Personal Injury

Liability update 2016

Posted on 18 March, 2016 by | Robert Weir

Rob Weir QC summarises a number of important cases in personal injury and clinical negligence covering issues of liability over the last 12 months.

VICARIOUS LIABILITY: 1st stage of the 2 stage test

Cox v Ministry of Justice [2016] UKSC 10

The claimant, a catering manager at HMP Swansea, was injured when one of the prisoners, working under her supervision, dropped a bag of rice on her back. Her claim in negligence against the prison service for breach of its direct duty of care to her failed. Her case rested on establishing that the actions of the prisoner, who was found to have been negligent for dropping the bag of rice, rendered the prison service vicariously liable.

Held by Supreme Court:

The claim succeeded. Vicarious liability can apply outside of an employment relationship provided that the tort is done by an individual who carries on activities as an integral part of the business activities carried on by the defendant and for the defendant's benefit. In such a case, the tort may fairly be regarded as a risk of the defendant's business activity. The 'business' of the defendant need not be commercial; nor need the 'benefit; take the form of a profit. There needs to be some element of control by the defendant over the tortfeasor but that can be modest. In taking the approach, the SC was following the judgment of Lord Phillips in the Christian Brothers case.

Applying that test in the context of this case, prisoners put to work in the catering department of a prison are integrated into the operation of the prison. They are placed in the kitchens by the defendant where there is a risk they may commit a variety of negligent acts. They are under the direction of prison staff. So their actions will render the prison service vicariously liable.

VICARIOUS LIABILITY: 2nd stage of 2 stage test

Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11

The claimant, a customer at one of Morrison's petrol stations, was verbally abused by an employee of the defendant when he went to the kiosk, which the employee was manning. The employee then followed the claimant, went over to the claimant's car and violently assaulted him. The reasons for this unprovoked attack were not known. The claimant

pursued a case against the defendant on the basis it was vicariously liable for its employee's assault. The claimant lost at first instance and in the Court of Appeal.

Held by the Supreme Court:

The test remained that the tort had to be so closely connected with the tortfeasor's employment that it would be just to hold the employer responsible. This requires the court to consider what was the nature of the employee's job; put another way, what functions or 'fields of activities' have been entrusted by the employer to the employee? This question must be addressed broadly. Then the court has to decide whether the connection was sufficient to make it right for the employer to be held liable under the principle of social justice.

Applying those principles to the facts of this case, the employee's conduct in abusing the claimant in the kiosk was within the 'field of activities' assigned to him. What happened after that was an unbroken sequence of events. The claimant succeeded.

VICARIOUS LIABILITY and NON-DELEGABLE DUTY: foster parents

NA v Nottinghamshire CC [2015] EWCA Civ 1139

Claimant was placed into foster care by the defendant in 1985. The defendant local authority had not acted negligently in selecting the particular foster parents or in supervising this placement. The foster parents committed gross acts of abuse on C. The question arose as to whether the local authority was strictly liable to the claimant on the basis that either: (a) the defendant was vicariously liable for the assaults committed by the foster parents; or (b) the defendant owed a non-delegable duty to protect the claimant from harm.

Held by Court of Appeal:

The claim failed on both limbs.

Vicarious liability: following the Christian Brothers case, the claimant needed to establish that the foster parents were undertaking activities on behalf of the local authority and were sufficiently integrated into the organisational structure of the local authority enterprise. But the opposite was the position: the foster parents provided a family life for the claimant and that, by definition, could not be part of the activity of the local authority.

Non-delegable duty: (per Tomlinson LJ) the local authority had not assumed for itself a duty to protect the child from harm. But the local authority's duty was more limited: it was to arrange for a foster placement. (Per Burnett LJ) difficult to see how the defendant could be held not to be vicariously liable for an assault and yet liable for breach of a non-delegable duty not to assault the claimant. (Per Black LJ) not fair, just and reasonable to impose duty of care as it would lead to defensive practice in relation to the placement of children and discourage placement with families.

