HOW INSURERS AVOID, OR FAIL TO AVOID, COVERING ALCOHOL PROBLEMS

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Introduction

In this article I will discuss how issues relating to alcohol use and misuse arise in insurance disputes resolved by the UK Financial Ombudsman Service (FOS)[1]. I have also included for the purpose of comparison, a few determinations published by the Australian Financial Ombudsman Service.

Alcohol is a proven factor often causing or contributing to the occurrence of insurance risks. These include mortality and morbidity[2], crime[3], accidents (including motor accidents)[4], fire[5], financial loss[6], professional negligence[7], marine collisions[8] and unemployment[9].

Other drugs may give rise to similar risks. However there are few FOS determinations involving drugs other than alcohol[10].

Where possible most insurers seek to avoid liability for alcohol related losses[11], no doubt because drinking often gives rise to risky behaviour. One insurer in a FOS case expressed what is perhaps the industry view "… It is always fair to apply exclusions to someone who wilfully harms themselves." At the other end of the scale some people consider alcoholism to be a disease significantly affecting the patient's ability to control his or her behaviour.

Insurers can avoid paying for alcohol related losses in a number of ways. They may, for instance, identify people or businesses with alcohol problems at the underwriting stage. At that point they may either withhold cover or grant it on condition that appropriate risk management systems are put in place. Alternatively, cover at a lower premium may be granted when the insured adopts appropriate risk management systems[12].

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[1] I cover all relevant forms of insurance cover except private medical insurance, which raises quite distinct issues and is best considered separately. See "Private medical insurance and alcohol treatment" Goodliffe, J. "Alcoholis" March 2008 page4 http://www.m-c-a.org.uk/documents/Doc%20Newsletters/Newsletter_March_08

[2] See World Health Organisation "Global status report on alcohol and health 2014 http://www.who.int/substance_abuse/publications/global_alcohol_report/msb_gsr_2014_1.pdf?ua=1

[3] See Institute of Alcohol Studies "Alcohol related crime statistics" http://www.ias.org.uk/Alcohol-knowledge-centre/Crime-and-social-impacts/Factsheets/UK-alcohol-related-crime-statistics.aspx

[4] See Institute of Alcohol Studies "Alcohol Accidents and Health" 2013 http://www.ias.org.uk/Alcohol-knowledge-centre/Health-impacts/Factsheets/Alcohol-accidents-and-injuries.aspx

[5] U.S. Fire Administration/National Fire Data Center "Establishing a Relationship Between Alcohol and Casualties of Fire" July 2003

[6] E.g. the downfall of Barings Bank.

[7] Alcoholism in the Professions", 1984, LeClair Bissell and Paul W. Haberman, "Drug Impaired Professionals, 1997, Robert Holman Coombs.

[8] Charles M. Davis 2008: "Marine casualties: reporting and investigation obligations and drug and alcohol testing obligations" http://davismarine.com/articles/Marine%20Casualty%20Reporting%20&%20Testing%20Obligations.pdf

[9] "Alcohol misusers' experiences of employment and the benefit system" 2010 by Linda Bauld et al. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214493/rrep718.pdf

[10] A few FOS determinations address the insurance problems created by cannabis farms.

[11] There are exceptions. For instance, some private medical insurers cover the cost of treatment for alcohol dependence.

[12] Alexander C Wagenaar and Harold D Holder: "Effects of alcoholic beverage server liability on traffic crash injuries." Alcoholism: Clinical and Experimental Research: 15, [6], 1991, p942-947

In other cases cover may be granted (e.g. in life assurance) on the faith of declarations of health and sobriety made by the insured. If these declarations then turn out to be untrue when a claim is made the insurer will seek to avoid the insurance contract.

There may also be clauses in the policy which exclude liability for alcohol related losses. Or the insurer may be able to reject a claim in an accident policy. It may argue that losses arising from drinking do not amount to an "accident" where, for instance, the insured chokes to death on his own vomit following a binge[13].

It is less common for insurers to attempt to exclude cover for the insured's liabilities to third parties, where the liability arises from the insured's drinking. A solicitor, for instance, will not normally lose the benefit of his professional indemnity cover because he/she was under the influence of alcohol, or suffering from a hangover, when they committed their acts of negligence.

By contrast section 148(4) of the UK Road Traffic Act 1988 allows motor insurers to require their insured to reimburse them in certain circumstances. An example is where the insurer has paid the claims of third parties arising from the insured's drinking and driving for which the insured has been convicted. The amounts involved may be considerable. The industry also at one time sought to discourage people from travelling as passengers of drunken drivers by excluding liability to such passengers, but that plan fell foul of section 149 of the 1988 Act[14].

The FOS jurisdiction

Many issues arising from alcohol problems are resolved by FOS. FOS has jurisdiction to resolve customer complaints involving £150,000 or less. The complaints are against firms regulated under the Financial Services and Markets Act 2000 (FSMA). The eligible customers are those who are consumers or "micro-enterprises" (i.e. very small businesses). These people and businesses have a choice as to whether to make their claims to FOS, or, if they prefer, to sue in the civil courts.

Firms against whom claims may be made include insurers, where they refuse to pay out a claim. Claims may also be made against insurance intermediaries, such as brokers or financial advisers, or banks who may have mis-sold the product or given poor advice[15].

Claims against insurers are also made by people who are not parties to the insurance contract. These include, for instance, the victims of the insured's drunken driving. FOS does not have jurisdiction here because the third party is not a customer. So such claims are resolved in the civil courts.

FOS claims are resolved by an informal procedure and by reference to what is, in the ombudsman's opinion, "fair and reasonable in all the circumstances of the case"[16]. So legal rules are usually applied, although they may be departed from in appropriate cases.

FOS actively discourages outside lawyers from getting involved in these cases[17]. There are no formal hearings and witnesses are not examined or cross-examined.

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[13] *Dhak v Insurance Co. of North America* [1996] 1 W.L.R. 936. "Alcohol as an issue in insurance claims", Goodliffe. J. International Insurance Law Review, April 1996

[14] Which derives from the EU Motor Insurance Directive.

[15] FOS also has jurisdiction in other financial non insurance claims (e.g. consumer credit, banking and investments) but that is not discussed in this article.

[16] Section 228 FSMA.

