hall, Dentons' Director of Services, Mr. Paul Dickinson, arranged for a number of members of Dentons' maintenance department to be trained at one day courses run by Matthew Hall. It was one of these members, a Mr. McAvoy, who carried out an assessment of Mrs. Fifield and her workstation. Mr. McAvoy was not available to give evidence to the judge, but the judge heard evidence from a Mr. Brown, who conducted an assessment in May 1999, too late to be of relevance to the claim. The judge commented that the process appeared from the paperwork to have been much the same on each occasion.
51. The judge's findings about the work station assessment carried out by Mr. McAvoy appear at paragraphs 39 to 41 of the judgment.

"39. Once staff had been trained, each work station was assessed in 1993. The form used on each occasions was a tick box form with room for comments at appropriate places. Mr. McAvoy appears to have gone through the form with Mrs. Fifield. The form of the entries suggests that he did his job conscientiously, so far as he could. He noted that a document holder was required, and that the typewriter was taking a lot of space but "until the nemux cabinet is moved it cannot go into another position + cable under the desk". Importantly he also made the note "Kate has been receiving medication on her wrists (drugs)".

40. When Mr McAvoy had completed the form he handed it in, probably to a Mr. Hagland. No-one told the personnel department anything about it. Indeed, the existence of the form only came to light at a late stage in these proceedings, after the defence and after the ergonomists' reports had been exchanged. Nothing was done, and (so far as the evidence goes) no one was told anything about Mrs. Fifield's reported wrist pains.

41. So far as can be seen from the evidence, the assessments were made, the forms filled in and filed and forgotten, after (at least in Mrs. Fifield's case) any physical requirements had been dealt with in that the nemux cabinet and the cabling were removed (as they were going to be anyway) and she was offered a document holder which she did not use because it was too big."

52. In paragraph 42 of the judgment, the judge describes a booklet produced by Dentons entitled "You and Your Workstation", a copy of which was placed on Mrs. Fifield's chair. The judge records Mrs. Fifield's receipt of the booklet, and comments dryly that it was her copy which was produced in evidence, since nobody on Dentons' side had one. The evidence from Mr. Dickinson was that the booklet was accompanied by a memorandum asking the recipient to read it: the judge was not satisfied that this was the case. Mrs. Fifield's evidence was that she must have glanced at the booklet, but did not read it in any detail. The booklet was updated in 2000. The judge commented: –

"44. On the evidence that was the limit of Dentons' efforts to comply with the Regulations. There was no re-assessment of workstations. An assessment would be carried out on a case by case basis if it was perceived to be necessary. Hence the 1999 assessment was carried out at the request of the personnel department after Mrs. Fifield's condition became a matter of serious concern."

53. The judge then analysed the evidence of two ergonomists who had provided written reports and gave oral evidence to him. Whilst they were, the judge found, "realistic and as helpful as the circumstances permitted", the "main upshot" of their evidence was that it did not assist him in "resolving the adequacy of the 1994 risk assessment since it largely depends on the reality behind the series of ticks on the form".
54. Having set out the respective submissions on both sides, the judge reached the following conclusions:

"63. In my judgment, the risk assessment and Dentons' treatment of it was inadequate. Whilst Mr. McAvoy was no doubt perfectly adequately trained for dealing with the purely mechanical questions as to desk position and the like, I am wholly unpersuaded that he had any meaningful interchange with Mrs. Fifield on the questions under the heading of "Job

design". He was not, I judge, in a position to discuss with her in any meaningful way the adequacy of opportunities for regular breaks from display screen use or the steps that could be taken to minimise repetitive or boring tasks, and eliminating peaks and troughs.

64. The impression I am left with is that the whole risk assessment exercise was regarded as an unfortunate waste of time with which Dentons were required to comply and the form filling was regarded as a tick box exercise and little more. That impression is reinforced by Dentons' treatment of the form when completed. It was not referred to personnel. Nothing was done in relation to the reference to wrist pain. The form was simply filed away and forgotten. This was clearly inconsistent with the Guidance which provides (rather obviously) that those conducting the assessment should have the ability to: "Make a clear record of the assessment and communicate the findings to those who need to take appropriate action". No doubt Mr McAvoy did what was required of him but that hardly constituted communicating with the personnel department who needed to know about the wrist pains.