ASBESTOS

Heneghan v Manchester Dry Docks Ltd [2016] EWCA Civ 86

The claimant's father, H, died of lung cancer which, it was agreed, had been caused by asbestos fibres (as epidemiological evidence showed that the risk of his developing lung cancer was more than doubled by reason of his exposure to asbestos). H had been exposed to asbestos during course of his employment with various companies. It was agreed that 32.5% of H's exposure had occurred during his employment with the defendants. The question arose as to whether C was entitled to 100% or 32.5% of the full damages.

Held by Court of Appeal:

The issue reduced to one of whether the defendants' breach of duty materially increased the risk of H developing asbestos or whether it materially contributed to his developing asbestos. There was no scientific evidence to allow a finding that the exposure had materially contributed to the asbestos. On convention grounds, the claimant's case on causation would fail. But the Fairchild exception should be applied across from mesothelioma cases to lung cancer cases. That also meant that the Barker reduction should apply. The Compensation Act 2006 was of no effect as it applied only to mesothelioma cases. Therefore, C was entitled to 32.5% of full damages.

Carder v Secretary of State for Health [2015] EWHC 2399 (QB)

C, 85 years old, developed asbestosis and also suffered from other unrelated conditions which affected his lung function. The proportion of C's exposure to asbestos attributable to D was 2.3%. The question arose as to whether C was entitled to 2.3% of full damages or no damages on the basis that no injury could be proven to have been caused by such modest amount of exposure.

Held:

C could suffer actionable injury without being aware of it. The question was whether C had suffered real damage and was worse off to a degree that was not so trivial that the claim in damages was not justified. Although the 2.3% contribution was small, it was not de minimis. C succeeded.

This case is on appeal to the CA.

Woodward v Sec of State for Climate [2015] EWHC 3604 (QB)

The claimant's wife died of mesothelioma as a result of exposure to asbestos during an 8 month period working in the canteen of Bentley Colliery in 1976-1977. The exposure came from asbestos being carried into the canteen by other workers on their clothing. Given the very limited evidence, the judge assessed this exposure as being modest and lower than the threshold levels set out in TDN 13.

Held by judge:

The claimant's claim failed. The judge followed Williams v University of Birmingham [2011] EWCA Civ 1242 and held that the risk of harm was not foreseeable. What the HSE was saying in TDN 13 was that exposure below the limits was an acceptable risk and any reasonable employer was entitled to follow that guidance.

ROAD TRAFFIC LIABILITY

Smith v Stratton [2015] EWCA Civ 1413

C a passenger in a car with 3 other young men, driven at speed when a police car sighted. D1, the driver, lost control and drove into parked vehicle. C sued MIB after insurer avoided policy. MIB contended that C engaged in a joint criminal enterprise of dealing in cannabis from car. Trial judge held that MIB not liable. Although no direct evidence of drug dealing, circumstantial evidence was sufficient.

Held by CA: dismissing appeal and claim.

Trial judge not just entitled to but right to draw inference of drug dealing. C did not give evidence and so there was no direct evidence to contradict the MIB's case. C's evidence as to his general conduct would have been highly relevant even though he claimed to have no recollection of the accident itself.

Jackson v Murray [2015] UKSC 5

Claimant, then aged 13, got out of school minibus on A road in rural Scotland (with 60mph speed limit) and proceeded to cross road. Defendant, driving at 50mph in opposite direction, collided with C. D did not see C at all although she was in view for about 1.5 secs after emerging from behind the bus. D should have been travelling at 30-40mph. Held at first instance: D liable, C 90% contributorily negligent. On appeal: C 70% contributory negligence.

Held by Supreme Court:

(By the majority): contributory negligence reduced to 50%. 2 SCJs in minority would have kept figure at 70% contributory negligence (on basis the right figure was actually 2/3rds contributory negligence).

Sabir v Osei-Kwabena [2016] PIQR Q4

Claimant walked 3.6/3.7 into road and was struck by defendant's car coming from her right along suburban road at 30mph. C was in the road for about 2.6 secs. D did not brake before the collision. Trial judge found D liable for failing to keep a proper look out and C 25% contributorily negligent. On D's appeal on issue of contributory negligence:

Held by CA: should not interfere with judge's apportionment.

