QBE European Operations

Technical claims brief

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Liability

Actionable injury or damage? *Greenway and others v Johnson Matthey plc [2014]*

Four of the five claimants were chemical process operators and the other was a maintenance engineer. Owing to the risk of sensitisation through exposure to platinum salts, the defendant required routine and regular skin prick testing undertaken by its occupational health department. All the claimants were found to have become sensitised to chlorinated or halogenated platinum salts, and as a result, had been omitted from any work involving potential contact with platinum. Three of the claimants no longer worked for the defendant, but claimed substantial damages for loss of earnings or for loss of earning capacity. The two claimants who remained with the defendant claimed that their earnings had been reduced by the restrictions placed on their employment. Four of the claimants sought provisional damages under section 32A of the Senior Courts Act 1981. They accepted that those claims also depended on establishing the presence of actionable injury on standard tortious principles.

There were two central issues for the court to resolve:

1. Whether the claimants had a completed cause of action in tort
2. Whether the claimants might recover more than nominal damages in respect of their contractual claims.

In relation to 1. it was the claimants' submission that they had sustained actionable injury or damage because; it was probable that their sensitisation would progress to allergy, whereas in the absence of further exposure, there would be no progression, and it was a direct and necessary consequence of the foregoing that restrictions were placed on their working activities so as to obviate allergy.

In relation to 2. the claimants relied on an implied term which was exactly co-extensive with the defendant's obligation under the general law of tort to provide and maintain a safe place and system of work, and to take reasonable care for the claimants' safety. It arose because the law imposed it in view of the relationship between the parties.

The claim was dismissed at first instance, so the claimants appealed.

Mr Justice Jay, in the Court of Appeal, decided that you could not define the actionable injury by the steps which were taken to prevent it. Those steps might result in economic loss, but that was not the same as, or an inevitable component of the injury. The correct approach was to analyse the sensitisation in terms of the physical (or physiological) harm it might be causing, not any financial loss which might be consequent upon that harm.

Properly analysed, the tort claim was one for pure economic loss. General damages for pain, suffering and loss of amenity would not be awarded on the facts. Although that could not be determinative of the issue, it served to indicate the true nature of the claim. The claimants had not suffered actionable injury, and the claim in tort had to fail.

Further, where the law imposed an implied term in view of the relationship between the parties, essentially for reasons of public policy, the scope of that rule of public policy was to safeguard the health, safety and welfare of employees from the careless acts and omissions of their employers. So in the event of breach, where personal injury was suffered, the employer would be required to pay compensation. The concepts of health, safety and welfare, properly understood, embodied the notion of protection from personal injury and not from economic or financial loss suffered without personal injury. It was because the implied contractual duty was precisely adjacent to and reflected the obligations imposed by the law of tort, so that the outcome had to be the same however the cause of action was sought to be classified. The claimants' pure economic loss fell outside the parameters of the defendant's duty, and the claim in contract had to fail.

> The case is a useful reminder that claims for pure economic loss fall outside the scope of negligence and breach of statutory duty claims. The absence of an actionable injury was fatal to the claimants' claims and the court followed the guidance from the pleural plaques decision in *Rothwell*.

Excessive force? *Browne v Commissioner of Police of the Metropolis [2014]*

The claimant, who had worked as a close-protection security guard for celebrities, was walking along Kentish Town Road at 10.30am with the comedian and television celebrity Noel Fielding. As they walked along the road they were seen by two police officers, in a patrol car. The officers believed that the two men were showing signs of drug use and so they turned the car round to follow them, intending to stop them and talk to them. During the ensuing incident Mr Fielding was restrained, handcuffed and searched and then taken to the police station where he was subjected to a strip search. No drugs or drug related materials were found on him and he was subsequently released without charge or further action.

The claimant was searched and various drug related materials were found. An ambulance was called to attend to the claimant who had by then been arrested. He was taken to the hospital. In the course of the search, the claimant suffered a severe fracture of his right knee. He was in hospital for about a month and underwent several operations and has been left with ongoing difficulties. No further action was taken by the police in respect of the drug related materials. The claimant brought a claim for damages for assault and battery against the police in respect of the knee injury.

The main issue was for the court to decide how the claimant came by the fracture in the course of the search. It was the claimant's case that he had been the subject of a deliberate assault. The defendant suggested that the injury was sustained as a result of the reasonable force required in light of the claimant's resistance. The claim would be allowed.

The claim was successful on the basis that the search was unlawful due to the officers' failure to give the appropriate information and secondly because of the excessive force used to restrain him. Whilst the claimant had not been deliberately assaulted by the police, the officers had used unnecessary and unreasonable force to restrain him. This amounted to an assault. Finally, the court decided that the claimant had not been not guilty of any contributory negligence. The claimant received damages in excess of £100,000.