65. Mrs. Fifield was not party to any meaningful training in order to participate in the assessment. Nor, on the evidence, was any real thought given to her work and how it was organised. The duty of the employer is to intervene and alter work practices if need be, not to rely on the employee, who will have other priorities and may not appreciate (in the absence of training) the importance of breaks and a varied routine, who may be distracted by day to day pressures and deadlines, and who may have become habituated to undesirable working practices.

66. I take the view that there was a breach of duty to Mrs. Fifield in failing to comply with the requirements of the DSE Regulations. I am further of the view that consequent on that breach of duty there was a breach of duty in respect of Regulation 5 of the MHSW Regulations, and that the inept way in which the risk assessment obligations were undertaken also gives rise to a claim in negligence.

67. In my judgment, despite the persuasive argument to the effect that compliance with the Regulations and an absence of negligence would have made no difference to the eventual outcome, Mrs. Fifield's working practices would have been materially altered if she had been properly trained and had risk assessments been performed competently and with proper frequency. On balance, the likelihood is that she would have ensured that her typing was spread throughout the working day and was not concentrated in the morning and early afternoon;

she would have taken regular breaks from typing in every hour; she would have ensured that her breaks did not involve pressured manual tasks; she would have told Dentons of the intermittent symptoms she experienced during 1998; and the risk of injury from the increase in work load would have been identified and her workload would have been managed so as to reduce the quantity of typing and the ensuing document collation that was required. Further, in the knowledge of her wrist pains, it is more likely than not that other secretarial help would have been enlisted to deal with the PAC."

55. These formidable, well reasoned and largely fact based conclusions are consistent with a finding made in paragraph 46 of the judgment that whilst the judge accepted the ergonomists' conclusion that they did not think any further intervention into the organisation of Mrs Fifield's working day had been identified, Mrs Fifield "was left very much to her own devices as to how she arranged her time and how she organised her time".

56. The judge then turned to causation. There was no dispute between the parties as to the applicable law. I have already set out his conclusions in relation to the medical evidence. I do not need to examine the psychiatric evidence since the allegation of somatoform disease is no longer pursued. The judge was thus able to reach his conclusion in paragraph 88 of the judgment:

"88. On the balance of probabilities, taking account of all the evidence and the synchronicity of the onset of the major problems and the change in Mrs Fifield's workload, I am satisfied that the deterioration in Mrs Fifield's condition and the onset of the chronic symptoms would not have occurred but for (Dentons') breach of statutory duty and negligence."

57. Although the judge also found negligence, it is clear from paragraph 31 of the judgment that the only discrete allegation of negligence advanced independently of the allegations of breach of statutory duty was the assertion that the decision to require Mrs. Fifield to undertake the PAC work in addition to her normal work load was negligent because Dentons ought to have foreseen the possible consequences in the light of what they knew or ought to have known about Mrs. Fifield's wrist pains. In my judgment, the assertion of common law negligence adds little to this aspect of Ms. Fifield's case, which, it seems to me, succeeds or fails on whether or not the judge was right to find relevant breaches of Dentons' statutory duties contained in the DSE Regulations which were causative of Mrs. Fifield's injuries.

Dentons' case on the Regulations

58. Despite the detail in which, and the vigour with which this part of the case was argued by Mr. Waite, I can, I think, take it quite shortly. Mr. Waite firstly made the point that, as applicable to the instant case, paragraph 15 of the MHSW Regulations

provided that breaches of Regulations 3 and 5 did not give rise to civil liability for breach of statutory duty. I therefore propose to concentrate on the DSE Regulations.

59. I start with Regulation 6. Although not contained in Denton's skeleton argument, Mr. Waite properly conceded, as he was bound to do, that there was material upon which the judge could properly find a breach of Regulation 6 of the DSE Regulations. This reads: –

Provision of training

6. - (1) Where a person -
- (a) is already a user on the date of coming into force of these Regulations; or
 - (b) is an employee who does not habitually use display screen equipment as a significant part of his normal work but is to become a user in the undertaking in which he is already employed, his employer shall ensure that he is provided with adequate health and safety training in the use of any workstation in that undertaking upon which he may be required to work is substantially modified.
- (2) Every employer shall ensure that each user in his undertaking is provided with adequate health and safety training whenever the organisation of any workstation in that undertaking upon which he may be required to work is substantially modified.

