PERSONAL INJURY SEMINAR SERIES

FATAL CLAIMS & INQUESTS

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AN OVERVIEW OF INQUESTS AND RECENT DECISIONS

By Navjot Atwal

Statutory jurisdiction

It must be considered whether the death of a person might fall within one of the three categories under s.8(1) of the Coroner's Act 1988 requiring the coroner to hold an inquest. There must be reasonable cause to suspect that the deceased: -

- Died of a violent or unnatural death;
- Died of a sudden death of which the cause is unknown;
- Died in prison or in such a place or in such circumstances as to require an inquest under any other Act.

There is no general discretion for a coroner to hold an inquest in the public interest, either a case falls within s.8(1), where an inquest is mandatory, or it does not.

A death from natural causes which is wholly unexpected and arises from culpable human failure will also qualify. Deaths in custody give rise to an automatic requirement for an inquest by jury under s.8(1)(c).

Purpose of the inquest

- Rule 36 Coroner's Rules and s.11(5) of the Coroner's Act 1988 state that an inquest must focus on establishing the identity of the deceased how, when and where a deceased came by their death and no other matter. Opinions on other matters are not permitted.
- Rule 42 forbids a verdict imputing civil or criminal liability (nevertheless it is necessary for the coroner to examine the circumstances of negligent acts and omissions relevant to the death). The duty to inquire takes priority.

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- The preclusion on imputing civil or criminal liability extends solely to the wording used in the verdict and not the inquiry itself: R v HM Coroner for North Humberside ex p Jamieson [1995] QB 1.

- The inquest is run by the coroner who retains a considerable discretion to run the proceedings as is thought appropriate within the statutory framework.

- Inquest proceedings are inquisitorial rather than adversarial. An inquest is not a trial.

- There are no parties to an inquest (merely interested parties) and no formal allegations or pleadings.

Practical matters

- If representing the family then take as full instructions as possible while being sensitive to the grief of the bereaved. It is important to manage the expectations of a family as the role of a coroner's inquiry is limited. A pre-inquest conference is often useful and minimises stress for the family on the day of the hearing.

- Confirm whether a post-mortem examination has been held and obtain a copy of the report to ascertain the cause of death. Rule 57(1) of the Coroners Rules permits the coroner to supply a copy of the post-mortem to a properly interested person.

- In cases of very controversial deaths it may be wise to consider obtaining a second post-mortem (i.e. in cases where causation is likely to be in issue or where foul play is suspected).

- Make contact with the coroner notifying him/her that the family are represented. Practice with regards to communication with coroner's offices varies hugely

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throughout the country. It is wise to be polite and establish a good working relationship with the coroner's officer from the outset.

- In controversial deaths it is useful to obtain copies of the GP medical notes to ascertain any relevant prior history.

- If death has occurred in police custody then write for a copy of the police custody record specifying that the forensic medical examiner's report and notes/tape of any interview should be included. If the death was in prison custody write to the Prison and Probation Ombudsman who should order disclosure and allow input from the family into the report.

- Ask the coroner for a list of witnesses and disclosure of key documentation to be used at the inquest. It is important to try to obtain full evidence as early as possible (CCTV evidence may be wiped, memories fade and witnesses disappear). Push for statements to be taken if necessary and suggest witnesses to the coroner if you suspect reluctance on his/her part to investigate the death thoroughly (especially if the inquest is an Article 2 ECHR inquest).

- Lay down markers on the family position at an early stage. If you lay down clear markers early on about the potential areas of dispute in relation to witnesses the coroner may be minded to fix a pre-inquest hearing (a directions hearing) at which issues such as disclosure and the need for expert evidence can be ventilated.

- Establish the families concerns and establish an agenda for the hearing. Be wary of becoming a hostage to the client's agenda thus alienating the tribunal. Explain the meanings of the different types of verdicts available and try not to encourage the families to focus solely on the verdict. The main reason for the inquest is to establish

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the means by which the deceased came to die and any verdict will be framed so as to not impute civil or criminal liability.