> The Court of Appeal judgment gives some narrative which may support the officers' decision to at least talk with the two men they saw walking down the street:
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> "It was Easter Sunday morning at about 10:30am. They had been to a party and had not slept. Mr Fielding was still wearing his stage outfit consisting of dungarees, gold boots and a ladies' checked jacket. At that time his hair was dyed yellow blonde. Mr Browne was more conservatively dressed... Having been in Mr Browne's words "almost the last men standing" at the party."
>
> That said, the Court of Appeal seemingly had no hesitation in finding for the claimant and concluded that the officers' evidence was inconsistent and unreliable.

Liability and an obvious tripping hazard. *Butcher v Southend-on-Sea Borough Council [2014]*

The claimant had been visiting her parents who lived in sheltered housing owned by the defendant. The accommodation had a back entrance, which was approached along a tarmac path, with an area of patchy grass alongside. There was a difference in level of approximately 2 ½ inches between the path and the patchy grass. At trial the judge found that the edge of the path was clear and did not need to be marked. He accepted that the claimant had stepped half on, and half off, the path which had caused her to twist her ankle and fall.

Shortly after the accident the defendant inspected the area, concluded that dry weather had caused the earth to shrink from the edge of the path and instructed contractors to fill in the gap so that the path and the surrounding area were level.

The judge decided that the defendant was in breach of its duty as an occupier and that it was foreseeable that someone might lose their footing at the edge of the path because of the difference of levels. The judge said that the defect was easily remedied. As to contributory negligence, the defect was an obvious hazard and if the claimant had been paying proper attention the accident would not have happened and therefore her damages were reduced by 50%.

The defendant's case was that they had a reasonable system of inspection and had conducted a risk assessment. The defence was unsuccessful, so the defendant appealed.

The Court of Appeal held that the issue of a system of inspection was relevant where a hazard suddenly developed, such as a spillage in a supermarket (see Ward v Tesco Stores Limited [1976]). The court accepted that the hazard at the edge of the path had not developed within minutes or hours or even days. Nor was it the kind of hazard, such as a risk of branches dropping from trees, which required a professional risk assessment.

The Court of Appeal decided that the drop at the edge of the path was obvious and had not been detected by the manager or the caretaker. The court said it was relevant that there had been no previous accident, but similarly so, that the hazard had been rectified after the accident without difficulty or expense. The question for the trial judge was simple: whether before the accident it was foreseeable that someone would inadvertently step off the path and lose their balance because of the difference of level? It could not possibly be said that the judge was wrong to find that this was foreseeable and that the defendant had not taken such care as was reasonable in all the circumstances to see that visitors were sufficiently safe. The appeal was dismissed.

> The case highlights a fundamental point - simply having a system of inspection or risk assessment, as opposed to critically assessing, and acting upon, the results. A successful defence must show that systems are effective and that reasonable steps are taken to reduce the risk of accident. The case also shows the different approach to defending trip/slips claims which occur due to temporary or more permanent hazards.

Foster care and a non-delegable duty? *NA v Nottinghamshire County Council [2014]*

The claimant was born in 1977 and from the age of 7, alternated between periods living with her mother and her abusive partner, and a variety of foster placements followed by a number of residential children's homes. She was subjected to physical, emotional and sexual abuse, and claimed that the local authority should be vicariously liable for abuse by the foster carers, in the same way that the local authority would be liable if the abuser were a local authority employee. She also alleged that the local authority owed her a non-delegable duty of care whilst she was in foster care.

The court decided the local authority's social workers had not negligently failed to remove the claimant from her family home. In applying the Bolam test, from the case of Bolam v Friern Hospital management Committee [1957], the court had to consider the actions that should be taken by a reasonably competent social services department. The evidence of the local authority's social work expert was strongly preferred.

As to vicarious liability, the court applied the established Supreme Court test in Various Claimants v Catholic Child Welfare Society [2012] and decided that the role of a foster carer was not 'akin' to being employed by the local authority. The local authority does not have control over foster parents and does not direct what they do, and how they do it. It is essential to the whole concept of foster parenting that the local authority should not have that control. A foster parent's role is to provide family life, bringing up the foster child as a member of the family and enjoys independence from the local authority. The circumstances are very different from a child placed in a residential setting.

Perhaps most importantly, the local authority did not owe the claimant a non-delegable duty of care. Whilst the required five features identified by Lord Sumption in the Supreme Court in Woodland v Essex County Council [2013] were met, it was not fair, just and reasonable to impose the duty. The following reasons were given:

1. It would place an unreasonable burden on a local authority providing critical public services and where it had taken all reasonable steps to ensure that the child was safe in the placement
2. Its imposition would lead to risk averse foster parenting
3. There is a fundamental distinction between placement in a children's home and placement with foster carers. The latter provides experience of family life and the local authority does not have the same control over the children's day to day lives. That may bring risks but provided that all necessary reasonable care has been taken to ensure that foster parents and the placement are suitable "those are risks which will generally be worth running in order to obtain for a child the benefits of family life."