60. Mrs. Fifield's case was that she had received no such training. Dentons were manifestly unable to establish the contrary. The judge found in paragraph 67 of his judgment (set out at paragraph 54 above) that her working practices would have been "materially altered if she had been properly trained". That, in my judgment, is a finding which was plainly open to the judge on the evidence, as were the findings contained in the balance of paragraph 67. The admitted breach of Regulation 6 was thus causative of Mrs Fifield's injuries. That, in my judgment, is the short and simple answer to the Regulation 6 point.

61. Regulation 2 of the DSE Regulations reads as follows: –

Analysis of work stations

- 2 (1) Every employer shall perform a suitable and sufficient analysis of those workstations which -

- (a) (regardless of who has provided them) are used for the purposes of his undertaking by users; or
- (b) have been provided by him and are used for the purposes of his undertaking by operators,

For the purpose of assessing the health and safety risks to which those persons are exposed in consequence of that use.

- (2) Any assessment made by an employer in pursuance of paragraph (1) shall be reviewed by him if -
 - (a) there is reason to suspect that it is no longer valid; or
 - (b) there has been a significant change in the matters to which it relates;

And where as a result of any such review changes to an assessment are required, the employer concerned shall make them.

- (3) The employer shall reduce the risks identified in consequence of an assessment to the lowest extent reasonably practicable.

62. Dentons' argument in relation to Regulation 2 struck me as artificial in the extreme. As I understood it, it ran along the following lines. On its true construction, Regulation 2 is concerned with the equipment that makes up the workstation and the immediate work environment around the display screen equipment. The health and safety risks are those that arise from the equipment, the user's interface with the workstation and the immediate environment. The ergonomic experts had been in agreement that, with one minor exception, the design and disposition of Mrs. Fifield's workstation were satisfactory and did not present her with a risk of injury. Having concluded that the workstation was ergonomically sound, the judge should have found that it did not present a health and safety risk to Mrs. Fifield. The judge had been further wrong to roll up the various breaches compendiously in paragraph 67. The judge should have concluded that training and job design were the subject of discrete statutory duties under regulations 4 and 6 respectively and could not properly form the basis for a finding that the workstation assessment undertaken by the Dentons was not suitable or sufficient. Alternatively, the Judge should have found that there was no breach or causatively relevant breach regarding the provision of training and job design.
63. For Mrs Fifield, Mr Gore QC pointed out that Dentons' construction of Regulation 2 flew in the face of the *Guidance* attached to the Regulations. I agree. I do not need to set out the *Guidance* in detail, but it refers in terms to Regulation 2 addressing the prevention of "all the known health problems that may be associated with display screen work". In my judgment, Dentons' construction of Regulation 2 would neuter it and render it wholly ineffective. It is plainly wrong.

64. Secondly, as applied to this case, the arguments deployed by Dentons disintegrate against the rock-like quality of the judge's findings of fact. On the evidence deployed in this case, the judge in my view was manifestly entitled to find, as he did, that Dentons regarded the whole risk assessment as "an unfortunate waste of time".
65. Similar considerations apply to Regulation 4 which is in the following terms: –

Daily Work Routine of users

- "4. Every employer shall so plan the activities of users at work in his undertaking that their daily work on display screen equipment is periodically interrupted by such breaks or changes of activity as reduce their workload at that equipment."
66. In my judgment, the judge's findings in paragraph 67 of his judgment clearly establish a breach of Regulation 4. In this respect, however, there is a more insidious aspect to Dentons' defence, namely that it was really down to Mrs Fifield to look after herself, and that if she did not take sensible breaks and limit her periods of continuous typing, she had brought her own misfortune on herself. Dentons' skeleton argument for this appeal is replete with references to Mrs. Fifield's "concessions" in her oral evidence. I cite only one extract from the skeleton argument settled by junior counsel:

"Further, Mrs. Fifield gave oral evidence in cross examination that: (a) she knew what repetitive strain injury was; she knew it was possible that keyboard work might cause pain; that she knew that she should report any problems about her computer (and her use of it); she knew that she should take breaks from prolonged periods of keyboard work. In light of these concessions (covering as they did many of the issues the statutory Guidance states should be covered in training, and in light of the agreement at trial that Mrs. Fifield had been provided with a booklet ("You & Your Workstation") which gave appropriate health and safety information on all relevant matters, the judge should have found that Mrs. Fifield had indeed received training, alternatively, that any failure to provide training was immaterial."

67. This submission, in my judgment, reinforces the judge's findings that Mrs Fifield was very much left to her own devices, and that Dentons regarded compliance with the Regulations as an unfortunate waste of time. Accordingly, in my judgment, the second limb of Dentons' appeal also fails.