[17] In *N v Gresham Insurance*, DRN1444168 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=10988 the Ombudsman, Harriet McCarthy, a lawyer, said "Mr N has submitted that his solicitor's costs of completing the complaint form and supporting statement should be reimbursed [on his legal expenses cover], as it would have assisted our understanding of his complaint. However, he did not require professional representation to bring his complaint to us. We are used to dealing with complex issues and how we deal with complaints does not depend on how well they are presented to us. The outcome to this complaint would not have been any different if Mr N had presented it himself without representation. It therefore remains my decision that it is not appropriate for these costs to be reimbursed."

Cases are referred initially to an adjudicator who tries to resolve the dispute. He/she usually recommends how the complaint should be settled. If either party does not accept his/her approach the matter is then referred for a more formal determination to one of a panel of 140+ ombudsmen.

The customer may accept or reject the ombudsman's determination. If the customer accepts the determination, it becomes binding on the firm. If it is rejected the customer may bring the claim again in the civil courts (although that happens rarely). Neither the firm nor the complainant have a right of appeal against the determination, although it may be challenged on narrowly defined grounds in judicial review proceedings. It is rare for such proceedings to be launched against FOS where the merits of a claim are in issue, and rarer still for the challenge to succeed[18].

It is usually in the customer's interest to bring a claim to FOS, rather than the courts for a variety of reasons. These include:

- the fact that much of the work in preparing the case is done by FOS itself,
- the complainant will not have to pay any costs even if he/she loses,
- the much less daunting procedure compared to that of the courts,
- FOS's specialist expertise in financial services, including insurance,
- the fact that FOS has a reputation for being "consumer orientated",
- the fact that the complainant can reject the ombudsman's determination if he/she does not like it and start again in the civil courts.

FOS works within a regulatory regime one of the objectives of which is "securing an appropriate degree of protection for consumers"[19]. One of the "Principles for Businesses" requires a regulated firm "to pay due regard to the interests of its customers and treat them fairly". That objective and that principle are currently being enthusiastically promoted by the Financial Conduct Authority (FCA) with a wide range of "thematic reviews"[20], many of which are aimed at getting a better deal for consumers.

So in relation to cases where FOS has jurisdiction, claims are more likely to go to it than to the courts. This has tended to hold up the development of UK retail insurance law, because until now FOS determinations have not been systematically published and in any event do not create binding precedent.

FOS determinations

Since April 2013, however, FOS has been publishing all Ombudsman determinations[21]. There are 9480 of these in insurance cases[22] as at 8 April 2015. So there is enough material to get a reasonable perspective on how alcohol issues are addressed by FOS. Some of these determinations have been more or less heavily redacted to remove sensitive and confidential material and anything that might identify the complainant. The complainant is referred to by an initial only, e.g. "Mr. A", but the identity of the firm against which the claim is made is given. The redaction process can make it a little difficult to follow the ombudsman's reasoning.

Although these determinations do not create legally binding precedent, the Handbook[23] of the FCA includes guidance that firms should ensure that "lessons learned as a result of Ombudsman determinations… are applied in future claims"[24]. Failure to follow the guidance may therefore lead to regulatory problems for the firm concerned.

[18] *Westscott Financial Services Ltd CBHC Llp & Anor v Financial Ombudsman Service* [2014] EWHC 3972 (Admin) (02 December 2014)
[19] FSMA section 1C . See The FCA's approach to advancing its objectives July 2013 http://www.fca.org.uk/static/documents/fca-approach-advancing-objectives.pdf
[20] http://www.fca.org.uk/about/what/regulating/how-we-supervise-firms/thematic-reviews
[21] At http://www.ombudsman-decisions.org.uk/
[22] Other than payment protection insurance (PPI) determinations, of which there are 21,017. PPI cases are the largest category dealt with by FOS but rarely raise alcohol issues.
[23] The FCA Handbook is so called because it contains guidance as well as rules
[24] DISP 1.3.2AG

An accident insurance case

FOS's approach to alcohol issues can be illustrated by considering some of its recent determinations in general insurance cases.

B v Friends Life limited[25] concerned a claim by Miss B for benefit under accident insurance cover. It was contained in a "protection account" provided by insurer Friends Life. This excluded cover for injuries related to "alcohol abuse". The ombudsman, Doug Mansell[26], noted that alcohol abuse was not defined within the policy terms and conditions.

Miss B had an accident. She was taken to the accident and emergency department of a hospital. There she passed out briefly on the hospital toilet. Miss B underwent a number of tests and was found to have abnormal liver function. Miss B's brother is said to have informed the hospital that she was a heavy drinker. She was seen to have the 'shakes' (an alcohol withdrawal symptom). She was visited by the alcohol liaison team who considered she was exhibiting signs of breakthrough withdrawal symptoms. They prescribed Librium.

Although some of the hospital notes referred to Miss B as having had an "intoxicated" mechanical fall, the ombudsman considered they were not consistent and appeared to be open to question. It did not appear to him that any of the clinical tests that were undertaken indicated there was an excessive level of alcohol in Miss B's system. No blood tests had been carried out.

Miss B's brother attended the hospital and was recorded as having been questioned about Miss B's alcohol consumption. He suggested she was a heavy drinker. However, the Ombudsman was not persuaded that these comments could be simply taken at face value:

> "They are subjective and it is not clear what he considered to be 'heavy' alcohol consumption. This is a value judgment that may well differ from one person to another".

In any event the brother subsequently denied having made the comments.

The ombudsman concluded:

> "In considering this case I am mindful that Miss B suffered a serious head injury as a result of the fall, and this had an effect on such matters as her consciousness. She was recorded as suffering a seizure after she was admitted onto the ward. Therefore, I consider that the symptoms resulting from the blow to her head could have been misinterpreted as being caused by alcohol."

Approach to evidence

There seem to be differences between the ombudsmen as to the approach to evidence in these cases. For Doug Mansell it was enough that the hospital ***could*** have been wrong about Miss B's alcohol consumption.

Some other ombudsmen, by contrast, take a more even handed approach to the evidence. They remind themselves that factual decisions should be made on the balance of probabilities – the test that applies in civil proceedings, rather than "beyond reasonable doubt", the test applying in criminal proceedings.

This approach tends to be taken in particular by ombudsmen who are qualified barristers or solicitors. These ombudsmen include Reidy Flynn who has dealt with a number of insurance cases involving alcohol.