ARTICLE 2 ECHR

- Article 2 EWCR requires everyone's right to life to be protected by law.

- In certain circumstances the state comes under a duty to carry out a full investigation into a death in accordance with the procedural duty implicit with Article 2 ECHR. These relate to circumstances in which the state may bear some responsibility for the death. The inquest is normally the means by which the state discharges the procedural duty. These inquests are variously known as '*article 2*', '*enhanced*' or '*Middleton*' inquests.

- It is now clear that the right to an effective investigation is a substantive entitlement under the ECHR.

- The purpose of an article 2 compliant investigation was explained in R(Amin) v SSHD [2004] 1 AC 653 at 18: -
    a. Ensure that the full facts are brought to light;
    b. Ensure that suspicion of deliberate wrongdoing is allayed;
    c. Identifying and rectifying dangerous practice and procedure;
    d. Ensuring that lessons are learned which may save the lives of others;
    e. Safeguarding the lives of the public and reducing the risk of future breaches of Article 2.

Cases in which an Article 2 inquest will be held include: -

- Deaths in prison (whether natural or otherwise). This can include cases of death arising out of medical negligence in prison.

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- Deaths in police custody or resulting from an injury caused by a police officer in the purported execution of his duty.

The above cases will be heard before a jury as will deaths reportable by employers or a person in control of premises to the HSE arising out of accidents at work.

RECENT CASE-LAW DEVELOPMENTS IN ARTICLE 2 INQUESTS

Rabone v Pennine Care NHS Trust [2012] UKSC 2

Background

The appellant parents appealed against a decision that the respondent NHS trust did not have a duty under Article 2 to take reasonable steps to protect their mentally ill daughter from the risk of suicide.

The appellant's daughter had suffered from depression and had been informally admitted to hospital following a suicide attempt. She was assessed as a high risk of suicide but was allowed two days' home leave during which she committed suicide.

The appellants brought proceedings against the NHS Trust for negligence and breach of article 2. The negligence claim was settled but the High Court held that there had been no duty on the hospital under article 2.

The Court of Appeal had dismissed the appellant's appeal. The main issue to be determined was: -

(i) Whether the article 2 obligation could in principle be owed to a mentally ill hospital patient who was not detained under the Mental Health Act 1983;

(ii) If yes, whether there was a "*real and immediate*" risk to the daughter's life of which the NHS Trust had known or ought to have known and which it failed to take reasonable steps to avoid.

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Outcome

The appeal was allowed: -

- The European Court of Human Rights had not considered whether an operational duty existed to protect against the risk of suicide by informal psychiatric patients.

- However, the Strasbourg jurisprudence showed that such a duty existed to protect persons from a real and immediate risk of suicide where they were under the state's control, Osman v United Kingdom (23452/94) [1999] 1 F.L.R. 193, Oneryildiz v Turkey (48939/99) (No.1) (2004) 39 E.H.R.R. 12, Powell v United Kingdom (Admissibility) (45305/99) [2000] Inquest L.R. 19 and Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74, [2009] 1 A.C. 681 considered.

- In the instant case, the NHS trust owed an operational duty to the daughter to take reasonable steps to protect her from the real and immediate risk of suicide.

- She had been admitted to hospital as a real suicide risk. She was extremely vulnerable and the NHS trust had assumed responsibility for her. She was under its control. If she had insisted on leaving the hospital, the authorities could and should have exercised their powers under the 1983 Act to prevent her.

- In reality, the difference between the daughter's position and that of a hypothetical detained psychiatric patient in similar circumstances was one of form, not substance.

- The daughter's position was far closer to that of such a hypothetical patient than to a patient undergoing treatment in a public hospital for a physical illness.

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- Those factors led to the conclusion that the operational duty existed in the daughter's case (see paras 15-34 of judgment).