Conclusion

68. I have come to the clear view that this appeal is wholly without merit, and should be dismissed. The judge was plainly right to find that Mrs. Fifield had suffered a work related injury. He was plainly right to find Dentons in breach of statutory duty, and he was plainly right to find that her injuries were caused by those breaches of statutory duty.
69. I cannot say that this appeal should never have been brought, because Clarke LJ, on the papers, gave permission (albeit, as he said, with reluctance). It is, of course, commonplace for a case to give one impression on a first reading for a paper permission application, and a quite different impression when the arguments are deployed. I therefore do not query Dentons' right to prosecute the appeal. I have to say, however, that I find it distasteful that a large and well known firm of solicitors should not only submit a long-standing and competent employee to a trial at which it called psychiatric evidence in an attempt to show that her symptoms were imaginary, but that even when it rightly abandoned that unattractive argument in this court, it nonetheless sought to escape from its responsibilities to its employee both by attacking clear and compelling findings of fact by the judge relating to its dismissive attitude to its responsibilities under the Regulations, and by persisting in the argument that Mrs. Fifield's injuries were not its responsibility. In my judgment, these are not the actions of a responsible employer. Moreover, the proportionality of Dentons' behaviour can be measured by the fact that in the court below the judge ordered an interim payment of £100,000 on account of Mrs. Fifield's costs: see paragraph 3 of this judgment. By the time the case has concluded in this court, the costs of both sides are likely to total something in the order of three times the amount of the damages awarded.
70. In written submissions made after this judgment had been distributed in draft, Dentons invited me to reconsider the terms of paragraph 69 on two grounds. The first was as follows: –

"This appeal was prosecuted throughout by the employers' liability insurers of Dentons, and not by Dentons themselves, who had no involvement in the appeal process. Thus Dentons' insurers made the decisions (i) to seek permission to appeal; (ii) to pursue the appeal once permission was granted; and (iii) on legal advice as to the manner in which the appeal was pursued thereafter."

The second was that since I had recognised their right to prosecute the appeal pursuant to the permission granted by Clarke LJ it was unfair of me to designate Dentons' conduct of the proceedings as distasteful.

71. I have, of course, reconsidered paragraph 69 in the light of these arguments, but see no reason to alter the thrust of what I said. Dentons' statement that they were the

creature of their insurers explains their conduct. I can, however, only express my surprise in these circumstances that the course favoured by the insurers was not subjected to a more detailed exploration than seems to have occurred in relation to the balance which needed to be struck between the unlikely success of the arguments advanced, its impact on Dentons' standing as employers and the costs involved. As to the latter, the final two sentences of paragraph 69 speak for themselves.

72. A party may well have a right to argue a distasteful point. The right to argue it does not render the point any less distasteful. I am, however, prepared to substitute the word "unfortunate" for "distasteful" in line 6 of paragraph 69.
73. For all these reasons, I would dismiss this appeal.

Lord Justice Jonathan Parker

74. I agree with the judgments of Wall LJ and Buxton LJ.

Lord Justice Buxton

75. I agree with everything that has fallen from my Lord. I add a few words of my own on a more general issue, of the proper use in elucidating the history of her complaint given by the claimant of the medical records and reports that are before the court.
76. In opening the appeal Mr Waite properly stressed that the issues under grounds 1 and 2 were ones of fact: in essence, the date on which the "more serious" symptoms, those that took Mrs Fifield to her GP in February 1999, first manifested themselves. To that issue, the only witness was or could be Mrs Fifield herself. The question for this court was whether it could differ from the judge's acceptance of her account. That clear requirement was, however, only inferentially apparent in the grounds as drafted. Ground 1 criticised the judge for failing to attach any or any proper weight to the "contemporaneous medical notes" or to the history that the claimant gave to Mr Eckersley in May 2003. Ground 2 was taken up with extensive criticism of the judge's handling of the exchanges between Mr Eckersley and Dr Seifert that are described by my Lord in his §§ 20–34 above. It seemed to be suggested that this material was evidential in its own right, and not merely as material that could have been used at the trial to discredit Mrs Fifield.
77. It is therefore necessary to remind ourselves of the evidential status of such material. What the doctor writes down as having been told him by the patient, as opposed to the opinion that he expresses on the basis of those statements, is not at that stage evidence of the making of the statement that he records. Rather where, as here, the record is said to contradict the evidence as to fact given by the patient, the record is of a previous inconsistent statement allegedly made by the patient. As such, the record