The contrast between the two approaches may be illustrated thus. Doug Mansell accepted at face value Miss B's brother's statement that he never said that she had a drinking problem. He also took a dim view of the fact that no blood test had been carried out. By contrast in another case Reidy Flynn[27] said:

[25] DRN2043764 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=50610
[26] A former FOS adjudicator
[27] DRN9856271 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=40846

> "I consider there are two significant points. First, Mr S's symptoms are entirely consistent with an excessive alcohol intake; and no other cause for Mr S's treatment has been suggested. Although he was investigated for an irregular heartbeat, it does not appear that any cause was found or that he experienced similar symptoms on any other occasion. The medical history recorded at the hospital referred to "occasional alcohol" but this information most probably came from Mr S and was not therefore independent.
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> "Secondly, Mr S has been unable to give a satisfactory explanation for his GP's notes. He has denied saying that he drank "heavily", but he has not suggested any reason why she would have written this if he had not said so. I am satisfied on a balance of probabilities that the GP made an accurate record of what Mr S told her. I note that the hospital does not appear to have tested Mr S's blood/alcohol level, but the absence of such evidence is not conclusive."

In a recent issue of its newsletter "Ombudsman News"[28] FOS commented:

> "As with all insurance cases, it is up to an insurer to show that an exclusion applies, not for their customer to show that it doesn't. We expect a high standard of proof from insurers – proof that's consistent with other evidence. We generally put more weight on evidence from blood tests – and less on one-off remarks by a doctor at the time of any accident."

How strict the approach to evidence can be is illustrated by *H v St Andrews Insurance plc*[29] where the ombudsman, Lindsey Woloski[30], ruled that a death certificate reading:

> "Cause of death I (a) Hanging. Conclusion. [Mr R] died on [date] at [address] as a result of hanging. Although he died by his own hand, he took the actions which resulted in his death whilst the balance of his mind was affected by alcohol."

was not considered adequate evidence that Mr. R's death was not an "accident". The insurer was required to re-investigate.

In an Australian case[31] a doctor's note reading:

> "nil [alcohol] but [alcohol] abuse in past and was going to aa‟s" [sic]

Was not considered adequate evidence that the claimant was an alcoholic. The insurer's refusal to pay was, however, considered justified on the grounds that the claimant had failed to disclose his sleep apnoea and depression, both conditions being linked to alcohol misuse.

How drunk must the insured be?

The alcohol exclusion in insurance policies may use a variety of different wordings. Such as:

- "any claim arising directly or indirectly from … excessive alcohol intake".
- "any claim that results from using alcohol"
- "any claim that arises from alcohol abuse"

The FOS newsletter article referred to above[32] gave a number of examples of FOS cases. None of these seem to be on the database of determinations. So they either date from before April 2013 or are cases resolved by adjudicators This suggests that there may be significant areas of FOS practice where decisions by adjudicators are at least as enlightening as ombudsman determinations, but aree not in the public domain.

In one of the cases mentioned in the newsletter the exclusion said:

[28] http://www.financial-ombudsman.org.uk/publications/ombudsman-news/120/120-alcohol-exclusions.html
[29] DRN8363962 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=58369
[30] A barrister
[31] 290129 https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/290129.pdf
[32] See footnote 28 above.

> "You are not covered for anything caused as a consequence of: … alcohol abuse, alcoholism".

Neither "alcohol abuse" nor "alcoholism" was defined. FOS commented:

> "As neither term was defined, we took the common meaning for each of them. Alcoholism is a dependency on alcohol, and alcohol abuse typically means prolonged or regular over-consumption of alcohol. Neither of these definitions seemed to match Mr J's behaviour."

In the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) 'psychoactive substance abuse' is defined as a 'maladaptive pattern of use indicated by ... continued use despite knowledge of having a persistent or recurrent social, occupational, psychological or physical problem that is caused or exacerbated by the use [or by] recurrent use in situations in which it is physically hazardous'. The word "abuse" has been dropped in the current International Classification of Diseases (ICD 10) and replaced by "harmful use" and "hazardous use". "Alcoholism" was used in older classification systems (e.g. ICD 6) but has now been replaced for clinical purposes by the more precise "alcohol dependence".

In any event whatever expression is used should, I suggest, cover binge drinking, which need be neither prolonged nor regular but will be recurrent. Binge drinking is prevalent among young people, including when they travel abroad to destinations where alcohol is cheaper than in the UK. It seems to be a distinctive characteristic of the British drinking culture[33] and is a major financial burden for the National Health Service ("NHS").

What about "party destinations"?

In one case[34] a travel insurance policy for a "party destination", the policy excluded claims arising "directly or indirectly from using alcohol".

The Ombudsman, Timothy Bailey[35], commented:

> "I note that this policy is marketed to holidaymakers and travellers. In many cultures within the UK it is common to drink alcohol as part of the experience of holidaying and foreign travel. In the light of this, I consider it would be reasonable for [the insurer] to expect its customers to interpret the policy wording accordingly. I think most reasonable customers would understand this term to mean that cover is restricted if alcohol is used in a reckless way, instead of the normal level of alcohol intake experienced by many reasonable holidaymakers".

In the case in question the policyholder was admitted to hospital following his drinking. But the evidence did not establish conclusively for the ombudsman that his blood alcohol content was not more than around the drink drive level, or that it was the reason for his admission to hospital in a dehydrated state. So, the ombudsman, overruling the adjudicator, upheld the complaint.

In another travel insurance[36] case the policy excluded liability for injuries directly or indirectly caused by "alcohol abuse". When crossing the road late at night, the claimant was struck by a vehicle and was severely injured. He admitted he had been in "good form" and was drinking, but he was not so drunk that he did not know where he was. He had spoken to some of his friends after the event and they explained that he was drinking but "not very drunk". He could talk fine and there was no evidence of any problem. He was estimated to have had 9 drinks. The Ombudsman, Timothy Bailey, commented:

> "This amount of intake (if accurate) is high. However spaced over several hours this is not an exceptional intake for many people out socialising – nor one that could be unexpected by an insurer offering insurance to someone of Mr C's age when on holiday."

