MINUTES OF JOINT CHILD INJURY AND PRODUCT LIABILITY SPECIAL INTEREST GROUPS OF APIL

Held at Charles Russell Solicitors, 8-10 New Fetter Lane, London on Wednesday 5 December 2001.

1. Matters Arising from Minutes

Minutes of the last meeting held on 10 April 2001 were approved.

2. Newsround

- Kevin Grealis updated members on the recent successful Child Injury master classes, held in London, addressed by Professor Wyatt and a record 50 plus delegates attended. The second master class in Manchester addressed by Dr Rosemary Morton was also very well received. Kevin commended members to the new CPIL Children and Litigation Course.

- Amanda Stevens noted the highlights of the recent Child Injury Conference in Dublin, which drew both English and Irish delegates and proved to be very stimulating. Further details are in the APIL Newsletter for October 2001, pages 8 – 11.

- Cathy Leech drew members' attention to the forthcoming joint Product Liability and Child Injury SIG to be held in Birmingham on 21 February when Dr Michael Hayes and a colleague will address the group on children's playground safety issues.

3. Executive Committee Report

There was no Executive Committee Report available.

4. Talk by Cindy Morgan on the decision in Abouzaid v. Mothercare

Cindy produced a handout for this talk, which is available on request from the APIL office, together with a copy of the transcript of the Judgment.

Cindy began by outlining the brief facts of the case, which were that in 1990 Mrs Abouzaid purchased a Mothercare Cosytoes, for her young son's pushchair. The purpose of the Cosytoes is to keep a baby warm in a buggy without the impediment of blankets. Cindy exhibited the product. On the first day of use, Mrs Abouzaid removed the product from its clear plastic packaging and made several attempts to attach it to the pushchair. No fitting instructions had been supplied. Her elder son Iman aged 12, offered to take over the fitting process, after his mother had made several attempts. He faced the front of the pushchair and reached around the back of the seat to hook the elastic straps together. During that process, he lost his grip on the metal buckle, and the elastic sprang back, pushing the buckle into his eye, causing a detached retina. He underwent surgery for that.

He also developed a divergent squint for which he underwent surgery. He is now left with grossly defective vision, and effectively has lost the sight in his left eye. He is now excluded from various occupations such as the Army, the Police and those involved in working at heights or with heavy machinery.

The Claimant obtained an expert report from ROSPA concluding that the Cosytoes product was not safe as the metal fastening could be propelled with considerable force. The Court also concluded that the design of Cosytoes could easily be refined to make it a safer product. The matter duly proceeded to the County Court with a claim in both negligence and breach of duty under the Consumer Protection Act 1987. At the case management conference, the Court ordered that Dr Hayward, a highly experienced engineer, be jointly instructed to produce a liability report. He was to consider the allegations of negligence, any defects under the CPA, and whether the supplier should have been aware of the defects. In preparing his report, Dr Hayward considered the DTI database of home and leisure accidents, compiled from hospital statistics since 1977, containing several million records. This data showed that of all the injuries to eyes involving elastic, between the period 1978 to 1988, only one had involved a pram. Dr Hayward went on to discuss the Cosytoes product with 3 child experts in product safety and said that there had been no discussion within the industry of potential difficulties or defects in using elastic for a Cosytoes type product, nor were they aware of any technical safety problem with it. The experts said they were aware of dangers to the eyes from use of elastic luggage straps and swimming goggles. Dr Hayward went on to consider the mechanics of the accident and the sequence of events leading to the injury. He tried himself to fasten the buckle behind the pushchair and found a tendency for the buckle to fly to a point in front of the Cosytoes. He also found that one had to get close to the seat of the pushchair to get the buckle right around the chair. He concluded although if he was advising manufacturers on Cosytoes products today, he would say it was defective, in 1999 manufacturers could not have been expected to recognise the hazards, because even manufacturers of child care products had not identified the risks. Also, in the absence of previous similar accidents and the state of knowledge in 1990, no special instructions or warnings were required.

The Claimants made an application at Court for the joint expert to give oral evidence at trial, but the District Judge declined to make an order and referred the matter to the Trial Judge who dismissed the application. The County Court Judgment given by His Honour Judge Simpson, was that he did not accept the conclusions of the expert engineer. He concluded that a defect existed if the safety of the product was not such as persons generally were entitled to accept. He noted the failure to provide instructions, the unsafe design as the product could not be fastened safely, and the application of common sense that there was an obvious danger which could easily be put right. He considered that the manufacturers should have had in mind the fact that older children were likely to bend down into the path of the elastic of the Cosytoes product, and that they would use the product at eye height.