itself is hearsay. It may however be proved as evidence that the patient did indeed speak as alleged in two ways. First, if the statement is put to the witness, she may admit to having made it. Alternatively, if she does not "distinctly" so admit the statement may be proved under section 4 of Lord Denman's Act 1865. Second, by section 6(5) of the Civil Evidence Act 1995 those provisions do not prevent the statement being proved as hearsay evidence under section 1 of that Act. If the court concludes that such inconsistent statement has been made, that goes only to the credibility of the witness; the statement itself cannot be treated itself as evidence of its contents. Authority is scarcely needed for so protean a proposition, but I would venture to mention the observations of Lord Esher MR in *North Australian v Goldsborough* [1893] 2 Ch 381 at p 386.

78. In the present case, none of those steps were taken. In particular, if it had been intended to achieve what was suggested to us had been achieved, and adduce Mr Eckersley as a witness vouching to the accuracy of his note of the patient's factual history, the safeguards under the 1995 Act would have been valuable in underlining the seriousness and significance of that step. As it was, everything in relation to the GP's notes proceeded through argumentative cross-examination of Mrs Fifield. I have not been able to trace where there was actually put to her Mr Eckersley's note recorded by my Lord in §22 above, and said to demonstrate that Mrs Fifield admitted the onset of severe symptoms before the significant increase in her workload at the beginning of 1999. And it was indeed suggested to us that these materials could be adduced, as they were so adduced, as reasons why the judge should have disbelieved Mrs Fifield, without the records ever having been put to Mrs Fifield at the trial. For the reasons indicated above I am unable to agree.

79. Part of the confusion that attended both the trial and the appeal was attributable to the lines of dispute not having been identified before the trial opened. My Lord has set out, in §11 above, §§14–15 of the Particulars of Claim, which undoubtedly represented the account as to the date of the onset of the severe symptoms that was given by Mrs Fifield in evidence. The Defence said of these, and other, allegations that they were

"neither admitted nor denied, as the Defendant has no knowledge of the matters pleaded therein and the Claimant is put to strict proof."

That may well have been all that the Defendant could sensibly say before disclosure of the medical records, and before he had in his hand Mr Eckersley's report, of which as we have seen so much was made in this appeal. But it was unsatisfactory for the pleading never to be revisited before the trial, when the Defendant by that time knew that his position was not that he neither admitted nor denied §15 of the Claim; but, rather, that he would advance a positive case that §15 was unreliable or untrue on the basis of statements inconsistent with it made by the person on whose instructions the paragraph had been drawn.

80. This failure to identify before the trial the issues in dispute with Mrs Fifield's account, and the material on which the dispute was based, meant that this part of the trial took

on much of the worst aspects of the pre–Woolf world, with the case being developed only as the trial proceeded. Much of that was permitted to happen because of the universal assumption that the medical records are "evidence", without analysis of what if anything it is that they prove. To obviate such difficulties in future, and to ensure that factual issues in medical cases are economically and efficiently tried, the following procedure should be adopted. First, a party who seeks to contradict a factually pleaded case on the basis of medical records or reports should indicate that intention in advance, either by amendment of his pleadings or by informal notice. Then, the opposite party must indicate the extent to which they take objection to the accuracy of the records. When the area of dispute is identified, a decision will have to be taken as to whether the records need to be formally proved by either of the means referred to in §3 above. Thereby, not only will the ambit of the dispute be clarified in advance, but also it will be clear what interpretation is sought to be put on what my Lord has called somewhat Delphic records: for an example, see §14 above.

81. Two consequences may then follow. First, if the foregoing precautions have not been taken, the trial judge may be reluctant to permit reference to reports of the patient's statements in the medical records for the purpose of contradicting her evidence. Any such reluctance is unlikely to be criticised by this court. Second, on the other side of the coin, if there is unreasonable failure to admit that such statements were made, to the extent that it is necessary to call busy doctors to court simply in order formally to prove them, then such failure of co–operation is likely to be penalised, possibly severely, in costs.

82. None of this procedure should be burdensome; it should indeed be merely part of the narrowing and clarifying of the issues that should take place in any event in advance of the trial. Had the procedure been adopted in this case the trial would undoubtedly have been shorter, easier, and simpler for this court to adjudicate upon.