

Apportionment of benign disease: a deeper look



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What does it mean to be apportionable?

- ▶ Divisible diseases?



What does it mean to be apportionable?

- ▶ ~~Divisible diseases?~~
- ▶ Divisible injuries
- ▶ Where:
 - ▶ Concurrent torts cause wholly separate injuries; or
 - ▶ Successive torts contribute to the same injury
- ▶ (*Rahman v Arearose*)



What does “injury” mean?

- ▶ Equates to harm: the consequences of the tort
- ▶ PSLA may be apportioned: it compensates for the *effect* (not the *injury*)
- ▶ Loss of earnings is indivisible (*Dingle*)



What does it mean to NOT be apportionable?

- ▶ Per *Rahman*: indivisible injuries:
 - ▶ Multiple concurrent tortfeasors, but
 - ▶ Damage is logically impossible to apportion
 - ▶ "no rational basis" for apportionment
- ▶ Avoids burden of proof difficulties
- ▶ Cognate with "the same damage" in Civil Liability (Contribution) Act 1978



A final class: *evidential impossibility*

- ▶ Where:
 - ▶ Multiple tortfeasors
 - ▶ Each caused some damage
 - ▶ Neither caused the whole
 - ▶ Would be *some* damage from each tort, if committed individually
 - ▶ ...but nobody can tell how much or what part
- ▶ Not concurrent torts (*Rahman*)
- ▶ Attempt apportionment (*Thompson*)



Which category is my case in?

- ▶ Do you understand what has caused the harm?
- ▶ Do your experts?
- ▶ What is the dose-response relationship?
- ▶ Where does the evidence point?

An example: HAVS/VWF

- ▶ Symptoms are dose-dependent
- ▶ “Threshold disease”: initial dose consumes “reservoir of tolerance”
- ▶ Later symptoms are caused by the accumulated whole
- ▶ Symptoms can disappear – *if it's caught early*
- ▶ Knowledge development in late 20th century
- ▶ Different (conflicting?) decisions:
- ▶ ...*a game of two HAVS*

Case 1: *Allen v BREL*

▶ Timeline:

- ▶ Starts work: late 1950s
- ▶ Develops symptoms: 1968
- ▶ Trigger date for tort: c. 1976
- ▶ Left to work elsewhere: 1987

▶ Full value = £11,000. Deduct:

- ▶ £1,500 for pre-1976
- ▶ £1,500 for post-1987
- ▶ £4,000 (half the remaining £8,000) for 1976 to 1987



**British Rail
Engineering
Limited**

Case 2: *Brooks v SYPTE*

- ▶ Timeline:
 - ▶ Starts work: 1961
 - ▶ Starts with D: 1982
 - ▶ Trigger date for tort: 1989
 - ▶ Develops symptoms: 1999
- ▶ No apportionment



Allen

2001, decision of Smith J upheld



Brooks

2005, decision of Smith LJ



What's the difference?

- ▶ What difference a non-negligent course would have made
- ▶ *Allen*: symptoms had started; disease irreversible
- ▶ *Brooks*: without negligence, symptoms could have been avoided



Insight from *Brooks*

- ▶ All exposure causes damage
- ▶ ...but PSLA compensates for the *effect* of that damage
- ▶ In a threshold disease early damage has no effect (except heightened susceptibility)
- ▶ Natural corollary of the *de minimis* rule

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What about NIHL?

- ▶ “NIHL is treated as a divisible cumulative injury” (*Munkman on Employer’s Liability*)
- ▶ Ignores threshold issue
- ▶ Ignores *Dingle*
- ▶ Assumes damage through cumulative exposure