[33] "Binge drinking and public health", Parliamentary Office of Science and Technology, 2005 http://www.parliament.uk/documents/post/postpn244.pdf

[34] In Mr B v Mapfre Asistencia http://www.ombudsman-decisions.org/viewPDF.aspx?FileID=27187

[35] A former scrutiny manager in the Council for Healthcare Regulatory Excellence

[36] C v ETI DRN6011404 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=34516

So there was no breach of the policy. In any event the ombudsman did not consider that the alcohol had caused the accident:

> "Taking into account the level of alcohol in Mr C's blood, I consider it likely that the risk of a mishap happening would have been higher than usual. However, although it is more likely that a mishap would happen, [the insurer] has not shown that the level of alcohol intake was probably the actual cause of the accident. It has not shown that the accident would not have happened even if Mr C had drunk a moderate amount or even no alcohol at all."

If each of Mr C's drinks contained, say, 2 units of alcohol, then he would have consumed 18 units. This is 4.5 times the limit recommended by the NHS[37]. Drinking (by a man) 8 or more units in a session qualify as "binge drinking". The approach to causation adopted by the Ombudsman is at odds with the Wayne Tank[38] principle, correctly summarised in a determination[39] by an Australian FOS panel:

> "Although there may have been concurrent causes of the deceased's death, in insurance law, where there are concurrent causes of damage, loss, or in this instance death, one of which is excluded from cover by a policy term, the exclusion clause operates to defeat a claim".

In another travel insurance case, *E v Europaische Reiseversicherung AG*[40], the claimant was run over by a car when his blood alcohol content was 0.26. The ombudsman Christopher Gilbert[41], overruling the adjudicator, considered that his injury was attributable to the influence of alcohol and did not uphold his complaint.

Notice of terms and conditions

Questions sometimes arise in FOS determinations as to whether the insured had adequate notice of a clause in the policy excluding the insurer's liability for alcohol related losses. In most Ombudsman determinations these issues tend to be resolved in favour of the insurer. It is usually held that:

- the claimant did in fact have notice of the exclusion and/or
- these exclusions are standard and/or
- the claimant would have bought the cover even if he had known of the exclusion and/or
- no other insurer would have given him the cover without the exclusion.

In *F v Portman Building Society*[42], however, the Ombudsman, Ross Crawley[43], held a payment protection insurance policy to have been mis-sold because the pre-existing medical condition exclusion appeared at the end of a six page policy summary and was not given adequate prominence.

By contrast in *R v Admiral Insurance Company Limited*[44] a similar argument failed. Admiral declined a claim under R's motor insurance policy because at the time of the accident he was under the influence of alcohol. He was convicted of driving whilst over the legal limit. Admiral sought recovery of money it paid in settling a claim by a third party. It relied on section 148(4) of the Road Traffic Act 1988.

R claimed that the policy exclusion for claims arising while driving under the influence of alcohol or drugs was not drawn to his attention. However, the exclusion was highlighted in the key facts as a "significant exclusion" and it was drawn to the attention of R's father. The Ombudsman, Helen Moye[45], held this was enough and rejected R's complaint.

[37] http://www.nhs.uk/change4life/Pages/alcohol-lower-risk-guidelines-units.aspx
[38] *Wayne Tank & Pump Co. Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57
[39] Case number: 329511 https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/329511.pdf
[40] Case number DRN2889546 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=71993
[41] A solicitor and arbitrator
[42] DRN3925651 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=54196
[43] A barrister
[44] DRN2443194 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=48448
[45] A former in house counsel

This seems reasonable up to a point. However the UK insurance industry could, perhaps, show a little more obvious interest than it does in encouraging its customers to be sober when they drive. The issue of drink driving is not mentioned in the safe motoring advice given by, for instance, Admiral[46] or Aviva[47] on their web sites. Perhaps insurers and intermediaries do not want to send out a "scary message".

In some North American states[48] insurers are required by law to give written warnings about drink driving to their motor policyholders. I once asked the ABI about the UK insurance industry's role in reducing the problems arising from drink driving. I was told "I am happy to outline the main insurance implication of drink-driving — higher motor insurance premiums — if you wish[49]."

Interpreting the insurer's questions

Sometimes insurers ask questions on application forms in terms which are not, in the view of the ombudsman, specific enough. In *B v Legal and General*[50] the ombudsman, Jo Storey[51], remarked:

> "Because the question asked [about drinking] by Legal & General does not specify a period of time, it is open to interpretation by the person answering it. I cannot safely conclude the late Mr B had answered this question incorrectly or deliberately sought to misrepresent his alcohol consumption beyond the disclosed 17 units per week. The application form asks whether Mr B's 'average' weekly consumption had ever exceeded the amount declared in the last five years. However, it does not specify how this average weekly consumption ought to be calculated – for example is it over one month, six months, one year etc[52]."

When the answers to questions themselves raise questions, the ombudsman may expect the insurer to have resolved the questions at the underwriting stage rather than granting cover and putting forward a mis-representation defence at the claims stage. So Ms Storey's determination continues:

> "In its guidance, Legal & General says individuals who may have alcohol problems almost always deny the extent of their drinking, and that any evidence has to be interpreted from the applicant's statements. Despite knowing Mr B had been told by his GP to reduce his alcohol consumption from 25 units during a period of work related stress, Legal & General did not make any further enquiries about why his GP had given him this advice, or how long this had gone on for. Instead Legal & General accepted the late Mr B's answers and agreed to provide life cover only, with the information it sought relating solely to his pre-existing heart condition …
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> I consider it would have been good insurance practice for Legal & General to have made further enquiries at the application stage based on the amended declaration it had received. Because Legal & General chose not to do so, I am not persuaded it is fair and reasonable for it to subsequently rely on information later obtained in order to decline to pay the benefit under this policy."

A similar issue arose in a travel insurance claim in *K v Mapfre Asistencia*[53]. The insured when applying for cover admitted that he suffered from a condition[54] caused by alcohol excess in half of all cases. Cover was

[46] http://www.admiral.com/motoring-advice/road-safety-advice.php
[47] http://www.aviva.co.uk/car/motor-advice/article/essential-guide-staying-safe-road-winter/
[48] Including New York. See http://www.dfs.ny.gov/insurance/circltr/1997/cl97_10.pdf
[49] "Drink driving and the wider purpose of insurance" Jonathan Goodliffe, Complinet Insurance 11 December 2007.
[50] DRN0776816 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=39316
[51] A legal services consultant.
[52] By contrast Mr. Justice Lindsay said in *Mundi v Lincoln Assurance Ltd* [2005] EWHC 2678: "I suspect that the question as to units a week is deliberately left vague, but I cannot think it is open to an applicant to reduce his figure by reference to an average arrived at over a long period which includes long spells of abstinence. To take an extreme example, it would surely be absurd if an applicant at age 50 who had abstained until he was 45, but who had thereafter drunk a litre of whisky a day, would be able to supply an average arrived at over the whole of his adult life and not expect avoidance of his policy, even if the latter part of the question – has consumption ever been substantially higher? – had not been raised."
[53] DRN4519923 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=35032
[54] Not identified, presumably for confidentiality reasons.

granted, but a subsequent claim for medical expenses was rejected by the insurer on the grounds of the insured's drinking.