The Defendants appealed to the Court of Appeal where the matter was heard in December 2000. The Court of Appeal had some difficulty because it was not entirely clear whether His Honour Judge Simpson had made a finding of liability under the Consumer Protection Act or in negligence.

The three Court of Appeal Judges went on to conclude that Mothercare was not negligent as there was no foreseeable risk of damage and the potential risk of serious damage was very small. The Court of Appeal then went on to consider whether the product was defective under Section 3 of the CPA, and found there was a lack of safety to the public at large. They noted that the product today would be considered as defective, and concluded that the risk of injury arose from the very nature of the elastic. This was a defect both at the time of the accident and now, and that public expectations had not changed, and nor had technology. The questions considered under the CPA, by the Judges, were a) how was the damage caused?; b) was the level of safety such as the public were entitled to expect? They noted the test was not whether the damage was foreseeable. The Judges concluded that there was no evidence that expectations of safety should be lower in 1990 than now, so the product was defective. It had no warnings and the public was entitled to expect better. The Defendants raised a statutory defence under Section 4 of the CPA, but Mothercare relied on the absence of any accident data in the DTI database as evidence of "scientific or technical knowledge" such that they would not be expected to have discovered the defect. The Court found that the matter of previous accidents was irrelevant to the question of whether the product was defective. The data relied upon was relevant to the question of foreseeability, but was not relevant to the question as to whether a defect exists. The Court of Appeal considered that the Trial Judge at first instance had been correct to assume there had been no raised expectations of the public and also noted that the safety fault could be rectified at minimal cost.

Damages were awarded at £17,000 for general damage, and £15,000 Smith & Manchester. The balance was agreed special damages. The Smith & Manchester award was challenged and the Defendants sought to pay only a nominal amount, saying that Iman had always worked in the hotel trade and did not have difficulty in finding jobs. The Court of Appeal however, found no favour with those arguments and felt that if Iman developed a problem with his other eye, he would be effectively blind and the effect on his earnings capacity would be very severe indeed. Mothercare's petition to appeal to the House of Lords was dismissed.

Cindy concluded that previously there had been doubts as to whether the CPA gave greater protection than negligence at common law. The CPA had been designed to assist the Claimant in the onerous and costly task of proving fault, especially in situations where the Defendants generally hold most of the data. The decision in Abouzaid v. Mothercare has caused great concern for both producers and liability insurers.

3. Talk by Adrienne de Vos – the McDonalds' Scalding Cases

Adrienne began the talk by putting this claim in context given the adverse publicity that some personal injury cases have received when there is talk of a growing "compensation culture". The ATLA website contains a product liability section, showing that punitive damages are awarded in the USA in less than 5% of civil jury verdicts. A study by the American Bar Association in 1990, showed that most awards were only US$50,000 or less. The high value awards are rare, and therefore have more immediate impact, although in cases where punitive damages have been awarded, 80% of manufacturers have also made changes to their products for safety reasons.

Adrienne described the McDonalds group action in which 30 cases had been issued. The cut off date for joining the group was last September. The claims were being brought in negligence, under the Occupiers Liability Act and under the Consumer Protection Act. A Plastic surgeon has provided the generic medical evidence. 23 out of the 30 cases concern children. The Defendants are arguing, amongst other things, that failure to supervise is the cause of their injuries.

The case revolves around the issue as to the appropriate temperature and method (containers etc) at which to serve hot drinks in McDonalds. Currently there is no legislation as to the safe temperature for serving drinks. Scalds are apparently the commonest cause of burns in the UK in children. One of the medical experts has relied upon a 1940 study into pigs, which established at what temperature skin damage can occur. A liquid coming into contact with skin at 44°C will not cause damage unless there is protracted contact. In the band 44°C to 51°C, the rate of cellular destruction doubles with each degree Centigrade rise in temperature. When liquids come into contact with skin at a temperature above 70°C, there is total tissue destruction and no time to avoid this. The key factors in determining the extent of the burn are the temperature of the fluid and the duration of contact. Most deep thermal burns heal eventually, but there can be problems with scar hypertrophy. Full thickness burns require skin grafts, which are very slow to heal and require prolonged dressing, leave extensive scars and are excruciatingly painful.

