



CASES AND TRENDS IN 2007: LIABILITY

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The most important case to have been decided this year comes near the year end: the House of Lords decision in the pleural plaques cases of *Johnston & others* (incorporating *Grieves v Everard*, on recovery for psychiatric injury). The combined decision confirms a trend in favour of defendants, but also indicates that the focus of attention can now be expected to shift to the contractual aspect of employee claims. This article reviews workplace and other tortious duty decisions of 2007.

WORKPLACE INJURY, DISEASE, & PSYCHIATRIC INJURY

A. Workplace injury; psychiatric injury; pleural plaques: *Johnson and Grieves*

Facts: The claimants were exposed in the course of their employment to asbestos, as a result of which they developed pleural plaques i.e. localised thickening of the pleura, the double-layered membrane surrounding the lung. The development of plaques is caused by, and indeed evidences, exposure to asbestos. Once it is discovered, the patient knows that he is at risk in the future of asbestos-related illness which (if it develops) will be painful and potentially life-threatening. Nevertheless, any subsequent development of asbestos-related disease (which may not occur at all, and if it does may follow after a period of years) is not caused by nor does it flow from the development of the plaques. Crucially the plaques themselves are – save exceptionally – asymptomatic.

Background: Over the years patients have suffered anxiety (or, possibly, recognised psychiatric illness) when a finding of plaques being present has been communicated to them by their doctors (or, possibly, further explained or commented on by others who have got to hear of their diagnosis).

In three cases in the 1980s dockyard workers were held able to recover from the Ministry of Defence for the onset of pleural plaques. In the first two in 1984, *Church* and *Sykes*, Pain J and Otton J respectively allowed recovery for the plaques and their development; in the third (*Patterson*) in 1987 Simon Brown J allowed recovery for development of plaques together with the risk of future disease and anxiety, upon a basis which came to be referred to as a theory of “aggregation”.

This remained the position on the authorities until it was challenged by the defendants in the *Johnson/Rothwell* litigation. In February 2005 Holland J, considering 10 test cases, allowed recovery on the aggregation basis, but his decision was overturned in the Court of Appeal. The House of Lords has now considered the litigation, by now reduced to 4 test claimants one of whom, *Grieves*, was a claimant with pleural plaques who developed recognised psychiatric illness as opposed to anxiety.

Decision: It is now authoritatively decided that pleural plaques cannot constitute damage sufficient to found a cause of action. The decision, as well as bringing to an end a chapter on recovery and asbestosis going back 20 years, contains (in *Johnson*) analysis of the nature of injury and damage and the definition of compensatable damage, and (in *Grieves*) discussion of the basis of recovery for psychiatric injury.

Johnson/Rothwell/Topping: The House of Lords were unanimous that the appeal should be dismissed. The first speech, with which all concurred, was given by Lord Hoffmann, and there was substantial agreement within the individual subsequent speeches. In summary, the reasoning, in the case of a claimant with pleural plaques who has suffered anxiety, is as follows:

- (1) Asymptomatic plaques are not compensatable damage
- (2) The risk of future illness does not constitute damage sufficient to found a cause of action
- (3) Anxiety about the possibility of future illness materialising does not amount to damage sufficient to found a cause of action either
- (4) There being no compensatable injury, there is no cause of action under which damages may be claimed, so that
 - although a person *with* a claim for compensatable physical injury may recover for anxiety and for the risk of future injury
 - a person as here *without* a claim for compensatable physical injury has no avenue for recovery for anxiety or future risk.

Grieves v Everard: In the case of a claimant with pleural plaques who has suffered a recognized psychiatric illness, different and special considerations apply because of the nature of the injury sustained.

- (1) For such a claimant to recover he must satisfy the requirements for recovery for psychiatric illness, for which “the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable” (per Hale LJ in *Hatton v Sutherland*, which their Lordships adopted as authority).
- (2) A person of unusual mental vulnerability cannot recover on the basis that he is apprehensive that he may suffer a tortious injury. The test to be applied is what would be the reaction of an employee of ordinary fortitude.
- (3) Absent specific knowledge (which is assumed unlikely) about how a particular employee is likely to react many years after he has left his employment to the risk of asbestos-related illness, an employer is entitled to assume that his employees as persons of ordinary fortitude will not develop psychiatric illness.
- (4) The case of *Grieves* is distinguishable from *Page v Smith* upon the basis that the precipitating event in *Page* was capable (in terms of foresight) of giving rise to physical as well as psychiatric injury.