- There was a real risk that M would take her life when allowed home. That risk existed when she left hospital and continued and increased during the two days, which was sufficient to make the risk immediate. The NHS trust were or ought to have been aware of that risk. The standard demanded for the performance of the operational duty was one of reasonableness, which included "consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available",

- The decision to allow the daughter two days' home leave was one that no reasonable psychiatric practitioner would have made. The NHS trust had failed to do all that could reasonably have been expected to prevent the real and immediate risk of suicide (paras 35-43).

NOTE:

The Supreme Court provided a range of factors to be considered as to whether an Article 2 ECHR operational duty existed such as the level of assumption of responsibility of the state. The Supreme Court concluded vulnerability was a relevant consideration as well as the nature of risk.

McCaughey's Application for Judicial Review [2011] UKSC 20

The appellants appealed against a decision refusing to declare that a coroner was obliged to conduct an inquest in a way that satisfied the procedural obligation arising under the European Convention on Human Rights 1950 art.2.

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The appellants were the next of kin of two men who had been shot and killed in 1990 by members of the British Army in Northern Ireland. They alleged that the deceased had been victims of a shoot to kill policy. A coroner had been assigned to conduct an inquest and the appellants wanted the inquest to address the planning and control of the operation during which the deaths had occurred.

Because the deaths took place before the Human Rights Act 1998 had come into force, the Court of Appeal of Northern Ireland found that the decision of the House of Lords in McKerr's Application for Judicial Review, Re [2004] UKHL 12 was binding and that no procedural obligation arose under art.2 of the Convention. The appellants argued that the decision of the EctHR in Silih v Slovenia (71463/01) (2009) 49 E.H.R.R. 37 had destroyed the basis of the decision in *McKerr* and meant that if an inquest was held into a death which predated the Act coming into force, there was an obligation to ensure that it complied with the requirements of article 2.

Outcome

The appeals were allowed. The decision in *Silih* imposed a detachable, freestanding obligation to comply with the procedural requirements of article 2 where a significant proportion of the procedural steps that article 2 required took place after the Convention had come into force.

In the instant case, the United Kingdom was not under a continuing article 2 obligation to investigate deaths which occurred over 20 years ago. However, a decision had been made to hold an inquest into those deaths and it was apparent that, as a matter of international obligation, it had come under a freestanding obligation to ensure that the inquest complied with the procedural requirements of art.2 (see paras 50-51 of judgment).

The Convention was a living instrument and it had always been clear that the content of Convention rights could evolve over time. It could not have been Parliament's intention that the Convention rights enshrined in the Act were to remain set in stone.

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R (on the application of Secretary of State for the Home Department) v Assistant Deputy Coroner for Inner West London [2010] EWHC 3098 (Admin)

The claimant secretary of state applied for judicial review of a decision of the defendant coroner not to conduct part of the inquests into the deaths of the victims of the July 7, 2005 London bombings as a closed hearing excluding the bereaved families and their legal representatives.

During the course of the inquest the coroner ruled that she would be inquiring into the preventability of the bombings, including whether there had been failures on the part of the security service and police force to properly investigate and assess the intelligence in relation to two of the bombers, and whether any of the alleged failings contributed to, or were causative of, the events of July 7.

Given the sensitive nature of the evidence the secretary of state sought a closed hearing. The coroner refused. The issue for determination was whether the Coroners Rules 1984 r.17 empowered the coroner to exclude properly interested persons and their legal representatives, including the bereaved families, from part of an inquest and to receive and later take into account closed material received in their absence.

The application was refused. The construction of r.17 adopted by the coroner was correct. Rule 17 provided that whilst inquests should be held in public the coroner could exclude "the public" if it was in the interests of national security.

The essence of the construction issue was whether "the public" in the proviso to r.17 meant "any person" or whether it only applied to those who were not properly interested persons and their legal representatives.

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The first sentence of r.17 recognised the fundamental principle of legal proceedings, namely that they should be heard in public unless there was good reason for them not to be. In the first part of r.17 the natural meaning of "public" was persons other than properly interested persons.

There was no reason to ascribe any other meaning to "public" in the proviso. Specific and clear words would have been required to qualify the rights of properly interested persons.