Adrienne discussed the case in the States in 1992, when 70 year old Stella Liebeck was a passenger in a drive through McDonalds. She purchased a drink and was holding it on her lap, trying to remove the lid. The liquid spilt, giving full thickness burns to 6% of her body area, comprising her thighs, groin, perineum and buttocks. The case went to Court in 1994 and McDonalds produced documents showing that they had received more than 700 claims for scalds for the period 1982 to 1992. McDonalds quality assurance manager admitted when giving evidence from the witness box that McDonalds coffee was not fit for consumption at the temperature at which it was served as it would cause burns. Drinks were being served at 170°F to 180°F in US cases which equates to 87°C to 90°C in the UK cases. Adrienne explained that her experts say that drinks served at home are normally at a temperature of 135°F to 140°F.

It is understood that Stella Liebeck began her case because when she asked McDonalds for just her medical expenses for her treatment, they declined. When the case finally came before a Judge, he said that McDonalds had shown reckless, callous and wilful conduct. Initially she was awarded US$2.7m, mostly by way of punitive damages, although this was later reduced to US$480,000 on appeal. The initial award equated to 2 days coffee sales for McDonalds. Later, the claim was resolved by way of confidential settlement so damages awarded may have even been less.

With reference to the UK cases, the first issue is temperature at which the drink is served.

The second issue is the nature of the cups in which hot drinks are served. They have at least a 30% wider top than bottom, making them very unstable. Even at a very small tilt of tray angle, such as 18° the cups will fall over and the lids will come off. Furthermore, the polystyrene nature of the cup masks the true temperature of the liquid inside and causes the liquid to stay hot for a very long time. People in this country tend to like drinking hot drinks at around 65°C, but at the temperature McDonalds are selling, ie at 80°C it takes 30 minutes for the drink to cool down to that level.

McDonalds feel the temperature they serve at is what the client wants, and also necessary to preserve quality to ensure that full flavour is extracted from the bean. The Claimant's case is that there should be a differential between the brewing temperature and the serving temperature.

The third argument is about the level of warning that should be given under the CPA. In the Liebeck case, McDonalds admitted that the warnings on the cup served only as a reminder to the consumer, but it was too late by then for them to do anything about the product.

The case comes to trial in March 2002.

4. Talk by Richard Barr on the MMR Litigation

Richard produced a handout for his talk which is available on request from the APIL Office. He began by giving a typical case study of one of the children for whom he is acting. "James" (not his real name) had a normal delivery and APGAR score of 10 at both 1 and 5 minutes. He crawled on time, and met all the usual early developmental milestones on time at the health visitor checks. He underwent the usual vaccinations of DTP and HIB. He was a cheery little boy, bright eyed, with a cheeky expression, he ate normal food and slept through the night. By 12 months, he had a dozen words and was set for a bright future. His family GP practice sent out the usual invitation for the MMR vaccination, for which they would get a substantial bonus if they vaccinated 90% or more of the eligible children. James' mother duly attended with him and received the usual reassurance from the practice nurse that James might get a fever on the night of the injection, which could be treated with Calpol, but other than that he should be fine. The day following the vaccination, he seemed withdrawn and quiet but picked up

a few days later. Then after a few weeks his parents noticed that he was no longer answering to his name. They sought medical help and it was suggested that James might need grommets for a hearing problem. Hearing tests later showed that there was no actual problem with hearing and the parents were just given a general reassurance that it was a phase he was going through. James then stopped sleeping through the night, developed an insatiable thirst, became more clumsy and unaware of hot and cold temperatures. He stopped speaking at all and started to watch videos obsessively, particularly Thomas the Tank Engine. He would line up his toys rather than play with them. He became obsessed with routines and would throw a tantrum if others did not comply with those routines. He lost his sense of danger and ability to feel pain. He became difficult to control, spending a lot of time flicking light switches and impossible to take shopping. On the rare occasions that his mother did take him shopping, she would invariably hear loud comments from other shoppers to the effect that he was a spoilt brat. A few months on he developed serious bowel problems when he appeared to be in pain and suffered alternately diarrhoea and then constipation. He was diagnosed as being on the autistic spectrum. He underwent colonoscopic investigation at the Royal Free Hospital. James is now 12 and attends a special school. He has no language, is violent, and it usually takes 3 people to control him if they take him out of school confines. His is one of the cases going to trial and there are approximately 1000 other cases. The similarity between the cases is so great, it is almost uncanny when taking the statements from parents of children affected.