The Ombudsman, Tim Bailey, said:

> "I consider it more likely than not that Mr M's condition was caused by the underlying condition of alcoholism, and that Mapfre should have been aware of this likelihood. Alcoholism is not a condition that is easily resolved and it was likely that Mr M's drinking would lead to further ill health from the condition that Mapfre had agreed to cover. It therefore does not seem reasonable for Mapfre to agree cover for this condition without warning Mr M that he would not be covered for claims arising from the underlying cause of the condition."

The insured, however, cannot read words into the declaration form which are not there. In *D v Royal London Mutual Insurance Society Limited*[55], Mr. D applied for a life policy in April 2009. He was a recovering alcoholic who was no longer drinking. He was, however, under the care of a consultant. He was also being prescribed medication to treat alcohol abuse and depression. He committed suicide in December 2010. He interpreted the proposal form as only requiring him to give a six months' medical history. This seems to have followed discussions with his independent financial adviser. According to the ombudsman, Melissa Collett[56]:

> "this was a mistaken interpretation on his part, given my findings above that the questions are much more wide-ranging and some of them specifically give a five year time frame for responses."

The ombudsman was also impressed by the fact that the insurer had sent a copy of the application form, including his answers, directly to Mr D to check. This was not something required by the rules but should perhaps be regarded as very good practice.

The ombudsman also noted that if Mr. D had made a full disclosure, he would probably have been uninsurable either by Royal London or by any other life insurer. She continued: "he may have been insurable in subsequent years, if he maintained his abstinence."

There are specialist firms that help people like Mr. D although it is not uncommon for such individuals when they have had very serious problems, to be unable to get life cover until they have achieved 10 years or more of sobriety[57].

Alcoholic denial

Misrepresentation is a recurring issue in insurance claims, especially where alcohol is a factor. The insurer may have asked for information (e.g. as to the policyholder's health) to help it to decide whether to offer cover and if so on what terms. The information provided may be incorrect in whole or in part. When the insurer finds out about this it seeks to avoid the policy.

A study by insurer Aviva, the results of which were published in December 2006, identified five main conditions that people fail to disclose when completing insurance application forms. These included "smoking status, alcohol consumption or advised to reduce alcohol consumption"[58].

The tendency, identified by Legal and General, for problem drinkers to deny the extent of their drinking is usually referred to as "alcoholic denial". This is worth discussing, since it is a condition that underlies the problem of misrepresentation and non-disclosure by alcoholics.

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[55] DRN3992031 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=41518

[56] A solicitor

[57] See the page on insurance on the web site of the mental health charity "Mind" http://www.mind.org.uk/information-support/guides-to-support-and-services/insurance-cover/ . See also Jonathan Goodliffe, "Insurance issues for people with mental health problems:" Complinet 10 April 2008 http://www.articles.jgoodliffe.co.uk/articles/rethink.pdf

[58] http://www.aviva.com/media/news/item/uk-norwich-union-study-identifies-the-top-reasons-for-non-disclosure-2932/

ICD 10 defines the dependence syndrome[59]. Dependence may be on alcohol or another substance. It is defined as a cluster of physiological, behavioural, and cognitive phenomena in which the use of a substance or a class of substances takes on a much higher priority for a given individual than other behaviours that once had greater value. Diagnostic guidelines include:

- a strong desire or sense of compulsion to take the substance;
- persisting with substance use despite clear evidence of overtly harmful consequences,
- impairment of cognitive functioning.

The diagnostic guidelines for harmful use indicate that there must be clear evidence that the substance use was responsible for (or substantially contributed to) physical or psychological harm, including impaired judgement or dysfunctional behaviour, which may lead to disability or have adverse consequences for interpersonal relationships.

These guidelines highlight the fact that the behaviour patterns associated with these conditions are irrational. That irrationality is also a key element in "alcoholic denial":

- the unwillingness of the drinker to accept that he or she has a problem with alcohol
- attributing problems to anything other than alcohol,
- minimising the extent of his/her drinking
- unwillingness to face up to the consequences.

Dr Graham Jackson, a cardiologist, comments[60]:

> "Dependency on alcohol is common and often denied. It is common in the medical profession and may contribute to the high suicide rate. The period of denial varies, and may last the lifetime of the individual who is unable to take the responsible decision not to drink. The denial extends to colleagues, family and friends who tolerate and cover for but do not confront the problem – a denial circuit in need of interruption."

Denial is often supported by the fact that, during and after his drinking bouts, the drinker suffers from short term memory loss - "alcoholic amnesia" or "blackouts". He/she may also be affected by Wernicke's encephalopathy, symptoms of which include confusion and memory loss. Wernicke's may lead to more serious memory loss - Korsakoff's syndrome. These conditions often make it difficult or impossible for the alcoholic to tell the truth (apart, perhaps, from saying "I don't remember"). Where alcohol dependence is co-morbid with another psychiatric disorder such as depression, cognitive deficits[61] will also arise from that other disorder. This too may support the alcoholic's denial.

Examples of alcoholic denial can be found in the law reports. In *Kelly v London Transport Executive*[62], the plaintiff had an accident and persuaded his solicitors to obtain a total of 19 medical reports. It only emerged at the trial that his symptoms in fact arose from his alcoholism. He was awarded only £75 in damages. In *Teszke and others v3M (UK) Limited*[63] three women caught with a bottle of British Sherry at work claimed that they only intended to turn it into a lamp and not to drink the contents.

People who have taken out insurance which is the subject of a FOS claims may also be in denial. Dr Lannes, medical director at French reinsurer, SCOR, has put it more bluntly: "It should be recognised that alcoholics are usually dishonest about their actual alcohol intake"[64]. This is a proposition unlikely to be new to lawyers with criminal, family or employment practices[65].

