Psychiatric Injury

Paul v The Royal Wolverhampton NHS Trust; Polmear v Royal Cornwall Hospital NHS Trust; Purchase v Ahmed [2022] EWCA Civ 12

Facts:

These 3 conjoined cases all related to situations in which the Defendants were alleged to have failed to diagnose the primary victim's life-threatening condition, and that primary victim some time later suffered a traumatic death. For Claimants Paul and Polmear that death occurred in the presence of close relatives (secondary victims) which caused them psychiatric injuries. In Purchase, the primary victim's mother came upon them immediately after their death, causing her psychiatric injury.

Issues:

The issue for the Court of Appeal was whether there was the necessary legal proximity between the Defendant and the secondary victim (who was a close relative in each case).

Sir Geoffrey Vos (the Master of the Rolls) considered the relevant authorities, in particular the leading case of *Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310* and the leading "bedside" case of *Taylor v A. Novo (UK) Ltd [2013] EWCA Civ 194.*

In each of the 3 appeals it was accepted that claims by secondary victims for psychiatric injury are available in clinical negligence cases and the 5 elements of establishing legal proximity from *Alcock* applied. However, applying *Novo* the secondary victims' claims failed as the psychiatric injury caused by a horrific event were removed in time from the original negligence. The appeals therefore failed.

However, the Master of the Rolls indicated that he had reservations about whether *Novo* is interpreting the limitations on liability to secondary victims correctly, and permission to appeal to the Supreme Court is likely to be granted.

Vicarious Liability/Non-Delegable Duty of Care in Negligence

Hughes v Rattan [2022] EWCA Civ 107

Facts:

The Claimant was a patient of the Manor Park Dental Practice, owned by the Defendant. She had received allegedly negligent treatment from 2009 to 2015 from a number of self-employed associate dentists working in the practice and brought a claim in negligence against the Defendant as the practice owner. The Claimant was allocated to her usual dentist or an alternative dentist if they were not available.

Issues:

There were 2 issues for the Court of Appeal to consider:

1) Does the Defendant practice owner owe a non-delegable duty of care to the Claimant patient?
2) Is the Defendant liable to the Claimant for the acts and omissions of his associate dentists on the basis of vicarious liability?

Whilst in the High Court the answer to both of these questions was yes, the Court of Appeal agreed only on the non-delegable duty of care, finding that there was no vicarious liability.

Non-Delegable Duty of Care

The Court of Appeal's unanimous judgment, given by Bean LJ, confirmed that the Defendant owed the Claimant a non-delegable duty of care, as she was a patient of the Defendant's dental practice as a matter of law as well as in layman's terms.

He based this decision upon the fact that the Claimant had signed a Personal Dental Treatment Plan which named the Defendant as the treatment provider, it was implied within the associate agreements (based upon a standard template contract from the British Dental Association) and also by considering Lord Sumption's factors from the leading case of *Woodland v Swimming Teachers Association & Others* [2013] UKSC 66. Those factors were that the Claimant, as the recipient of services, could be considered vulnerable in the sense that they were a patient receiving treatment from a dentist, there was an antecedent relationship between the Claimant and the Defendant (considering the Personal Dental Treatment Plan) and the Claimant had no control over how the Defendant chose to perform his obligations, she could only express a preference as to which associate dentist she would like to be seen by, but that was the extent of her control.

Vicarious Liability

The Court of Appeal considered that the decision on vicarious liability would be a multi-factorial one and that they would generally be slow to interfere with the trial judge's decision, nevertheless in this case they did, and did so unanimously.

Relying upon the Supreme Court decision in *Various Claimants v Barclays Bank plc* [2020] UKSC 13 and the test being whether the tortfeasors' (in this case the associate dentists) relationship with the Defendant can be properly described as being "akin to employment", the Court of Appeal felt that the test had not been met.

Factually the critical factors which influenced this decision were that the associate dentists were free to work at the Defendant's practice for as many or as few hours as they wished, and equally free to work for other practices and business as well, and some did so. Whilst the associate dentists were under a limited degree of control from the Defendant in that they were under a contractual duty (due to NHS rules) to follow the Practice's policies and procedures, these matters did not outweigh the factors going the other way.

The Court of Appeal concluded that the relationship was not sufficiently analogous or akin to employment to satisfy the *Barclays* test for vicarious liability to be established.

Vicarious Liability

Chell v Tarmac Cement and Lime Limited [2022] EWCA Civ 7

Facts:

The Claimant was the target of a practical joke by one of the Defendant's employees, while he was a site fitter sub-contractor working for the Defendant on their premises. The Claimant was injured when the Defendant's employee hit explosive pellet gun targets with a hammer close to the Claimant's head causing a loud explosion. The Claimant suffered a perforated eardrum, tinnitus and noise-induced hearing loss.

There had been tensions between the employees and sub-contractors and the Claimant argued that the Defendant should have undertaken a risk assessment for the foreseeable risk of injury arising from those tensions, and otherwise were vicariously liable for the employee's actions.

