Butterworths Personal Injury Litigation Service

Bulletin Editor
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OCCUPATIONAL DISEASE

Limitation

Summers v The City and County of Cardiff [2015] EWHC 3066 (QB)

The de minimis principle applies to the test of 'significance' of injury under s 11 of Limitation Act 1980

(Hickinbottom J)

The facts: Between 1963 and 1965 C had been employed in a school catering department and had spent much of his time tending a boiler where he was exposed to asbestos from the decrepit condition of the boiler's heat insulation lagging. This was the only known period of asbestos exposure. His employer neither disputed that exposure had occurred nor that this had been in breach of its duty of care.

C later suffered from various ailments including: (i) chronic obstructive pulmonary disease (COPD) caused by his smoking, and (ii) pleural thickening from caused by the asbestos. The Court found that in 2000, the Claimant had started to suffer from breathlessness and pain in his chest, in late 2000 he underwent an x-ray that revealed a tumour that later turned out to be benign. The hospital notes included a reference from 22 November 2000 that recorded the fact that he had been exposed to asbestos during his employment with the defendant, that pleural plaques had previously been noticed and which had been ascribed to his employment as an industrial painter 40 years ago. The GP record of 28 November 2000 noting the x-ray result mentioned 'asbestosis' and said: 'considering claim now against employer from when he was a boilerman. It indicated that a biopsy was needed to rule out the possibility that a lump revealed by the x-ray was not malignant. He consulted solicitors on 5 December 2000 who explained the three-year limitation period to him. A later note from the hospital to his GP (6 December 2000) attributed the pleural plaques (which in themselves are asymptomatic) with his occupational exposure to asbestos. The biopsy revealed the

lump to be benign. In C's own words, he was not interested in pursuing a claim for this respiratory condition because 'I thought I would knock it on the head'. He said that he took this view because, although he was still breathless and sometimes had chest pain – and, indeed, over time these were worsening – his condition 'was not bothering [him]'. The symptoms did not impinge on his activities or lifestyle. For example, there was no pain and he could still without difficulty walk to the shops and climb the stairs. His condition deteriorated in 2003 when he was admitted to the hospital with chest pain.

He did not issue proceedings until 18 August 2014 and in his reply he indicated that he did not intend to apply for the disapplication of the statutory limitation period under s 33 of the Limitation Act 1980.

The decision:

The claim was statute barred. The judge held that the requisite knowledge that the injury was 'significant' for the purposes of ss 11 and 14 of the Limitation Act 1980 was not when was told in February 2012 that he suffered from diffuse pleural thickening but earlier: 'well before 2011'.

Counsel's attempt to introduce a plea for the disapplication of the statutory period under s 33, where it had not even been raised in the skeleton arguments, was disallowed. Accordingly the claim was dismissed.

The Quantum of 'Significance'

For an injury to be 'significant' for these purposes, the threshold is set low. In giving judgment Hickinbottom J said 'it has been said that the test comes close to the test of seriousness of an injury for which the courts could properly award damages and thus in respect of which a cause of action in negligence accrues (*Cartledge v E Jopling & Sons Limited* [1963] AC 758 at 781; *Rothwell v Chemical & Insulating Company Limited* [2006] EWCA Civ 27; [2006] ICR 1458 at [21]). That test is essentially an illustration of the principle "de minimis non curat lex". Thus, where an injury is any more than very minor, it will generally satisfy the test for "significance" in section 14(2)'.

Whatever label might be attached to the condition, for limitation purposes an injury is 'significant' as soon as it becomes symptomatic (ie more than very minor symptoms). *Rothwell* makes it abundantly clear that it cannot be 'significant' if it is asymptomatic.

Causation

Albert Carder v (1) Secretary of State for Health (2) University of Exeter

2.3% of total exposure is not de minimis

(HHJ Gore QC)

The facts:

The claimant was exposed to asbestos by a number of different employers during his working life as an electrician. It was established that the defendant was responsible for approximately 2.3% of his total exposure and that that each source of exposure would have contributed to the development of the claimant's asbestosis in approximate proportion. He later developed asbestosis which was complicated by other respiratory conditions.