There was no power under the Rules for a coroner to choose which properly interested persons could be present during a closed hearing. To suggest otherwise would be to rewrite r.17 and put the coroner in the invidious position of having to say she trusted certain parties but not others. Construing "the public" as meaning "any person" failed to acknowledge that the words "any person" were used by the draftsman elsewhere in the Rules. Further, under the Coroners Act 1988 s.8(3) a coroner was obliged to summon a jury in certain circumstances.

The fact that inquests were inquisitorial did not diminish their context as essentially judicial procedures which were governed by the principle of open justice except to the extent that the principle was limited by statutory provision (see paras 15, 23- 24, 36-38 of judgment).

END

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FATAL CLAIMS

By James Hawkins

Introduction

1. It is intended, in this short seminar, to summarise the main principles and points to consider when formulating and advising on a claim for damages arising out of a fatal accident. Hopefully, this will provide a 'checklist' which may be of some practical use. One or two points will be looked at in more detail. In addition, two recent Supreme Court decisions which may impact on at least some types of fatal accident claims will be discussed.

The claim for damages: a checklist of claims to include (or consider)

2. In the usual claim, there are two types of damages claimed: those which are claimed on behalf of the estate of the deceased, and those which are claimed for the deceased's dependents.

(a) Damages claimed for the benefit of the deceased's estate

3. The Law Reform (Miscellaneous Provisions) Act 1934 treats as enduring for the benefit of the deceased's estate certain claims for damages which the deceased would have been entitled to bring up until the time of his or her death. These therefore include the usual past losses that would be expected in non-fatal injury claims, such as:

(i) Past loss of earnings;

(ii) Past care and assistance;

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(iii) DIY and services;

(iv) Travel expenses;

(v) Aids and equipment;

(vi) Medical expenses; and

(vii) Any miscellaneous expenditure or losses.

Interest should also not be forgotten.

4. Many of these will obviously apply only if there has been a period of time between the injury and the deceased's death. In these cases, an award of general damages is possible too. However, where death occurs instantaneously, or perhaps within a few minutes of the accident which causes injury, an award of **general damages** is unlikely.

5. A claim has also succeeded (Drake v. Foster Wheeler Ltd [2011] 1 All ER 63, High Court) in respect of **hospice care** received by the deceased, where the hospice was a charity and did not charge fees to those who used its services. A proportion of the cost to the hospice of providing those services was awarded to the deceased's estate, who wished to make a donation to the hospice. The amount was calculated on the proportion of costs for which the hospice did not receive PCT funding, and the family of the deceased had made it clear that any money received under this head of claim would be paid immediately to the hospice. The Judge approached the matter along similar lines to a gratuitous care claim. He added:

> *"Claims for hospice care are inevitably infrequent. They can only arise where a lingering and painful dying period has occurred as a result of illness or injury caused by the actionable acts or omissions of a tortfeasor. Such claims have always been rare. However, they may now become more frequent because it*

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is only relatively recently been possible to recover damages on behalf of a deceased whose lingering and painful death has been caused many years previously by unwarranted exposure to asbestos dust or similarly noxious substances. Recovery of the costs of hospice care in such cases does not give rise to a fear that the so-called floodgates will open or that a new head of recovery has suddenly been opened up. Rather, recovery is consistent with established principles and it is unlikely that there will be a significant number of claims in the future."

6. A statutory exception to the general position under this Act that a claim is made for those losses that the deceased could have claimed is that **funeral expenses** incurred by the estate are recoverable: section 1(2)(c). (A claim by a living mesothelioma sufferer for future funeral expenses was held to be wrong in principle in Watson v. Cakebread Robey Ltd [2009] EWHC 1695 (QB). There is a previous decision which suggests the contrary – Bateman v. Hydro Agri (UK) Ltd (15.9.95) – but this was not followed in Watson.)

7. There have been a number of decisions as to what expenses are recoverable under the description "funeral expenses". The costs of a headstone, of embalming the body, of transporting the body to the grave and of wreaths have been held to be recoverable. On the other hand, the costs of a wake and of a memorial service have been held not to be recoverable.