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[59] See "Management of substance use" on the World Health Organisation website http://www.who.int/substance_abuse/terminology/definition2/en/

[60] "Denial" Int J Clin Pract, March 2006, 60, 3, 253

[61] "How Major Depression Impaired My Cognitive Ability", Nate Kornell, Psychology today,

[62] [1982] 1 WLR 1055

[63] 9.6.76 EAT 53/76

[64] "Alcoholism and Life Insurance", SCOR Technical Newsletter published March 2002 http://wwwold.scor.com/www/fileadmin/uploads/publics/NT2002_03_en_NTS3Ang.pdf

[65] "The Alcoholic client and the Alcoholic lawyer Solicitor's Journal", Jonathan Goodliffe,10th and 17th March 2000

An obvious example of alcoholic denial arose in *F v Legal and General*[66]. The deceased, B, had applied for and obtained a term assurance policy. He had said on his medical declaration that his current alcohol consumption was "nil", that his consumption had not been higher than that in the previous five years and that he had not been taking medication.

After his death his medical records showed a considerable history of heavy drinking problems, including prescriptions of Librium. This drug is commonly prescribed for acute alcohol withdrawal syndrome. B's son, F, made a claim under the policy. The Ombudsman, David Bird[67], rejected the claim on the grounds of the misrepresentation.

B's willingness to fill in a manifestly false medical declaration can be seen as an aspect of the state of denial then affecting him. In other FOS cases lies and half truths in proposals for insurance cover or in the presentation of claims to FOS may be more subtle and less easy to detect.

Where, however, it serves a heavy drinker's interest to give a full disclosure of his drinking he sometimes seems to be able do so. In *L v St. James's Place Wealth Management Plc* [68] a man had applied for an annuity and declared heavy drinking and other possibly related medical conditions. These helped him to get an enhanced annuity rate for a low life expectancy. He died very shortly afterwards. His son complained that the financial adviser should have realised he had very little time to live and advised against purchasing an annuity. The claim was rejected by Ombudsman Venetia Trayhurn[69].

Where an alcoholic is in denial he may not be able to tell the truth even if he wants to. So it is questionable whether asking for further information[70] on an incomplete proposal form will result in a more truthful disclosure. In many cases it will make more sense for the insurer to decline the cover when the questions are not fully answered or to ask the person seeking insurance to undergo tests with biomarkers (see below).

FSMA recognises in section 3B(1)(d) the general principle that consumers should take responsibility for their decisions. If they do not tell the truth they must sometimes suffer the consequences even if they are unfit to fill in the proposal form.

Having said this people do not have to be alcoholics to drink too much or to fill in medical declarations incorrectly. They might just be "hazardous drinkers". They may have forgotten, for instance, that their doctor gave them advice about their drinking in a "brief intervention" which will be on their medical record. So asking them to check their medical declaration, as did Royal London Mutual, is sensible. It is also probably sensible for them to check the form with their doctors or review their own medical file if they can get access to it.

The Consumer Insurance (Disclosure and Representations) Act 2012

This Act reformed the law applying in insurance misrepresentation cases[71]. The insurer only has a remedy if "without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms".

If the insurer can then prove that the misrepresentation was deliberate or reckless, it can avoid the policy and keep any premiums paid[72].

If it was merely careless, the insurer can avoid the policy only if the insurer would not have granted cover on any terms. In that event the premiums must be repaid[73]. Otherwise the policy is adjusted by reference to

[66] DRN7176316 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=59450
[67] A former compliance officer.
[68] DRN4832671 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=59426
[69] A pensions lawyer
[70] As suggested by Ombudsman Jo Storey above.
[71] It came into force in April 2013.
[72] 2012 Act, Schedule 1 para 2
[73] *Ibidem*, para 5

what it would have been if a full disclosure had been made. This may require the amount of any claims to be reduced, to reflect the higher premiums that would have been payable[74].

In most determinations on the FOS database it is not clear whether the relevant events took place before or after April 2013 when the 2012 Act came into force. However it does not really matter for present purposes whether they did or not. This is because the Act mostly restated existing FOS practice in delivering "fair and reasonable" outcomes. The main significance of the Act, therefore, for present purposes, is that it requires the civil courts to follow what has been the long established FOS approach.

Deliberate, reckless or wilful

In theory an insurer can avoid a policy and keep the premiums where the misrepresentation is deliberate or reckless (a euphemism for "fraudulent"). In practice FOS almost never makes a finding of fraud against a claimant. Most insurers have given up even alleging fraud[75], since if one alleges it unsuccessfully the allegation has a tendency to backfire. Yet the Insurance Fraud Bureau estimates that undetected general insurance claims fraud total £2.1bn a year and add around £50 to the annual cost of household insurances[76].

I know of only one case where FOS made a finding of "reckless or deliberate" in the making of an insurance claim[77]. Where insurance claims are dealt with in the courts, by contrast, Judges are more willing to find an insurance fraud, but they do have the advantage of seeing the parties being examined and corss-examined[78].

In *A v International Insurance Company of Hannover*[79] the claimant started the fire which burned down his own home. The insurance policy contained an exclusion reading "we will not pay for any willful malicious act by you or any member of the family". At the relevant time Mr. A had consumed alcohol and was suffering from clinical depression. Yet he knew what he was doing. So the ombudsman, Helene Pantelli[80] did not uphold his claim.

How claims should be investigated

When insurers investigate claims they should not go on a fishing expedition to see if they can find any evidence to support a misrepresentation defence.

This principle is reflected in a Code published by the Association of British Insurers (ABI) on "misrepresentation and treating customers fairly"[81]. The key passage reads:

> "3.5 Insurers are fully entitled to ask for any medical or other information needed to properly assess a claim.
>
> 3.6 However, insurers should have a legitimate reason for requesting medical information at the point of claim and should apply the principles set out in the joint BMA/ABI guidance, "Medical information and insurance", on gathering medical information at the point of claim."