Richard described how his involvement with the MMR litigation began in a small way in 1992, when 2 out of 3 brands of MMR were withdrawn from public use on safety grounds. 5 or 6 families then contacted him, because their children were exhibiting adverse reactions. Richard then became aware of the publicity about a possible link between autism and the MMR vaccine. Around this time, Dr Andrew Wakefield, Gastroenterologist at the Royal Free Hospital, was studying inflammatory bowel disease and particularly its increase within western civilisation. His research was beginning to show that measles was an etiological factor in the development of inflammatory bowel disease. He had not had any involvement with autistic children when first approached to set up a scientific study of inflammatory bowel disease in children vaccinated with the MMR.

Suddenly, Richard Barr found a large number of cases were coming forward, which led him to extend his research on the medical literature on the MMR vaccine. This research began to reveal a great deal of evidence to show that there had been no proper safety trials conducted. The largest safety trial ever performed for MMR was 7 weeks in duration only. In other words, there was only 7 weeks follow up for children who had been vaccinated.

The case began to snowball and Richard sent a 300 page instruction to Leading Counsel, who advised it was best to pursue the claim under the CPA, rather than in negligence. The CPA came into force in January/February 1988 and the MMR was introduced in this country in October 1988. In 1998 the first claims were issued at Court and there are now over 400 issued cases. Mr Justice Bell has been

assigned Judge in the multi-party action in the High Court, but is shortly to be replaced (by Mr Justice Keith). The last experts meeting lasted a whole week.

The Claimant team of lawyers in this case has been much heartened by the case of A and Others v. National Blood Transfusion Authority, which gave a clear exposition of the CPA, which is a fault neutral statute. The Court determined that even if the defect could not be foreseen, this was not relevant, which is a real advantage to Claimants.

Richard then went on to discuss the difficulties of handling this type of litigation when the Defendants are a multi-national corporation. Richard disclosed how at each CMC he will have a team of about 6 to 8 lawyers, but the Defendants will turn up with up to 50 lawyers. The trial window has been set for October 2003 to deal with the issues of defect and causation. The Defendants are raising a development risk defence and the Claimants are seeking disclosure from them. Much of the year has been taken up with dealing with the Defendant's Part 18 requests. There are 8 cases going to trial and in each case a request of up to 80 pages has been served. The questions asked within the request are very searching and are trying to force the Claimant into making admissions. These have involved a lot of late working. He has a CMC next week.

Richard gave an indication as to the volume of work generated by the cases when he described there was 400ft of shelf space taken up in the office with the document bundles.

The Department of Health maintains there is no evidence to connect the MMR vaccine to autism, but part of the Claimant's case is that they have not found he evidence because they have not looked for it.

One of the Claimant's experts is Professor O'Leary who has a research laboratory in Dublin. He has been employing state of the art technology, which has found that there is evidence of the MMR virus within tissue taken on biopsy and blood samples from the Claimants, many years after the vaccination. These viruses should have cleared out within 28 days of the vaccine being administered and there should only be antibodies left as a result of the vaccination. The research has moved on to a new phase in which it is proposed that each child within the group is to be contacted by a nurse for a blood sample to be taken. In order to differentiate vaccine damaged children with autism from other autistic children, they are trying to identify the virus within the blood sample. The Claimant team now has plenty of evidence that there is a temporal and epidemiological link between the vaccine and autistic injury. The only reason that the Claimants are having to undertake further research into the link is because no one else is doing this.

There is no certainty that legal aid will continue. The Claimants have a justify every step and the Defendants make continual submissions to the Legal Services Commission about this. If Legal Aid does get withdrawn, the claims will collapse as it is not possible to enter CFAs with such huge costs.

In addition to the 25 main expert witnesses, there are a group of about 50 peer review experts, who are engaged just to keep an eye on the other experts and make sure they adopt a detached impartial view towards the claim.

In the last week, Andrew Wakefield has been forced to leave the Royal Free Hospital, because of the pressure he has been facing to withdraw from the litigation. There has been wide media coverage of this.

5. Elections

Cathy Leech and Adrienne de Vos indicated their willingness to continue acting as Co-ordinator and Secretary of the Product Liability Group respectively, there having been no new nominations for these positions.

Kevin Grealis stepped down from his position as Co-ordinator of the Child Injury Group, and Amanda Stevens was appointed as his successor. Andrea Johnson was elected as new Secretary of the Group.

Following the elections, the attendees adjourned to a local hostelry before proceeding to Sarastro Restaurant in Drury Lane for a Christmas meal.

Amanda Stevens
Co-ordinator