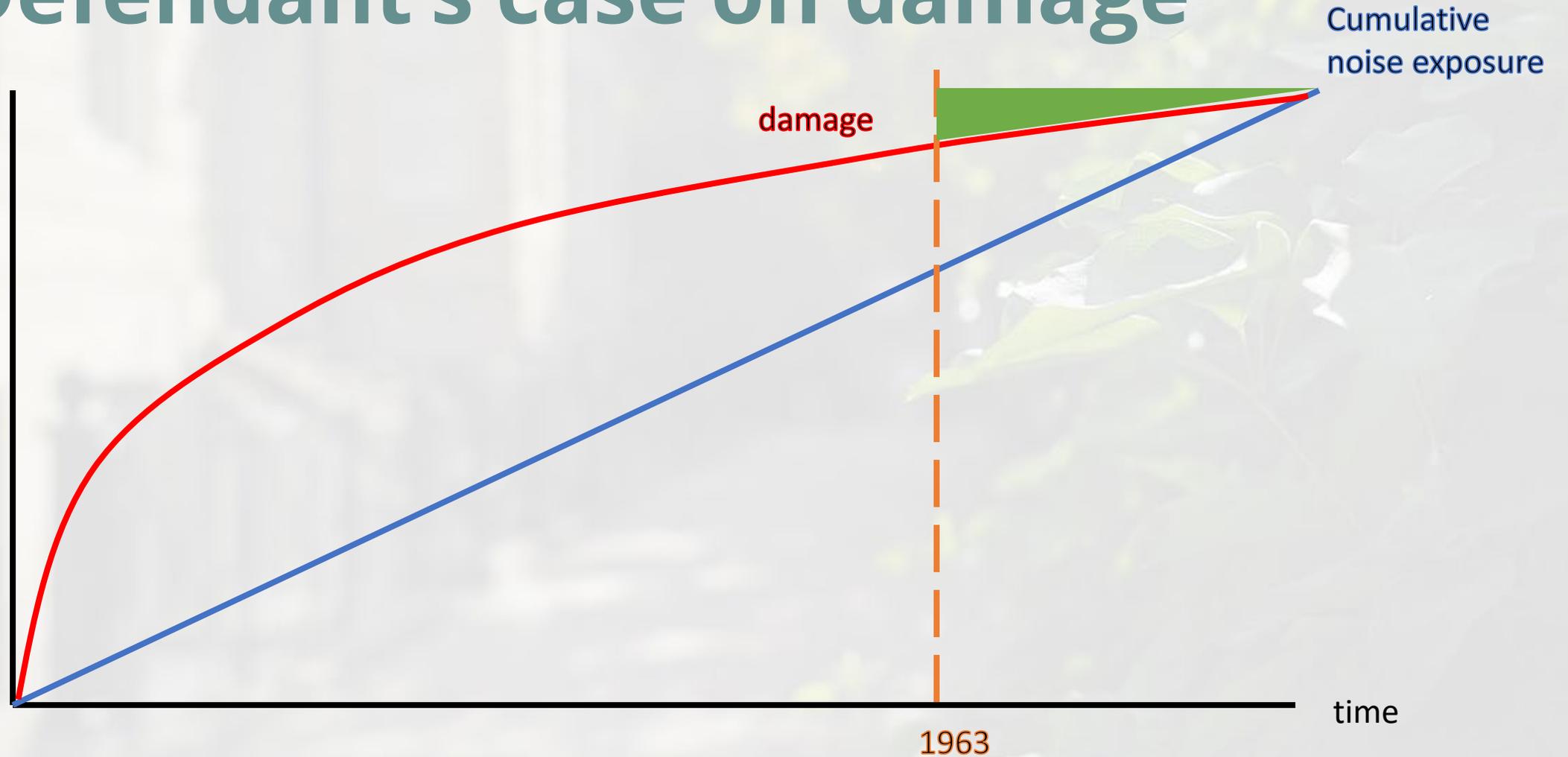


Thompson v Smiths Shiprepairers

- ▶ Mustill J in 1984
- ▶ Cut-off year is 1963
- ▶ Most Claimants already very deaf by then
- ▶ Defendant: only a *de minimis* difference made