The equivalent guidance to doctors[82] reads:

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[74] *Ibidem*, paras 6,7 and 8
[75] It was not alleged in *F v Legal and General* (above)
[76] http://www.insurancefraudbureau.org/
[77] DRN7634765 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=63807 (Ombudsman Sean Hamilton, a former solicitor and public prosecutor)
[78] As in *Versloot Dredging BV & Anor v HDI Gerling Industrie Versicherung AG & Ors* [2014] EWCA Civ 1349 (16 October 2014)
[79] http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=67366
[80] A solicitor
[81] https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2014/Protection/ABI%20Code%20Practice%20on%20Misrepresentation%20and%20Claims.pdf
[82] "Medical information and insurance Joint guidelines from the British Medical Association and the Association of British Insurers" http://www.financial-ombudsman.org.uk/news/pdf/medical-information-and-insurance.pdf

> "Only relevant information should be provided and it is ethically unacceptable to provide extraneous information. Doctors must not send originals, photocopies or printouts of full medical records in lieu of medical reports and ABI members should not accept them. The full records are not necessary and will very probably include information that is not relevant to the insurance being applied for. Insurance companies only need information that is relevant to the policy. Disclosure or other processing of information that is released without the consent of the applicant or insured person is likely to breach the Data Protection Act 1998, and may compromise a doctor's registration."

In *R v Friends Life*[83] Mr. R. applied for a life insurance policy in February 2010. The application was agreed on standard terms and started immediately. Mr. R committed suicide in 2011. Ms R made a claim to the insurer soon after. As part of its investigation into the claim, Friends Life requested Mr. R's full medical records from 1995 to the date of his death. These revealed a history of depression, non-prescription drug use and that he had been advised to stop drinking on medical grounds. The insurer maintained that if it had known the true position it would not have offered cover. So it declined to meet the claim and offered a refund of the premiums.

The ombudsman, Greg Barham[84], said:

> "… It is not reasonable for insurers to request and obtain consumers' full medical records in order to assess claims . . . Insurers should ask only for sufficient information to verify the claim. Where the insurer has reasonable grounds to suspect non-disclosure, it can seek relevant information to investigate further, but I would not expect it to make blanket requests for a consumer's full medical history, I would expect it to ask targeted questions of the consumer's GP.
>
> "Friends Life has provided some evidence to indicate that people who take their own life are likely to have some sort of mental health issue, but this does not mean it is likely that Mr R had that issue at the time he and Ms R applied for the insurance policy. The sale took place 18 months before Mr R died, so a great deal could have happened in the intervening period. At the time Friends Life obtained Mr R's full medical records it did not know whether he had taken his own life. Even if it was reasonable for it to suspect this, or if it had waited until the cause of death was established, Friends Life would not have known whether depression, drink or drugs were factors in Mr R's death – there was and still is little evidence to suggest they were. And even if Friends Life was aware of statistical evidence that indicated that people who take their own life tend to suffer with mental health problems, these could have been short-term issues, arising after the policy had started, brought on by a whole range of factors, for example money problems, the death of a relative, pressure at work, relationship problems.
>
> Overall, I am not persuaded that the circumstances of Mr R's death gave rise to a reasonable suspicion that he had failed to disclose information during the application process, about drinking, drug use or mental health problems. Because of this I do not think Friends Life had reasonable grounds to obtain Mr R's full medical records and so it should not be allowed to use them in assessing this claim."

At least one other ombudsmen[85] follows Mr. Barham's approach in such cases.

Issues about suicide

The NHS reports[86] that "90% of people who attempt or die by suicide have one or more mental health conditions … most commonly depression or an alcohol problem." The Institute of Alcohol Studies reports[87]

[83] DRN7691979 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=19998
[84] A former insurance claims negotiator
[85] Such as Doug Mansell in J v Legal and General http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=40328
[86] "Suicide – causes" http://www.nhs.uk/Conditions/Suicide/Pages/Causes.aspx
[87] "Alcohol, accidents and injuries" http://www.ias.org.uk/Alcohol-knowledge-centre/Health-impacts/Factsheets/Alcohol-accidents-and-injuries.aspx

that "In England and Wales, it is estimated that alcohol is associated with 15 – 25% of all suicides and 65% of all suicide attempts. In Scotland, 53% of people committing suicide who had contact with mental health services in the 12 months prior to death had a history of alcohol misuse."

In two other FOS determinations concerning suicides, the Ombudsmen arrived at the opposite conclusion to Mr. Barham on very similar facts. In *D v Royal London*[88] the life cover was taken out in April 2009 and the claimant committed suicide in December 2010. He did not reveal on the application form that he had had drinking and mental health problems. Ombudsman Melissa Collett rejected his widow's claim, holding that Royal London had been justified in investigating whether there had been misrepresentation. In *H v Legal and General*[89], the Ombudsman, Jim Biles[90] said:

> "Insurers should not routinely ask for a policyholder's full medical records when assessing a claim. But in this case, Mrs H told Legal & General her husband had taken his own life. And given that this happened only two years after the policy started, I think Legal & General was entitled to suspect there may have been an element of non-disclosure in the application and to make appropriately targeted enquiries about his past mental health and related aspects of his medical history".

With 140+ ombudsmen it is not surprising that their determinations are sometimes difficult to reconcile. There are also wider implications to be considered, including the impact on premium rates and suicide rates. Those not contemplating suicide have complained that they are being compelled to buy suicide cover rather than to get more conventional cover at a lower premium rating.

In the UK a practice has developed of putting off cover for suicide in life insurance until a year after the policy enters into force. The same practice is followed in other jurisdictions, although the period is sometimes 2 or 3 years rather than one. In the USA this practice may be required by state law. There is evidence that people are more likely to commit suicide when the 1 or 2 year period expires[91]. So calls have been made for the period to be extended.

It may be no coincidence that the claimants in *R v Friends Life* and *H v Legal and General* committed suicide within around 2 years of their policies coming into force. In *Beresford* v *Royal Insurance*[92] the insured shot himself in 1934, almost 10 years after insuring his life, and minutes before the policy was due to expire. The insurance policy expressly excluded from coverage death by suicide within one year of the inception of the policy. The House of Lords held that the plaintiff was not entitled to recover on grounds of public policy, suicide at that time being a crime.

Sometimes in the UK alcoholics take out insurance at a time when their life is falling apart. They have lost their job. They have remortgaged all the equity out of their house. They are being divorced. Their mental and physical health is breaking down. The insurance policy may be the only family asset of any significance. The alcoholic may have been contemplating suicide when he took out the insurance. He/she may ultimately commit suicide in the depressed belief that this will help his/her family.

Another insurance issue with suicide arises when the policyholder, usually affected by alcohol and/or drugs, commits or attempts suicide and in so doing causes damage. Is that damage to be considered deliberate?