It was contended that the ratios in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 and *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 meant that a claimant had to show that he had suffered damage from physical changes that had made him perceptibly worse off. It argued that the contribution made by the exposure for which the defendants were responsible would not have been noticeable.

The decision:

The judge did not accept the defendant's contentions relating to the *Cartledge* and *Greives* cases. A claimant could suffer actionable injury without being aware of it or suffering any symptoms and where it had not been and could not be discovered. The question was whether the claimant was materially worse off as a result of the defendant's breach of duty. The issue was one of fact and degree. The degree in this case was not trivial. It also included an increased risk of lung cancer and the condition was a progressive one, it amounted to actionable damage. As this condition is a 'divisible' disease, the second defendant was liable for 2.3% of the claimant's total entitlement for pain, injury, suffering and future care.

QUANTUM

Reaney v University Hospital of North Staffordshire [2015] EWCA Civ 1119

The material contribution principle is not relevant to quantifying a supervening injury resulting in additional care needs similar in kind to that which pre-existed

(Lord Dyson MR, Tomlinson and Lewison LJJ)

The facts:

The claimant was admitted to hospital with severe back pain. She was diagnosed as having transverse myelitis, a grave condition that caused an inflammation in her spinal cord. Its effect was to render her permanently paraplegic at T7. This left with no sensation below her mid thoracic spine nor any control over her bladder or bowels.

During her extended hospitalisation, and due to the treating hospital's admitted neglect, she suffered from a number of deep (grade 4) pressure sores. These eventually resulted in osteomyelitis and contractures of her legs which exacerbated her problems with reduced mobility, significantly. The full effect of these symptoms was not apparent until approximately six months from discharge.

The claimant's case was that but for the hospital's negligence, she would have been largely self-dependent. While her T7 paraplegia would have left her confined to a wheelchair for life, she would have only required about seven hours of care a week. This had been provided by her spouse and/or the local authority. Although that dependency would have increased in later life, hitherto it had been provided for the most part by her husband; so this disability had no appreciable financial implications to this 67-year-old lady.

However the effect of the additional supervening disability (that was permanent) was to leave her largely bed ridden: she could only sit out in a wheelchair for a maximum of four hours. More significantly, she now required 24-hour care from two carers. There were also extensive costs involved in providing her with suitable accommodation and equipment needs.

The key legal issue:

The Trust argued that as they were not liable to compensate her for her pre-existing (non-tortious) disability as their liability was confined to compensating her for the additional disability they had caused over and above her pre-existing disability. They cited a non-personal injury authority, *Performance Cars Ltd v Abraham* [1961] 3 All ER 413, that was later followed in the conjoined appeal of *Halsey v Milton Keynes General NHS Trust* [2004] and *Steel v Joy* EWCA Civ 576.

The defence also relied on the Court of Appeal ruling in *Baker v Willoughby* [1969] 3 All ER 1528 which created an exception to the 'but for' causation rule to mitigate the injustice that would have arisen if the normal causation rule applied. In that case the victim injured his leg in a car accident that left him permanently disabled with extensive future loss of earnings. Later on, he was shot in the same leg and it had to be amputated. The insurers argued that the negligent driver had no liability after the amputation as the intervening event had obliterated the claimant's injury from the first event and hence it ended the actionable loss from that first incident. The court held that the defendant remained liable for the full loss, notwithstanding the intervening event. This was not a case of concurrent tortfeasors; the second defendant did not cause or contribute to the first injury, so the first defendant was liable for the full future loss as though the second injury had not supervened.

Against this, the claimant argued that but for the hospital's negligence, she would have been able to cope largely for herself and that the supervening injury was directly responsible for her present extensive needs. She argued that *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 applied so that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. In essence, the claimant's case was that the sequelae from the pressure sores had tipped her into needing extensive funded future care and that but for that occurrence, she would have been able to do without through the agency of gratuitous and local authority funded care. Reference was also made to *Paris v Stepney Borough Council* [1951] 1 All ER 42 and the principle that the 'loss of an eye is significantly worse for a

one-eyed man than a man with full eyesight' and how this was applicable to the 'but for scenario' in the present case.