8. It should be noted that claims for future loss of earnings of the deceased are specifically excluded by section 1(2)(a), as are any claims for exemplary damages.

(b) Claims for the dependents of the deceased

9. There are two main heads of loss that can be claimed on the part of certain dependents of the deceased under the Fatal Accidents Act 1976:

   (i) Damages for bereavement; and

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(ii) Damages for loss of income and services dependency.

In addition, the 1976 Act allows recovery of funeral expenses incurred by the dependents. Double recovery is not permitted, so if the dependent who incurred the expense is also bringing the action for the estate the expenses can only be recovered under either the 1934 Act or the 1976 Act.

10. The first stage to each head of claim under the 1976 Act is to determine whether or not the relationship between the claimant and the deceased was such that the claimant falls into one of the specified categories of dependents who can bring a claim. This is different in respect of the claims for damages for bereavement and damages for loss of dependency.

11. Claims for **damages for bereavement** may be made for the benefit of:

(i) The wife, husband or civil partner of the deceased; or

(ii) The deceased's parents where the deceased was an unmarried child (although if the deceased was an illegitimate child, the claim is for the benefit of the mother).

12. Damages are set by statute (subject to revision) at £11,800. Where both parents are entitled to claim, this sum is to be divided equally between them. Interest may be awarded on this sum from the date of death.

13. There has been considerable criticism of the restrictive eligibility criteria for an award of bereavement damages. In particular, it is widely felt that the entitlement should extend to so-called "common law spouses". The Law Commission published a paper to this effect in 1999. Eventually, the Civil Law Reform Bill 2010 proposed extending eligibility to cohabitants of the deceased of two years or more, as well as to children whose parent had died. Sir Henry Brooke (formerly Brooke LJ) has written that he "deplore[d]" the length of time that such reform had taken, and that "great unhappiness and hardship" had been caused. However, it appears that such

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unhappiness is to continue, as the Government has announced that it has decided not to implement the Bill on the basis that it "would not contribute to the delivery of the Government's key priorities"[1].

14. A wider class of claimant is provided for in claims for **loss of dependency**. Those who may claim are:

(i) Wife or husband, or ex-wife or ex-husband;

(ii) Civil partner or former civil partner;

(iii) Unmarried partners who had been living under the same roof as the deceased immediately before his or her death and for at least 2 years;

(iv) Parent or other ascendant (grandparents, etc);

(v) A person who was treated by the deceased as his parent;

(vi) Child or other descendant (grandchildren, etc);

(vii) A person who, although not a child of the deceased, was treated by the deceased as a "child of the family" in respect of any marriage or civil partnership to which the deceased was at any time a party;

(viii) Brother, sister, aunt or uncle, or any of their children.

Half-siblings and step-children are included in the above.

15. There was, again, proposal for reform in the Civil Law Reform Bill 2010, to allow a claim by any person who was financially dependent on the deceased before his or her death.

16. Once eligibility is established, damages may then be claimed insofar as it is proven that the claimant has lost, as a result of the deceased's death, "services" which the deceased would have performed for their benefit, as well as any money which the

[1] Report on the Implementation of Law Commission Proposals, Ministry of Justice, 24 January 2011, page 13

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deceased would have spent on them. Broadly, therefore, one should consider "income dependency" and "services dependency".

17. In addition to these two categories, a Regan v. Williamson award may be made in respect of children and spouses of the deceased to reflect the loss of special care and support provided by a parent/spouse. Such awards may be in the order of £2,000 to £3,000, and may depend on the facts of an individual case.

18. It should be noted that only losses which occur within the relationship of dependency are recoverable – so that, for instance, if the spouse of the deceased was also a business partner, losses which are in reality associated with the business relationship may not be included.

19. Assessing dependency is generally done on the usual principles commonly applied in personal injury cases. For instance, there may be past and future dependency, and a multiplier-multiplicand approach may be applied (however, the multiplier being taken as at the date of death, rather than the date of trial; careful consideration also needs to be given to the multiplier to reflect contingencies, such as whether or not a relationship would have continued). Services dependency may consist of DIY, housekeeping, and child-rearing. These matters are familiar from other non-fatal cases.