Issues:

Was an employer vicariously liable for an employee's practical joke?

The Court of Appeal agreed with Spencer J and dismissed the Claimant's appeal, holding that it was unrealistic to expect an employer to implement in any effective way, a risk assessment process for general horseplay, ill-discipline or malice, and it would be unreasonable to extend the employer's duty to cover horseplay.

It was noted that if an employer was on notice of a foreseeable risk of injury to employees from a specific source of horseplay then the duty to implement a risk assessment process for that specific source may be triggered, but only in that situation.

The Court of Appeal considered that there was a lack of connection between the wrongful act and what the employee was authorised to do, noting the following points as relevant:

- The pellet gun target which caused the injury was not work equipment.
- The employee's work did not include the use of pellet gun targets.
- There was no abuse of power of any supervisory or management capacity.
- There was no indication of any threat from any friction between employees and sub-contractors.
- The opportunity for the wrongful act was not in itself sufficient.

This case was therefore distinguished from other similar vicarious liability cases where work equipment was used, the act was part of the usual field of authorised activities and there was a work-related motivation behind the incident which led to the injury. The Court has therefore not expanded the requirement on employers to carry out speculative risk assessments. The Court of Appeal acknowledged that these cases must turn on their own facts.

Breach of Duty - Foreseeability

Hill v Ministry of Justice [2022] EWHC 370 (QB)

Facts:

The Claimant was a probationary prison officer escorting 2 young offenders. One of the young offenders, who was known for violence towards other prisoners, pushed the Claimant causing him to sustain a back injury. The Claimant argued that the risk of injury to a probationary officer from this particular offender was reasonably foreseeable and his employer failed to mitigate this risk by either requiring 2 officers to escort these 2 young offenders or having a single inmate to officer ratio.

Issues:

It is trite law that an employer owes a duty to take reasonable care to protect their employees against reasonably foreseeable risk of injury in the workplace. It is important to note that the precise manner in which an accident happens does not need to be foreseeable provided that an accident of that general type can be foreseen. This case considers the assessment of breach of duty in relation to occupations which carry an inherent risk, in this case the prison service.

Cotter J, dismissing the Claimant's appeal, held that the test of foreseeability requires the Court to focus upon the circumstances of the individual case. In a case of inherent risk, it is reasonable for an employer to be informed, by their knowledge of the situation, of those inherent risks and the practicalities of taking any particular step or course of action. The Defendant employer must balance the risk to employees against the purpose of the activity.

On the facts there was nothing known to the Defendant employer that should have required a second officer to be involved in escorting the prisoners. Whilst that would have reduced the risk, it was not reasonably necessary based upon the knowledge of the Defendant at the time.

Duty of Care - Negligent Misstatement

McLean and Others v Thornhill [2022] EWHC 457 (Ch)

Facts:

The Defendant was a tax barrister who provided written advice to the promoters of 3 film finance tax schemes. The Claimants were wealthy investors who were members of limited liability partnerships formed for the purpose of participation in the distribution of films, seeking to offset tax liabilities. The Claimants brought claims in negligence against the Defendant, arguing that he owed them a duty of care because his advice had been referred to in the information memoranda and shared on request with them as potential investors.

Issues:

Zacaroli J applied *Hedley Byrne v Heller* [1964] AC 465 and the Supreme Court decision of *NRAM v Steel* [2018] UKSC 13, that the Defendant owed no duty of care to potential investors, despite the Defendant being aware that potential investors could see his advice.

The Court decided that there was no duty because the investors were told explicitly that it was not reasonable to rely on the Defendant's advice rather than seeking their own independent advice. Given the financial position of the Claimants it was objectively reasonable to assume that they would do so and it was not therefore reasonably foreseeable to the Defendant that they would rely upon his advice.

Zacaroli J rejected the Claimants' claims, holding that there was no duty, having considered relevant tax authorities and HMRC practice, no breach and no causation of loss.

Causation

Martini and Another v Royal Sun Alliance Insurance Plc [2022] EWHC 33 (QB)

Facts:

This claim arose from a series of motor vehicle collisions which occurred on an unlit section of the M20 motorway. A Fiat van driver (insured by the Defendant company) fell asleep at the wheel, crashing into the rear of an HGV. Following this collision, the Fiat van was left stranded and unlit in the middle lane of the dark motorway causing other drivers to have to take evasive action to avoid it and a further 3 collisions occurred with either the Fiat van or the other vehicles in the subsequent collisions. There were 4 collisions in all.

Issues:

At trial the Court had to consider apportionment of liability, and whilst acknowledging that these cases are highly fact sensitive, Jon Turner QC (sitting as a Deputy High Court Judge) highlighted some key legal principles to be borne in mind when analysing such cases.