The first instance decision: The trial judge found that, but for the pressure sores and their consequences, Mrs Reaney would have been able to spend her waking hours out of bed in a standard wheelchair which she would have been able to self-propel. She could have undertaken a few basic household tasks. She would have been able to get out and about, doubtless with family support and supervision. She would inevitably have been doubly incontinent, but her bowel management would have been better than it now is and she would not have required a urethral catheter which she now requires. He also accepted the expert evidence to the effect that but for the negligence, she would have been able to rely on the support of her family members: consisting of initially about seven hours of care a week, increasing at 70 years to help hoist her out of her wheelchair; gradually increasing as she got older.

A key finding of the judge was:

> 'She would not have required the significant care package (and the accommodation consequent upon it) that she now requires but for the negligence'. In para 21 of the supplemental judgment, he said that the requirement of 24/7 care from two carers for the rest of her life was 'materially different from what she would have required but for the development of the pressure sores and their *sequelae*'.

This led the judge to conclude that she was entitled to full compensation of *all* her care, physiotherapy and accommodation costs. He held that the Trust was liable for the full cost of the claimant's future care, equipment and accommodation needs.

Material contribution?

As though to bolster his findings the trial judge went on to refer to *Bailey v Ministry of Defence* [2008] EWCA Civ 883 opining that if he had had any doubts about the issue of causation 'in the "but for" sense', he would have 'been inclined to find that the Defendants had "materially contributed" to the condition that led to the need for the 24/7 care of the nature discussed earlier in this judgment'. This was acclaimed by some as a significant decision in itself, effectively extending the 'material contribution' exception to the normal 'but for' causation test.

This author took a different view in his commentary in issue 117 of this bulletin, describing this special rule as a phenomenon '… perhaps best left to the discrete field of primary liability considerations in cases where medical science is unable to reveal whether on the balance of probability which of two potential cumulative causes actually materialised into an actionable injury'. The issue in *Reaney* was the quantification of the claimant's loss; not primary liability for the injury.

The Trust appealed.

The decision:

The appeal was upheld. The judge had erred.

The Trust was only liable for the effects of the worsened condition. The care needs caused by the Trust's negligence were largely the same as that which would have been required anyway, what had changed was its extent; a quantitive factor, not a qualitative one.

The case was remitted back to the trial judge to reassess the damages in the light of this finding.

The Court opined that had the trial judge found that the care package caused by the negligence had been qualitatively different in nature from that which the claimant would have required anyway, then his decision might have stood; but the trial judge had not made such a finding. The ratio *Sklair v Haycock* [2009] EWHC 3328 (QB) that the trial judge had relied on to support his material contribution theory was disapproved and the outcome was rationalised as being consistent with a case where the supervening injury had required care need that were different in kind from the victims pre-existing needs. The Court also held that the trial judge had erred in invoking the material contribution principle propounded in *Bailey*. *Reaney* did not feature a case of cumulative competing causes that could not be determined by medical science, it was a case of establishing what additional need had been caused by the Trust's negligence.

MOTOR LIABILITY

Horner v Norman [2015] EWCA Civ 1055

Failing to avoid hitting a pedestrian does not raise a presumption of negligence

(Moore-Bick VP, Lewison LJ and Sir Timothy Lloyd)

The facts:

C was knocked down as he was attempting to cross a two-lane dual carriageway. The evidence of the defendant's passenger and the driver of the car behind her was that both drivers had seen C standing on the curb as they approached. The cars were travelling at about 25mph in a 50mph zone. D had taken her foot off the accelerator when she observed C step into the road, ahead and to her left. Then she accelerated as she observed C step back, apparently thinking twice about crossing. When he later attempted to dash across the road in front of the driver, she braked but still clipped him on the offside front of her car. In dismissing the claim the trial judge found that C would have taken about two seconds to cross. If one allowed 0.7 seconds reaction time and 0.3 seconds for the brakes to take effect, that only gave one second of braking time. The judge was not satisfied that the coefficient friction of 0.65 for normal dry road conditions was appropriate as the police investigation revealed that there were patches of ice on the road.

C appealed. One of the arguments was that the accident could have been avoided even with half the coefficient of the normal braking effect and that any delay in reaction beyond 0.7 allowed was de facto negligent.