Ultimately, the public interest in promoting family life for children in foster care, trumped the inevitable difference of legal treatment between children abused by foster carers, and those abused in a children's home.

> This High Court decision contradicts the obiter comments from HHJ Godsmark QC in BB & BJ v Leicestershire County Council [2014] where he said, but for the limitation problem, there would be a non-delegable duty in respect of the abuse by foster parents. Local authorities will now welcome this more recent decision, as a finding of a non-delegable duty would have resulted in liability for proven abuse by foster carers, no matter how stringent their assessment and approval of those carers or how well social workers might have supervised the actual placement. There is likely to be an appeal.

Divisible injury. *Heneghan v Manchester Dry Docks & others [2014]*

The claimant was a lung cancer victim and his claim proceeded on the basis that there was no dispute on liability, and it was accepted by the defendants that it was more likely than not that his cancer was caused by exposure to asbestos. There were 6 defendants and their individual share of exposure ranged between 2.5% and 12%. Their total cumulative share of the claimant's lifetime exposure was 35.2%. Gross quantum was also agreed.

The claimant's case was that the damages were indivisible and that once medical causation had been proven, he was entitled to 100% of damages, against all six defendants, on the basis of a material contribution to the injury or the risk of such injury. This argument was rejected by the court and accordingly the claimant received 35.2% of his damages. As a result, lung cancer (and potentially other cancer claims) are indivisible conditions with divisible consequences.

The court agreed with the defendants that epidemiological evidence could not be used in this case to answer the question of which defendant was responsible for the culpable exposure. As a result, the claimant could not prove which of the defendants was guilty of negligent exposure. That led to the application of Fairchild and hence to Barker. The alternative was that the claimant recovered no damages from any defendant.

The judge accepted the defendants' argument that in cancer claims such as this a two stage test is applied:

1. What caused the cancer (i.e. asbestos or smoking or something else) which was a question decided on the balance of probabilities
2. Who caused the cancer, which was a conclusion which medical science could not reach when considering several "minority share" tortfeasors.

The court did accept that where a defendant had been responsible for more than half of culpable exposure, then proof against that defendant was possible on the balance of probabilities. But that did not mean that every material exposure by an employer "contributed" to the actual onset of the cancer.

> "This is the first authority to decide the correct approach to compensation in asbestos-related lung cancer cases involving more than one defendant who have exposed the claimant to asbestos in breach of duty. The rule is defined so that a defendant is liable for damages in proportion to its share of overall cumulative exposure. The damages are divisible by that proportion. The court decided the case on the basis that it was a fair outcome for the claimant and the defendants.

Crystal ball gazing?
Tate v Ryder Holdings Ltd [2014]

The claimant was born in 1990. In 2001, he was knocked down by a bus causing a severe brain injury, fractured pelvis and a contused lung. The two latter injuries healed promptly and completely. The court had previously approved a 70/30 apportionment of liability in the claimant's favour. The claimant has a 4 year old daughter, born in December 2009. The issue of quantum was to be determined by the court.

The central issue was the correct classification of the claimant's condition. The claimant's case was that he suffered from an organic personality disorder caused by his brain injury. The defendant's expert concluded that the claimant had a dissocial personality disorder that he would have had in the absence of the accident related injuries. There was no dispute that the claimant suffered from a severe personality disorder.

The defendant argued that irrespective of the accident, the claimant would have lived a life of irregular, menial employment and unstable, probably chaotic, relationships. He would not have sought recreation or relaxation other than with family and friends, and those he mixed with would all have been (as they are) bad, substance-abusing influences. If the court accepted that there was a significant risk that the claimant would have lived such a life, it would be legally correct to discount any award of compensation.

The court did not accept the defendant's submissions and said that the claimant's condition had resulted from the organic brain injury, and could only reasonably be treated by a regime of 24-hour personalised care. By reason of the organic brain injury the claimant lacked capacity, within the meaning of the Mental Capacity Act 2005, in important respects. The need for 24-hour personalised care arose directly only by reason of the organic brain injury. It would, therefore, be wrong in principle to discount the amount of damages required to provide such care in the light of an alleged risk as to how his life might have turned out if he had not suffered the organic brain injury.

The court said it would be difficult to evaluate in any acceptable or convincing way how this particular claimant, aged 11 at the time, would have developed and what the nature and quality of his life might have been. The defendant's scenario was exceptionally bleak and pessimistic, and his submission invited the court to speculate on a highly sensitive issue, where the court's speculation could be quite wrong and unfair to the claimant.

The claimant would be awarded very significant damages under the various heads of future care, loss of earnings, court of protection and deputyship.

> To decide this case in the defendant's favour, the court had to prefer their expert evidence, but also disregard much of the claimant's lay witness evidence. That is a very significant task when a claimant has suffered such a significant injury. Experience tells us that seriously injured claimants understandably receive a certain amount of sympathy from the court, and when faced with an 'all or nothing' outcome, any weaknesses in the defence will likely prove fatal at trial.

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