Per Tomlinson LJ: the destructive capacity of a car is relevant both to causal potency and moral blameworthiness. High blameworthiness by driver for having failed to see C for as long as 1.1 secs when she was in his direct field of vision and where he could expect pedestrians to cross. High causal potency because C in no sense created a situation of urgency.

Horner v Norman [2015] EWCA Civ 1055

C dashed across a dual carriageway and struck by front offside of car, travelling at about 30mph, in outside lane. C had no recollection. Trial judge impressed by evidence from D, who braked as hard as she could. Some ice about and trial judge rejected C's case that, with a PRT of 0.7 secs, D should have been able to stop (based upon a coefficient of friction of 0.65).

Held by CA: D not liable.

Judge right to be sceptical about using a purely mathematical analysis to determine liability. There was no evidence to indicate 0.7 secs represented the limit of what can be regarded as reasonable PRT. Judge entitled to accept D's evidence that she did all she could in face of reconstruction evidence.

Sinclair v Joyner [2015] RTR 29

Claimant cycling very close to centre of a country road with a 60mph speed limit. Defendant driving in opposite direction slowed to about 20mph when she saw C. C, then aged 58 years, was standing up on her pedals. There was a glancing

collision between the front wheel of the bicycle and the rear offside wheel of the car, which sent C toppling over.

Held by Cox J:

Primary liability established as D should have stopped given C was so close to centre of road and grimacing as she stood on her pedals. Instead, D left insufficient room for C to pass. Contributory negligence for cycling so close to the centre of the road assessed at 25%.

Damning criticism of the expert evidence of Mr Newton, who made the mistake of thinking it was his role to discover the facts and to determine what happened. Mr Newton also relied on 3 other experts to reach his conclusions, without even providing details of what he had asked them or what answers they had given.

Flint v Tittensor [2015] 1 WLR 4370

Claimant struck the bonnet of the defendant's new car, causing criminal damage. The defendant responded by driving forwards until C was hitched onto the bonnet, then reversing and driving off at speed with C still on the bonnet until D swerved and C was thrown from the car, sustaining his injury.

Held by Edis J:

D had committed the tort of trespass. D was not acting in reasonable self-defence. And C's claim was not barred by his own illegal conduct (of causing criminal damage). In response to C's conduct, D voluntarily committed a different kind of serious crime so that it is D's conduct, and not that of C, which is the operative cause of C's injury.

Hicks v Young [2015] EWHC 1144 (QB)

C was driven by D in D's taxi to C's home. As C stood up inside the taxi, D drove off causing C to sit back down. D thought that C was trying to evade paying but the result of his actions was to keep C a prisoner. C opened the door and jumped out when the taxi was driving at about 20mph and sustained injury.

Held by Edis J:

Driving away by D when C was stood up in the taxi was a breach of duty. C's decision to escape from the taxi was a foreseeable consequence of that negligence and so C succeeded on primary liability. C had seriously misjudged the level of risk he faced, jumping out of the taxi, and his damages were reduced by 50% for contributory negligence.

On appeal to CA, to be heard end April 2016.

McCracken v Smith [2015] PIQR P19

C was riding pillion passenger on a motorbike driven by D1. The bike had been stolen and their intention was that the bike be ridden dangerously. There was a collision with a minibus and the minibus driver, D2, was partly to blame.

Held by Court of Appeal:

C was precluded by the defence of illegality from bringing any claim against D1. The two boys, C and D1, were party to a joint enterprise of joyriding. However, C was entitled to succeed against D2 subject to a finding of contributory negligence. That was put at 65% (15% of which was for failure to wear a helmet).

CASES WITH AN INTERNATIONAL ELEMENT

Jurisdiction: under the CPR

Brownlie v Four Seasons Holdings Inc. [2016] PIQR P2

The claimant and her deceased husband went on holiday to Egypt. The claimant's husband died in a road traffic accident whilst on holiday and the claimant was herself injured. She returned to England and made a claim for her own injuries as well as claims under the Fatal Accidents Act and under the Law Reform Act. The claim was brought in tort and in contract. As the claimant was suing a foreign defendant, registered outside the EU, the issue of jurisdiction was to be determined according to 6BPD 3.1 of the CPR.