The decision:

The appeal was dismissed.

The judge had been right to take into account the possible effect of icy patches on the road. There was insufficient information to indicate the distance at which the defendant first observed C attempting to cross. Furthermore, although 0.7 seconds was taken by the experts to represent an average response time, there was no evidence to indicate that this represents the limit of what can be regarded as reasonable in a negligence action. Negligence on the driver's part had not been established.

FOREIGN ACCIDENTS

Vann v Ocidental-Companhia de Seguros SA [2015] EWCA Civ 572

(Lord Justice Jackson, Lord Justice Floyd and Dame Janet Smith)

The facts: The claimants, who were a married couple domiciled in England, were knocked down as they were crossing a road by a speeding car in the Algarve, Portugal. They were returning to their car parked on the opposite side of a wide road, in the evening after enjoying a family meal at a restaurant. Mrs Vann suffered very grave head injuries and her husband was killed. The drivers' insurers argued that they were partly to blame in choosing to cross the road when and where they did.

The claimants' representatives issued proceedings in the UK and against the defendant's insurers. They correctly founded the cause of action on the community and local applicable law provisions (which under Rome II was Portuguese law) that confer the direct right, in accordance with the decision in *FBTO Schadeverzekeringen NV -v- Jack Odenbreit*, CJEU 2007, Case 0463/06. The defendant gave evidence by written statement under the Civil Evidence Act 1995, on the basis that he was 'beyond the seas'. The European Communities (Rights Against Insurers) Regulations 2002 do not apply to this kind of scenario, as those regulations are restricted to accidents in the United Kingdom.

At first instance the judge found that the driver would have had a view of the party of people, whom the claimant and her husband were following, would have been clearly visible 60 metres away. The victims had already started crossing the road by the time the defendant's car emerged. The accident was caused by the defendant's failure to drive a safe speed (which would have been 43mph instead of 53mph to 64mph that he was doing) and/or slow down and for failing to take a proper look out. The judge held that victims could not be criticised for reacting as they did to the emergency. D appealed arguing that the victims had been contributorily negligent.

The decision:

The appeal was upheld. The victims had not taken reasonable care for their own safety. They had not covered much ground by the time the defendant's vehicle headlights would have been visible as they started to cross the road

and the engine should have been audible. The court made reference to the Portuguese Highway Code that instructed pedestrians to take care. They should have stopped or better still have returned to the kerb to allow the car to pass. There was no evidence as to whether the victims were keeping a sufficient look out, due to their injuries. A reduction of 20% was made to accommodate their own responsibility for the incident.

OCCUPIERS LIABILITY

Pollock v Cahill [2015] EWHC 2260 (QB)

Homeowner liable for blind guest toppling out of second floor window

(Davis J)

The facts: C, who had been blind for two years, fell out of an open second floor window, receiving brain injuries and spinal injuries that left him paralysed from the waist downwards. He brought a claim under s 2(5) of the Occupiers Liability Act 1957 contending that the claimant owners had failed in their common duty of care towards him. It was unclear how the accident happened or who opened the window.

It transpired that the window was in the room used by C as his bedroom. The trial judge decided that he was probably trying to make his way to the bathroom after having awoken and was disoriented, thinking he was opening the bathroom door instead of the window. This misconception would explain his momentum.

The decision:

The defendants were fully liable as they had failed to discharge their common duty to care as occupiers. They should have foreseen that this particular window posed a real risk to the claimant. The victim had not willingly accepted the risk of injury; this was not a case were *volenti* applied. There was no contributory negligence.