Defendant's case on damage

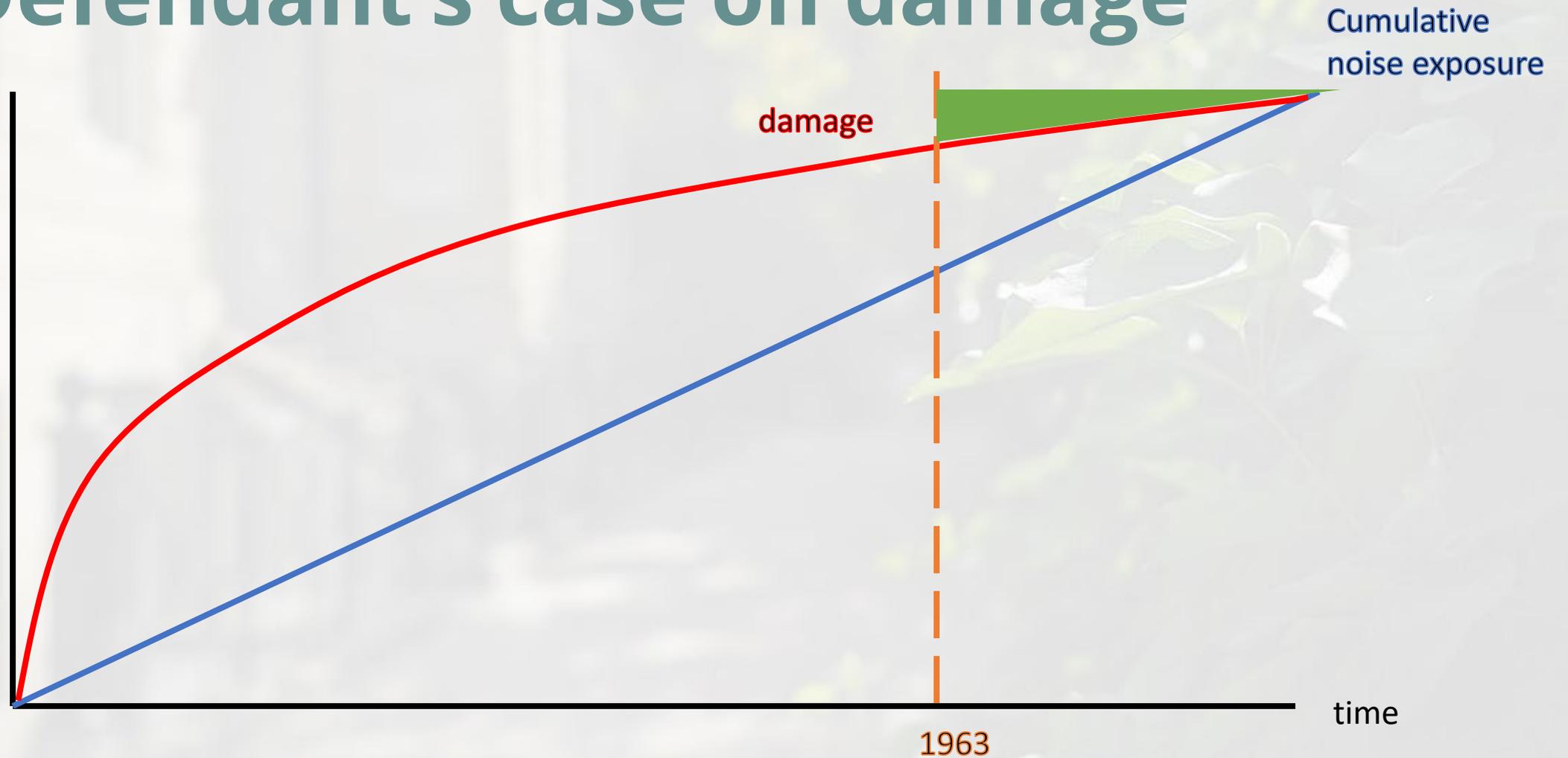


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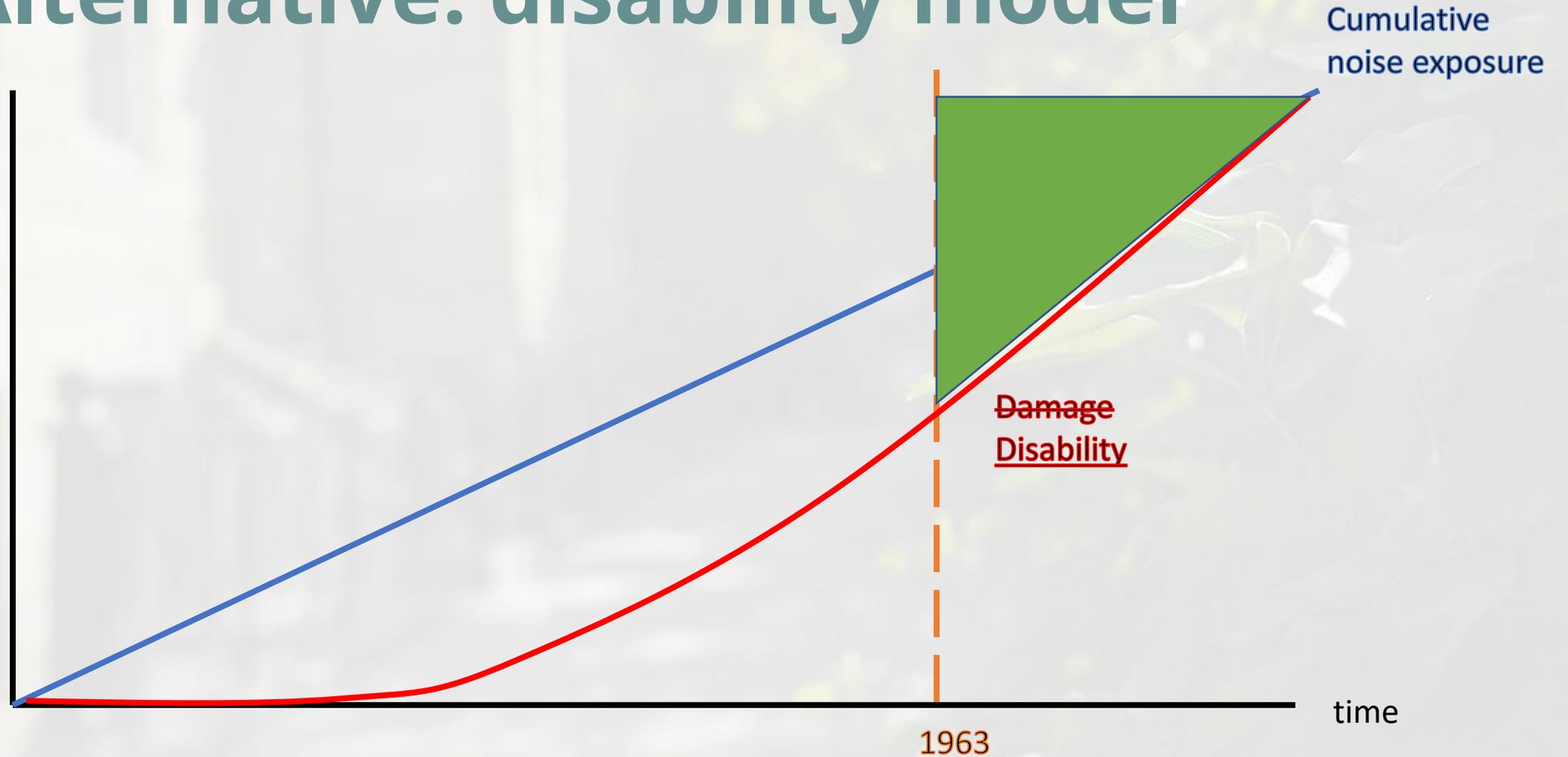
- ▶ Defendant's contention rejected
- ▶ Impairment (objective; measurable; decibels) is distinct from disability (subjective; qualitative)



Defendant's case on damage



Alternative: disability model



Thompson v Smiths Shiprepairers

I see no reason why the present impossibility of making a precise apportionment of impairment and disability in terms of time, should in justice lead to the result that the defendants are adjudged liable to pay in full, when it is known that only part of the damage was their fault. What justice does demand, to my mind, is that the court should make the best estimate which it can, in the light of the evidence, making the fullest allowances in favour of the plaintiffs for the uncertainties known to be involved in any apportionment. In the end, notwithstanding all the care lavished on it by the scientists and by counsel I believe that this has to be regarded as a jury question, and I propose to approach it as such.

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Military NIHL

- ▶ May not be cumulative at all – single shot or blast
- ▶ Immunities:
 - ▶ Pre-1987: Crown immunity
 - ▶ Combat immunity
- ▶ Acceleration of age-related hearing loss?



Asbestosis

- ▶ Another cumulative *threshold* condition
- ▶ 25 fibre/ml/years?
- ▶ Holtby:
 - ▶ 39 year career, 21 with D
 - ▶ 25% discount applied
- ▶ Merely a discount: *“any mathematical approach is clearly unsupportable on the evidence”* (HHJ Altman, QBD Leeds)