Held by Court of Appeal:

As regards the tort claim, under which the gateway for jurisdiction at 6BPD 3.1.(9) is that "damage was sustained within the jurisdiction", damage meant direct damage. As the claimant's injury occurred in Egypt, she could not bring her claim in England. She could, however, bring the FAA claim as this was a claim for an independent loss of dependency arising in England.

There was a strongly arguable case that there was contract between claimant and defendant and that it was made in England. Therefore, the gateway under 6BPD 3.1.(6) was satisfied and claimant's claim in England (breach of contract) could proceed.

Jurisdiction: under Brussels I

Shannon v Global Tunnelling Experts UK Ltd [2015] EWHC 1267 (QB)

An English claimant employed by an English defendant was injured in an accident at work in Belgium. The claimant sought to sue, in addition to the employer, two Belgian defendants. On the issue of whether the court had jurisdiction to proceed with the claims against the Belgian defendants.

Held by Jay J:

There was a risk of irreconcilable judgments arising from separate proceedings. Accordingly, article 6.1 of Brussels I applied and the claimant was entitled to proceed with his connected claims against the Belgian defendants.

Hoteles Pinero Canarias SL v Keefe [2015] EWCA Civ 598

The claimant was injured whilst on holiday in Tenerife. He brought a claim directly against the insurer of the operator of the Spanish hotel, pursuant to articles 9 and 11 of Brussels I. It was only when he discovered that there was a limitation on the insurance policy that he sought to join the hotel operator to the action, relying on article 11.3 of Brussels I. On the issue of whether the court had jurisdiction to hear this claim:

Held by the Court of Appeal:

The claimant was so entitled. Otherwise, there would be a real risk of irreconcilable judgments.

The defendant has permission to appeal and the appeal is due to be heard in 2016.

MIB 4th motor directive cases:

Moreno v MIB [2015] EWHC 1002 (QB)

The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 provide a remedy for a person injured in another EC country which the injured person can pursue against the MIB in England. The 2003 Regs give effect to the 4th motor directive. The Court of Appeal in Jacobs v MIB [2011] 1 All ER 844 had held that damages under the 2003 Regs are assessed by reference to English law.

Held by Gilbart J:

On a direct challenge by the MIB to the reasoning in Jacobs, in a Rome II case, that he was bound by Jacobs.

This case is on a leap frog appeal to the SC and will be heard in July 2016.

Wigley-Foster v MIB CA

Issue as to whether a claimant injured in a road traffic accident in Greece is entitled to rely on the 2003 Regs in circumstances where the Greek insurer became insolvent after a claim presented to the insurer (to which there was no reasoned response) but before a claim presented to the MIB.

Case has been heard by CA and judgment is awaited.

Applicable law: Rome II

Marshall and Pickard v Generali France Assurances and MIB [2015] EWHC 3421 (QB)

Mr Marshall was standing with Mr Pickard by Mr Pickard's car at the side of the motorway after it had broken down. Mr Pickard had a road traffic policy with RSA. A recovery truck, insured by Generali, was parked ahead of them. A French uninsured driver then drove off the motorway, collided with Mr Marshall (and Mr Pickard) such that he was thrown forwards and trapped by the trailer as the uninsured driver's car then collided with the trailer. Mr Marshall was killed.

The judge had to determine which law, French or English, applied as between Mr Marshall and Mr Pickard. If English law, as Mr Pickard had done nothing wrong, there would be no liability; if French law, which applied a rule of strict liability, then Mr Pickard/his insurer would be liable.

Held by Dingemans J:

Under Article 4(2) of Rome II, as both Mr Marshall and Mr Pickard had their habitual residence in England, the applicable law would be English law. However, that should be displaced under Article 4(3) and French law applied.

RSA is appealing this decision.

Applicable law: substance/procedure divide under 1995 Act

Allen v DePuy International Ltd [2015] EWHC 926 (QB)

New Zealand claimants sought to recover damages relating to faulty hip implants against an English defendant. The law of New Zealand applied. Under NZ law, there is a statutory bar on compensation claims and, in its stead, a no fault compensation scheme.