20. In respect of income dependency, it also has to be determined how much of the deceased's income would be spent on his dependents. There is a rule of thumb, which derives from Harris v. Empress Motors Ltd [1984] 1 WLR 212, which is often adopted where the deceased was the family earner:

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(i) Where the only dependent is the spouse/co-habitee, loss of dependency is taken as being **two-thirds** of the lost net income;

(ii) Where, as well as the spouse/co-habitee, there is one or more children, loss of dependency is taken as being **three-quarters** of the lost net income.

21. This is only a rule of thumb, and where there are other features which need to be taken into account this should be done.

22. Where both the deceased and his or her spouse/co-habitee worked, and but for the accident both would have continued working, a principle based on the case of Coward v. Comex (18.7.88) may be applied: deductions for living expenses may be made in line with Harris, but on the joint, pooled income. From this amount, the claimant's own income is deducted.

23. Further complications arise when the spouse stops working after the deceased's death, and when the spouse did not work beforehand but began to work afterwards. There are cases which suggest that the spouse's earning capacity afterwards should be taken into account, at least when the spouse was working before the accident (e.g. Wolfe v. Del'Innocenti [2006] EWHC 2694 (QB)). Where the spouse would not have worked but for the accident, then it would seem, following Wolfe and section 4 of the 1976 Act (see below), that any earnings which he or she has received by reason of having to work should not be taken into account.

24. Whilst it is useful to have these general approaches, the reasoning behind them must be borne in mind. They are designed to reflect the lost income of the deceased which would have been applied for the dependent's benefit, and therefore the dependency which he or she has lost. Each case should therefore be considered, when pleading or advising on a claim of this type, to see whether such an approach is appropriate.

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25. Section 4 of the 1976 Act provides that benefits which accrue or may accrue as a result of the deceased's death are to be disregarded. This would include matters such as life insurance or inheritance.

26. Also to be disregarded are a widow's prospects of re-marriage, or her actual re-marriage (section 3(3) of the 1976 Act). Oddly, the Act refers only to a widow and not a widower. It is questionable whether (especially bearing in mind the Human Rights Act 1998) such a distinction would be maintained by the courts, although that is how the section is worded.

Recent Supreme Court decisions

27. Two cases have recently been decided by the Supreme Court which ought to be borne in mind by practitioners considering fatal accident claims.

28. First is the case of AB v. Ministry of Defence [2012] 2 WLR 643, which highlighted the issue of limitation when dealing with claims arising out of exposure to harmful material, and what constituted "knowledge" for the purposes of limitation. It was held, by a majority, that a claimant has such knowledge when he first reasonably believes facts, even if they could not be supported or proven at that stage, with sufficient confidence to embark on investigating whether there is a claim in law. This did, however, have to amount to more than a mere suspicion, and the date on which a claimant first saw a solicitor or expert was not, without more, likely to be of significance. The discussion as to when a claimant has the required knowledge may be of importance in cases such as exposure to asbestos, or where clinical negligence has led to a terminal condition.

29. Second is the case of Durham v. BAI (Run off) Ltd [2012] 1 WLR 867. This case considered whether employers' liability insurance policies covered claims by employees who had contracted mesothelioma having been exposed to asbestos

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many years previously. It was held that negligent exposure of an employee during employment had a sufficient causal link for the policies to respond. Where policies required a condition to have been "sustained" or "contracted" within the period of the policy, it was sufficient that it was caused or initiated within that period even though it only developed or manifested itself subsequently.

30. This second case highlights a relevant consideration when dealing with fatal claims, especially when the event giving rise to the injury was some time previously: what are the prospects of recovery of damages even if a claim succeeds? It may be that the company responsible has become insolvent. In this case, it would be necessary to consider whether an insurer stands behind that company, and whether any policy would cover the event.

END

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