In *Porter v Zurich Insurance Company*[93] the claimant was in a state of delusion partly caused by alcohol when he set fire to his house, intending to die from the flames. He changed his mind and subsequently made a claim on the property policy. However the policy excluded liability for "willful and malicious acts".

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[88] See *D v Royal London Mutual*, above

[89] H v Legal and General DRN1806473 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=64690

[90] a former financial adviser.

[91] Yip, PS and Chen F "A study of the effect of exclusion period on the suicidal risk among the insured" Soc. Sci. Med. 2014 Jun; 110 26-30

[92] [1938] A.C. 586 See the discussion of this case in "Life assurance and consensual death: law making for the rationally suicidal" Davey, J and Coggon, J. Cambridge Law Journal 65 (3) , pp. 521-548. (2006).

[93] [2009] EWHC 376 (QB) (05 March 2009)

Mr. Justice Coulson, applying *Beresford*, held that the exclusion was effective because the claimant knew, despite his delusions, what he was doing and knew that it was wrong. There is no similar case in the FOS database, although it does seem to follow this general approach[94].

By contrast in an Australian FOS case[95] the claimant attempted suicide twice: once by driving his car into a tree and then by jumping off the Tasman Bridge. He claimed on his insurance for the damage to the car. There was evidence that he was under the influence of alcohol and drugs, but that evidence was rejected by the FOS Panel for the purpose of applying the alcohol exclusion clause. There was also an exclusion for damage "deliberately caused" but the claimant intended to commit suicide, not to cause damage.

The Panel explained that its decision in this matter might well have been different if the exclusion related to a "deliberate or intentional act" rather than "damage deliberately caused".

Would the insured have got cover if he/she had revealed everything?

As mentioned above, the insurer can avoid the policy only if the insurer would not have granted cover on any terms. In that event the premiums must be repaid, absent fraud. Otherwise the policy is adjusted by reference to what it would have been if a full disclosure had been made.

In most of the cases on the database where misrepresentation was established the ombudsman accepted the insurer's statement that it would not have insured the risk on any terms. In *G v Legal & General*[96], however, the ombudsman, Jo Storey, did not. The claimant had failed to make a full disclosure about his drinking and about a mental health problem. She relied:

- on her interpretation of the insurer's underwriting guidelines
- on what she determined was the true level of the claimant's drinking: "I am not persuaded on the evidence determining Mr H's decreasing intake of alcohol being under a 'free user' limit of 42 units per week that Legal & General would have sought a test in any event."
- the fact that the mental health problem did not last long and was, in her view, unrelated to the drinking.

The "free user" limit refers to the maximum level of drinking at which the insurer is willing to offer insurance cover. This is more than the NHS limit[97]. Presumably insurers want to keep their "free user rates" confidential if possible.

Can mental health problems be split off from drinking problems in this way? In another determination Ombudsman Jim Biles[98] said: "alcohol consumption and mental health issues are often linked and I believe it was therefore appropriate for Legal & General to also make enquiries about this aspect of his medical history when assessing the claim". Helen M. Pettinati, PhD and William D. Dundon, PhD comment[99]:

> "Both major depression and alcohol dependence carry a significant risk for the development of the other. Severity in one disorder is associated with severity in the other. Moreover, alcohol dependence prolongs the course of depression, and persistent depression during abstinence from alcohol is a risk factor for relapse to heavy drinking. Thus, logic dictates that both disorders be identified and managed concurrently and aggressively. Integrated psychosocial outpatient treatment programs and the ability to treat alcohol and depression simultaneously have reinforced the need to

[94] A v Royal & Sun Alliance Insurance Plc DRN1738651 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=17934

[95] Case number: 328171 https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/328171.pdf . In Australia FOS cases are sometimes determined by a panel, rather than by a single ombudsman. The determinations do not reveal the identity of the claimant, firm or ombudsmen involved.

[96] DRN3803431 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=54073

[97] See footnote 37 above.

[98] In *H v Legal and General*, see footnote 90 above

[99] "Major Depressive Disorder, Addiction, Alcohol Abuse, Depression, Mood Disorders" Psychiatric Times June 09, 2011

revisit the traditional management of co-morbid major depression and alcohol dependence more formally."

Biomarkers for alcohol misuse and depression

There are a number of biomarkers for chronic alcohol abuse. They may help insurers, especially when used in conjunction with medical examinations, to identify individuals who should be refused cover, or standard rated cover, especially in life insurance. The biomarkers are:

- carbohydrate-deficient transferrin (%CDT),
- gamma-glutamyltransferase (gamma-GT) and
- mean corpuscular erythrocyte volume (MCV)

Of these %CDT seems to be the most effective[100]. Dr Lannes comments[101]:

> "The GGT, MCV and especially the association of the GGT and MCV - are still useful to the insurer, but there is a more specific biological marker currently available, namely the %CDT. Although systematic request for this test in life insurance is unnecessary, it can however be of precious help to the insurer to remove any doubts about a case of alcoholism."

Biomarkers for depression are also in the early stage of development[102]. Depression is a disability for the purposes of the Equality Act 2010. So the requirements of that Act would need to be followed.

Considerable care will need to be taken when applying these tests, which may raise concerns similar to those which arise from the use of genetic testing by insurers and led to the "Concordat and Moratorium on Genetics and Insurance"[103].

Conclusion

Most ombudsmen arrive at fair conclusions in these cases, but there are some significant differences in approach between them. Legally qualified ombudsmen generally keep closer to legal principles and the rules of evidence than their colleagues who are not so qualified.

Such differences in approach are less obvious in determinations by the Australian FOS, since the more important Australian cases are dealt with by a panel of ombudsmen and the identity of the claimant, the respondent and the ombudsmen is invariably kept confidential.

[100] Validity of carbohydrate-deficient transferrin (%CDT), gamma-glutamyltransferase (gamma-GT) and mean corpuscular erythrocyte volume (MCV) as biomarkers for chronic alcohol abuse: a study in patients with alcohol dependence and liver disorders of non-alcoholic and alcoholic origin. Hock B et al. Addiction. 2005 Oct;100(10):1477-86

[101] See footnote 64 above

[102] "Genetic biomarkers of depression", Tamatam, A et al, Indian J Hum Genet. 2012 Jan-Apr; 18(1): 20–33.

[103] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216821/Concordat-and-Moratorium-on-Genetics-and-Insurance-20111.pdf