Held by Simler J:

The statutory bar was a substantive law provision. It removed or rendered unavailable the right to recover common law damages for personal injuries. Accordingly, the claimants could not recover damages.

CLINICAL NEGLIGENCE

Williams v Bermuda Hospitals Board [2016] UKPC 4

C attended hospital in the morning and, following a CT scan, was diagnosed with appendicitis and underwent an operation at 9.30pm. He was found to have sepsis which led to injury to his heart and lungs. There was some negligent delay and the operation should have taken place several hours earlier. The sepsis had started before the time when the operation should have been performed; it developed incrementally over 6 hours and was not divided into separate components causing separate damage to heart and lungs.

Held by Privy Council:

Bonnington established that where there are 2 simultaneous factors which lead to an indivisible injury, only one of which is negligent, then provided the negligent event is a material cause of the injury, the claimant can recover in full. The Bonnington principle applied equally where 2 factors operate successively rather than concurrently. As a matter of principle, successive events are capable of each making a material contribution to the subsequent outcome.

Given the negligence contributed to 2 hr 20 mins of delay during which the sepsis, which started 6 hours prior to the operation, was developing, it was right to infer that the negligent was a contributory cause of the sepsis.

Accordingly, C entitled to recover full damages for injury to heart and lungs.

Bailey v MoD did not involve a departure from the ‘but for’ test; it was an application of the ‘take your victim as you find him’ test.

Darnley v Croydon Health Services NHS Trust [2016] PIQR P4

C attended A&E after being struck on the head. He was told that he was likely to be seen within 4-5 hours. He left after 19 minutes and returned home where his condition deteriorated. He should have been seen within 30 minutes. Had he been seen by 30 mins, his condition would have deteriorated at hospital and he would have been effectively treated.

The question was whether there was a duty of care owed by reception staff at A&E to inform C that he would be seen within 30 minutes.

Held:

There was no such duty. It would not be fair, just and reasonable to impose a legal liability on civilian staff to provide information which was provided as a matter of courtesy. Further, C’s decision to leave after 19 minutes broke the chain of causation.

ABC v St. George’s Healthcare NHS Foundation Trust [2015] PIQR P18

C's father had Huntingdon's diseas as the defendant trust knew. D was under a hospital and restriction order having a few years earlier killed his wife, C's mother. C's case was that D should have informed her when she became pregnant even though her father refused to allow the medical staff to disclose this fact to C. She brought a claim in negligence and for breach of article 8 of the ECHR claiming psychiatric injury and economic loss and that she would have terminated her pregnancy but for the breach. D applied to strike out the claim.

Held by Nicol J:

The defendant owed its duty to C's father not to C. There was no comparable case establishing a duty of care to suggest that it would be an incremental step to find a duty of care was owed in this situation. C's case was based on an omission to act and it would be a radical departure to impose liability in circumstances such as these. The claim made under the HRA proceeded as an afterthought and added nothing. Claim struck out.

On appeal to CA for hearing in March 2017.

Evans v Royal Wolverhampton NHS Trust [2015] EWCA Civ 1059

Claimant underwent total hip replacement. The surgeon used cement to fix the cup. Some cement spread into neighbouring tissue. The surgeon severed the extrusion using his curette. It damaged the sciatic nerve and led to need for further operation. Trial judge held that surgeon's operative technique had fallen below the requisite standard.

Held by Court of Appeal: dismissing appeal, C succeeded.

Judge properly recognised that burden of proof lay with claimant and did not draw inference of negligence from fact that extrusion had been retained. Rather, judge found that the visible part of the extrusion must have been there to be seen at a part of the rim where extrusion was to be expected, so there was a failure to apply rigorous surgical technique. Court entitled to find negligence even though studies suggested that some extruded cement would be left in situ in up to 45% of cases. Per Dame Janet Smith: the studies tell one nothing about whether there has been negligence in a particular case; that question could only be decided by close examination of circumstances of particular case.