1) The "agony of the moment" principle, "...that the Court should not require the same standard of care from a party who is forced to exercise judgment in the agony of the moment as it may do from a party who reaches a decision without being subjected to such pressures..." (paragraph 56). This is a variation on the theme of acting in an emergency in establishing an appropriate standard of the care, and follows the case of *YYY, Aviva Insurance Ltd v ZZZ* [2021] EWHC 632 (QB), citing HHJ Saffman (sitting as a judge of the High Court) at [56], "...what matters is whether, having identified a potential hazard, the claimant has established that the steps taken by the defendant to mitigate it were not reasonable steps or a reasonable response even in the agony of the moment...".
2) A reminder that attributing tortious liability in road traffic cases and more generally requires the exercise of common sense, rather than theoretical or philosophical analysis or using the benefit of hindsight (paraphrasing paragraph 59).

The Court ultimately found that the Fiat van driver who fell asleep was the sole relevant cause of the damage and injuries sustained by all other parties.

Defamation – Right to Jury Trial

Blake & Others v Fox [2022] EWHC 1124 (QB)

Facts:

The 3 Claimants (a former Stonewall trustee, a television entertainer and an actress) had sent tweets referring to the Defendant (also an actor) in the context of racism, to which he responded referring to the Claimants in the context of paedophilia. The Claimants brought a libel claim for the paedophile tweets, and the Defendant counter-claimed in libel in relation to the tweets that he argued would be understood to mean that he was a racist.

Issues:

This hearing in front of Nicklin J was upon the Defendant's application to have the case heard by a jury. The presumption in favour of a jury trial in defamation claims was abolished by s.11(1) Defamation Act 2013, but there remains a residual discretion under s.69(3) Senior Courts Act 1981 under which a judge may agree to a jury trial.

The Defendant's case was based upon the argument that there was an appearance of "involuntary bias" on the part of the judiciary, due to their training and their adherence to the guidance contained within the Equal Treatment Bench Book, such bias would not be present if a jury were to decide the case.

Nicklin J, in dismissing the application for a trial by judge and jury together, did not accept that the Defendant had established, "...that a fair-minded and informed observer would conclude that there was a real possibility that a judge trying the case alone would suffer from 'involuntary bias'..." (paragraph 70).

In reaching this decision he also considered the factors set out by Warby J in *Yeo v Times Newspapers Ltd.* [2015] 1 WLR 971, that the emphasis is now against trial by juries and considered the following factors:

- proportionality and attendant cost savings;
- the benefits of a reasoned judgment;
- the increasing complexity of defamation litigation - including that of public interest defences.

Damages

Palmer v Seferif Mantas and Liverpool Victoria Insurance Co. Ltd [2022] EWHC 90 (QB)

Facts:

The Claimant suffered a mild traumatic brain injury in a road traffic accident, when the Defendant drove into the back of her stationary car. Liability was admitted, albeit there were ongoing arguments about the extent of the injuries. At the time of the accident the Claimant was working as a marketing executive at a nightclub earning £35,000 gross per year. She had 5 years' experience in the nightclub industry but had only worked for her pre-accident employer for 17 months and there had been some disciplinary issues. Following the accident, she was unable to continue in her employment and gave up her job due to ongoing symptoms.

Issues:

The Claimant made a claim for future loss of earnings on a multiplier/multiplicand basis totalling £1.2 million. The Defendant argued that that the claim should be limited to a *Smith v Manchester* award for disadvantage on the open labour market instead.

A *Smith v Manchester* award is a lump sum representing between 3 months' and 5 years' net earnings to reflect the potential (or contingent) future risk that the Claimant **may** find herself on the open labour market between jobs for longer due to injuries sustained in the accident.

Anthony Metzer QC (sitting as a Deputy High Court Judge) decided that this *Smith v* Manchester only approach was not appropriate. The Claimant's future loss extended beyond the remit of a contingent loss foreseen by a *Smith v Manchester* award. He decided this on the basis that the Claimant had been working before the accident in a steady job, had been unable to return to work since the accident and her residual earning capacity was severely restricted by the injury.

Effectively, in a case where a Claimant has an established career, the Court should map out future uninjured earnings on the basis of a "career model" looking at what her future career progression would have been had the accident not occurred. Having established an 'uninjured career model', the Court should then compare that with the Claimant's injured residual future earning capacity, with a suitable Ogden table discount. It is then possible to make a multiplier/multiplicand damages calculation (in this case she was awarded the amount claimed of £1.2 million).

Damages

Judicial College Guidelines – 16th Edition

The latest edition of the Judicial College Guidelines (JCG) were published on 11th April 2022. The Guidelines are used by the Courts in assessing the value of general damages for personal injury or clinical negligence claims.

Figures in the 16th Edition have been updated and reflect the 6.56% RPI increase since the 15th Edition.

New in the 16th edition you will find:

- An additional category of psychiatric injury for victims of sexual abuse.
- A new section for work-related limb disorders, including so-called “cold injuries” like frostbite, frostnip and soft-tissue non-freezing injuries, and non-freezing injuries affecting the nervous or vascular systems.
- A widening of the reproductive organ section to include injuries leading to loss of sexual function, sexual dysfunction and the psychological consequences.