NERVOUS SHOCK

Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588

Psychiatric illness from being confronted by spouse's shocking medical decline insufficient to establish claim

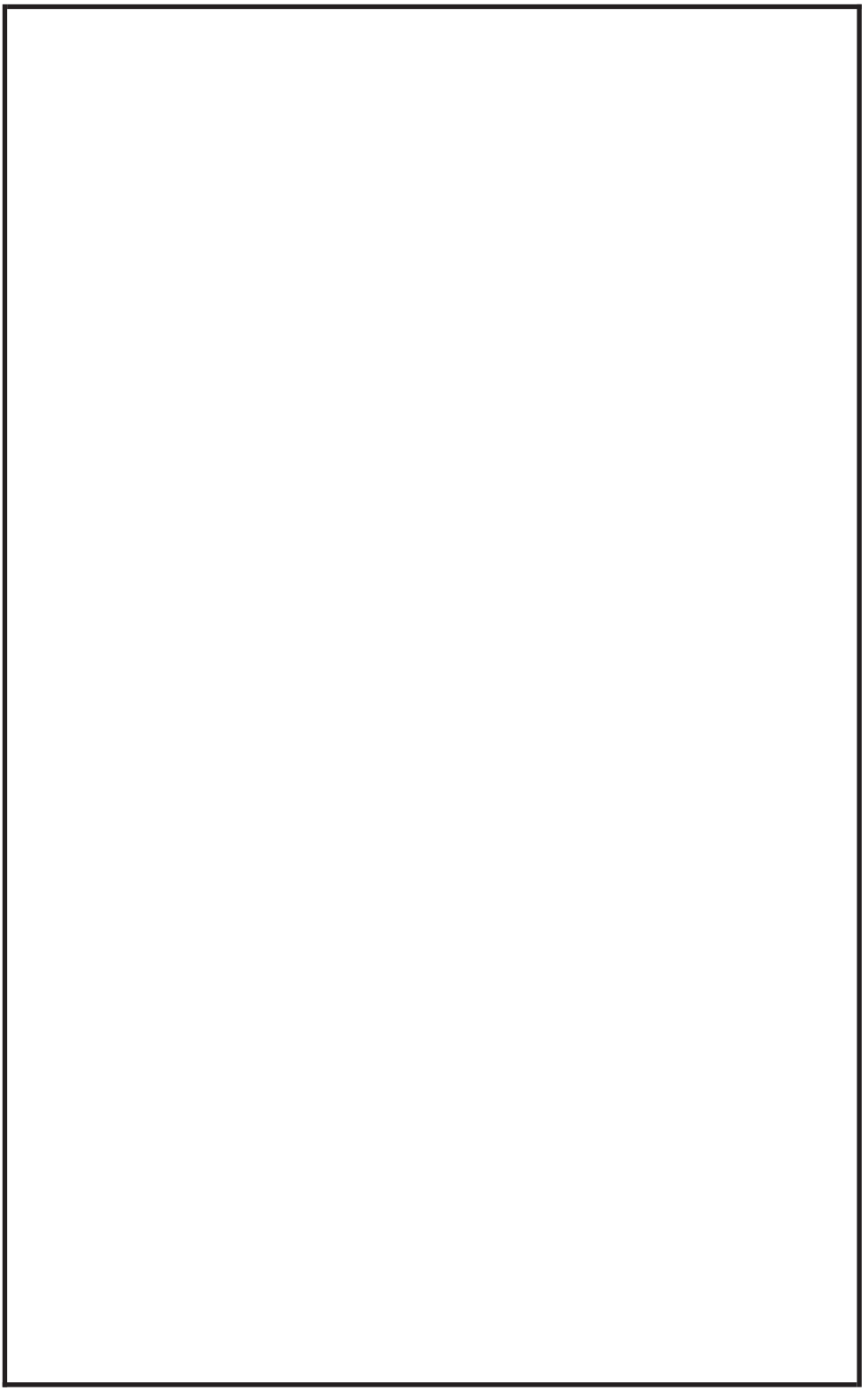
(Sullivan, Tomlinson and Beatson LJJ)

The facts: The defendant NHS Trust's negligent treatment resulted in the claimant's wife suffering serious medical complications after she underwent a hysterectomy. C claimed that he suffered PTSD on being confronted by his wife's rapid post operative decline caused C to suffer PTSD. The trial judge rejected his contention that he had PTSD but accepted that he had a psychiatric illness caused as a direct result of witnessing his wife's shocking

decline. He was awarded £9,165.88. The Trust appealed, contending that the events lacked the necessary sense of horror to warrant an award in a secondary victim case.

The decision:

The appeal was allowed. Although events unfolded rapidly and inexorably, there was no sudden appreciation of an event that was an essential requirement for this kind of claim.



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