O'Connor v The Pennine Acute Hospitals NHS Trust [2015] EWCA Civ 1244

C underwent an operation in which the femoral nerve was damaged. Issue at trial was whether this was due to direct injury by the surgeon. Trial judge found it was and, it being common ground that constituted a breach of duty, C succeeded.

On appeal: appeal dismissed, C entitled to recover damages.

Jackson LJ accepted that the trial judge had not sought to apply the doctrine of res ipsa loquitur or to reverse the burden of proof. He had not made a finding that the nerve was damaged by the doctor just because it was the least unlikely explanation, which would have fallen foul of the principles set out in Rhesa Shipping. Rather the judge had made his finding on the balance of probabilities and based upon the totality of the evidence. He had been entitled to take into account the fact that the defendant had not proffered any plausible explanation for C's injury consistent with the exercise of due care.

Rich v Hull & East Yorkshire NHS Trust [2015] EWHC 3395

C born at 32 weeks by emergency caesarean and went on to develop Respiratory Distress Syndrome which led to Periventricular Leukomalacia and cerebral palsy. Questions on liability trial were whether mother should have been prescribed corticosteroids before delivery and, if so, whether steroids would have made a difference.

Held by Jay J: claim failed.

Steroids were recognised to help a pre-term baby but it was reasonable only to give one dose. This would be effective for 1-7 days. There was a duty to prescribe the drugs if the doctor had a clinical suspicion that the mother would or might deliver within the next 1-7 days. On the facts, the doctor was not at fault for not having such a clinical suspicion.

The judge adopted the test that if epidemiological evidence shows that the risk of RDS would probably have been more than halved, the claimant succeeds on medical causation. The epidemiological evidence in this case did not support C's case and so it would have failed on causation on that basis. Nevertheless, the claimant had established that the failure to prescribe steroids materially contributed to C's damage so C would have succeeded on causation had a breach of duty been established.

SECONDARY VICTIMS

Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] PIQR P20

Mrs Ronayne had an operation on 8 July 2009 which was negligently performed. As a result, she developed septicaemia. She became unwell on 18 July and the claimant, her husband, made a claim for psychiatric injury for his experiences on seeing his wife on that day.

Held by Court of Appeal:

The circumstances fell far short of those needed to found a claim for a secondary victim and the claim failed. In particular, there was no single event and no element of suddenness. When the claimant saw his wife, the experience was not horrifying as his wife's condition was just as one might expect to see in hospital. The claimant had been prepared for the sight of his wife in this condition and the experience did not lead to any 'violent agitation of the mind'.

Shorter v Surrey and Sussex Healthcare NHS Trust [2015] EWHC 614 (QB)

On 5 May 2009, Mrs Shorter underwent a CT scan, which was misreported as normal. On 12 May 2009, the mistake was realised and she was called into hospital. She arrived about midnight and promptly had seizures as a result of subarachnoid haemorrhage from which she died. Her sister made a claim for his psychiatric illness.

Held by Swift J:

The claimant knew about the defendant's negligence on 12 May when she received a telephone call from the doctor that morning. When she saw Mrs Shorter, there was no 'horrifying event'. The claimant's professional background (as a medical sister) made it more likely that she would find the events horrifying. Whether an event was horrifying had to be measured by objective standards.

Claim dismissed.

Owers v Medway NHS Foundation Trust [2015] EWHC 2363 (QB)

The claimant's wife was taken to hospital with a suspected stroke at 8.20am. The claimant's case was that there was a negligent delay in her treatment of about 3 hours. At about 9.40am, his wife's condition deteriorated and the claimant brought a claim for his psychiatric illness.

Held by Stewart J:

Dismissing the claim. There was no sudden appreciation of a horrifying event by objective standards, although what he experienced was clearly very distressing.

Wells v University Hospital Southampton NHS Foundation Trust [2015] EWHC 2376 (QB)

The claimant and his wife claimed that the hospital had negligently caused their baby to be born stillborn. This claim failed on the evidence. Had it succeeded, the issue would have arisen as to whether the claimant was entitled to claim as secondary victim.