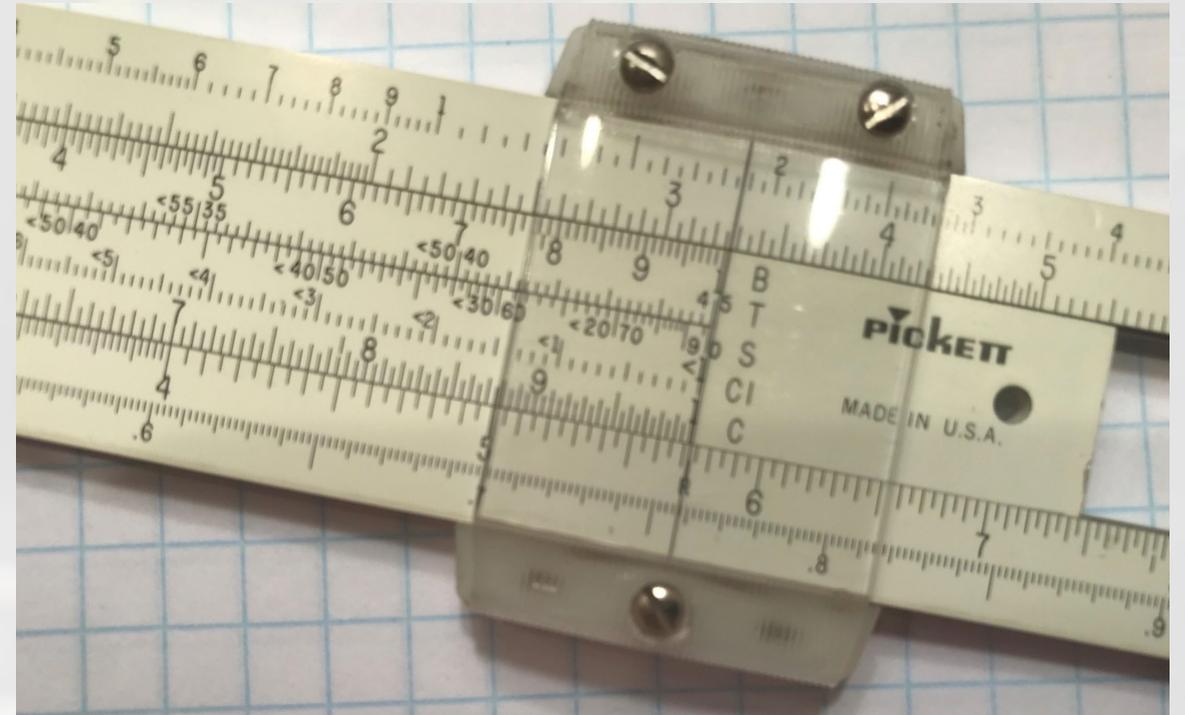
What does *Holtby* decide?

- ▶ Endorses and applies *Thompson*: apportionment is a “jury question”
- ▶ Merely notes the use of time-apportionment – no endorsement or prescription



Put down the *Holtby* slide rule

- ▶ Examine evidence carefully
- ▶ What difference would have been made?
- ▶ Are you measuring impairment, or disability?
- ▶ Does *Brooks* apply?
- ▶ Challenge *Holtby*: *Wright v Stoddard International* (CSOH)



Psychiatric damage: *Konczak*

- ▶ Very different principles
- ▶ Often: background of vulnerability
- ▶ *Konczak v BAE Systems*: distinguish:
 - ▶ The harm being the result of more than one cause, only one of which is D's tort; and
 - ▶ Pre-existing vulnerability leads to probability of harm in any event



Psychiatric damage: *Konczak*

- ▶ Aggravation is conceptually simple
- ▶ Harder: where tort tips the Claimant from being stressed, to being ill
- ▶ A rational basis for apportionment should be attempted
- ▶ On facts of *Konczak*: no apportionment



Take home messages

- ▶ Focus is on the harm caused by the tort
- ▶ Harm not always measurable objectively
- ▶ And on finding a rational, logical basis for apportionment
- ▶ Time apportionment is rough, ready – and (often) wrong



Cases

- ▶ *Rahman v Arearose* [2001] QB 351
- ▶ *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405
- ▶ *Dingle v Associated Newspapers* [1961] 2 QB 162
- ▶ *Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242, [2001] ICR 942
- ▶ *Brooks v South Yorkshire Passenger Transport Executive* [2005] EWCA Civ 452
- ▶ *Munkman on Employer's Liability*
- ▶ *Holtby v Brigham & Cowan (Hull) Ltd* [2000] ICR 1086
- ▶ *Wright v Stoddard International plc* [2007] CSOH 138
- ▶ *Konczak v BAE Systems plc* [2017] EWCA Civ 1188, [2018] ICR 1

Questions?



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