Held by Dingemans J:

Dismissing the secondary victim claim. There was no shocking event or assault on the senses. There was the gradual dawning of realisation that his child's life was in danger. There was a caesarean section followed by efforts to resuscitate the child, which failed.

OTHER CASES

Standard of care when socially useful activity

Humphrey v Aegis Defence Services Ltd [2016] EWCA Civ 11

The claimant was employed to provide close protection security services in Iraq. He worked in a small team, each team having an Iraqi interpreter. As part of his and the interpreter's training, they were required to carry a stretcher under time pressure. The Iraqi, who was not as fit as the claimant and other security operatives, dropped the stretcher as a result of which the claimant wrenched his shoulder and had to give up his work.

Held by Court of Appeal:

Dismissing the claim. It was reasonable for the defendant to take into account the scarcity of Iraqi interpreters and the importance of the work the claimant and the interpreters were performing in the reconstruction of Iraq when deciding on the training exercise to be performed. The judge had not found that, but for the social utility factor, there would have been a breach of duty. The importance of the activity in question was a factor properly to be taken into account when deciding whether there had been a breach of duty.

Whether defendant's mental incapacity made him not liable in negligence

Dunnage v Randall [2016] PIQR P1

The claimant sought to rescue his uncle, Mr Randall, when Mr Randall poured petrol over himself and set the petrol alight. In the event he was unsuccessful and Mr Randall died. In the process, the claimant sustained serious burns. Mr Randall had been suffering from an episode of florid paranoid schizophrenia. The judge dismissed the claim in negligence on the basis that the defendant's actions were involuntary.

Held by the Court of Appeal:

The issue was simply whether the defendant breached his duty of care to the claimant. There is no principle which requires the law to excuse from liability in negligence a defendant who fails to meet the normal standard of care partly because of a medical problem. Only defendants whose attack or medical incapacity has the effect of entirely eliminating any fault or responsibility for the injury can be excused. Unless the defendant did nothing to cause the injury, the defendant will be held liable even though he suffers from a mental (or physical) condition which impairs his control.

In this case, the defendant did act even though his acts were directed by his deranged mind. Accordingly, the claimant's case succeeded.

Francovich claim

Delaney v Secretary of State for Transport [2015] 1WLR 5177

C was a passenger in a car driven negligently by P which led to C being injured. C and P were driving so as to transport cannabis for the purpose of drug-dealing. In C's claim against the MIB, the MIB successfully relied on clause 6.1(e) of the Uninsured Drivers' Agreement (passenger who knew that the vehicle was being used in the course of a crime). C then brought a Francovich claim for damages against the Secretary of State on the basis that the exclusionary clause 6.1(e) was incompatible with the EU motor directives.

Held by Court of Appeal:

C succeeded in his claim.

The exclusionary clause in the MIB agreement went beyond the limited, exhaustive list of permitted exclusions in the 2nd motor directive. The breach by the defendant was sufficiently serious to give rise to liability and an award of damages.

Employers' liability and expert evidence

Kennedy v Cordia (Services) LLP [2016] 1 WLR 597

A home carer sued her employer when she slipped on an icy path whilst conducting a home visit. The risk of paths being icy was foreseeable. C's employer had addressed this risk by advising employees to wear safe, adequate footwear in inclement weather.

Held by the Supreme Court:

C was entitled to rely upon an expert engineering consultant who had qualifications and experience in the field of health and safety. This expert gave evidence that non-slip attachments were available which would have prevented C from slipping. D should have performed a risk assessment at which point it should have appreciated the need to provide such attachments for its home carers. D had breached the PPE Regs and was liable to C.

Commentary on the role of expert witnesses and approval of the guidance provided in The Ikarian Reefer.

Rob Weir QC focuses on all aspects of personal injury and clinical negligence matters. He has appeared in numerous reported cases over the years and has been shortlisted or won as 'PI & Clinical Negligence Silk of the Year' on numerous occasions. For more details on his latest case highlights or Devereux's leading personal injury and clinical negligence team, please contact our practice managers on 020 7353 7534 or email clerks@devchambers.co.uk.

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