(5) Specifically, the precipitating event in *Page* (see per Lord Hope at paras. 53-5, Lord Rodger at paras. 95-7)

- was a collision, i.e. a stressful/ sudden/ alarming single event:
- had a direct causal nexus with the psychiatric injury.

By contrast the events in *Grieves* were discontinuous in time and their connection indirect in nature: the original event was the inhalation of the asbestos dust, and the psychiatric illness complained of came on some 8 years later as the claimant developed a fear that he might at some yet further time in the future suffer from the effects of asbestos exposure. Moreover the mechanism by which he developed his psychiatric illness involved his doctor (who informed him about the plaques), and possibly the further intervention of others seeking to inform him about what to expect for the future.

Comment:

Aggregation: The rationale for the decision in *Johnston*, plainly stated in the words of Lord Scott at para. 73, is arguably harsh: “Nought plus nought plus nought equals nought”. None of the three elements (plaques, risk and anxiety) referred to can sustain a tort action, so there can be no recovery. It is noteworthy that Lord Hope sought at para. 42 to avoid this analysis; but in truth it seems inescapable.

Aggregation & negligible injury: Policy: What effect may policy have had upon the decision? None of their Lordships expressed themselves as adopting, and Lord Hoffman and Lord Hope specifically declined to adopt, the policy arguments in the decision of the Court of Appeal supporting the decision that pleural plaques were not a compensatable injury.

***Page v Smith*: distinguished but not departed from:** Lord Hoffmann considered that *Page* could be distinguished, did not therefore need to be departed from, and he would not wish to depart from it. Lord Hope (para. 52) and Lord Mance (para. 104) agreed but were more critical of *Page*, specifically leaving open the possibility that its correctness might need to be revisited in a future case.

Contract: It appears that this may be the way forward for claimants seeking recovery in future. Whereas in tort damage is a prerequisite to the cause of action, in contract it is not. These claims were framed in tort. Lords Hope, Lord Scott and Lord Mance drew attention to the scope for a claim based on the employer’s contractual liability, and noted that argument on that must await another case.

B. WORKPLACE STRESS: *DAW v INTEL INCORPORATION*

Facts: The claimant had been employed by the defendant for over 13 years. Early on in her employment she had had postnatal depression, to her employers’ knowledge, but recovered. She worked her way up to a good position. Increasingly stressed under a growing workload, she carried on working despite making 14 protests, until she was found in tears at her desk by her manager. He asked her to write out her problems, which she did at length and in detail. A promise by him to sort out management and staffing issues, and to give support, was not kept (there was confusion and inadequacy of line management). She consulted her GP, but did not resign. Finally however she saw her GP again; was signed off; attended the defendants’ Occupational Health department; left the office; and next day attempted suicide.

Issues: Various headings of conduct (as defined in the propositions of Hale LJ in *Hatton* at para.43) were in issue, in particular management and staffing inadequacies, the complaints to the defendants and their knowledge of the problems, and their conduct in failing to support the claimant as promised. On the facts, there was a consistent medical history up to and including the final breakdown.

For their part the defendants sought to rely on the claimant's conduct in two particular respects: firstly she had not resigned – they contended that it must be for an employee to decide whether to leave or carry on in the same employment. Secondly they relied on the counselling they had provided: they criticized her for failing to use it, and contended that the provision of counselling sufficed to discharge their duty to her.

Decision: At first instance the claimant recovered. In the Court of Appeal that decision was upheld.

- (1) On the facts, the Court of Appeal upheld the decision as to the events leading to the end of the employment and their effect; as to the findings of management failure; and as to causation. A particular point to note is that the claimant's failure to give up the job did not remove or discharge the defendant's duty.
- (2) As to the provision of counselling services, the claimant could not reasonably be criticised for not using the counselling offered.

Comment: The case is of particular interest as showing that mere provision of counselling is

- not a panacea, and
- not sufficient to discharge the employer's duty.

Thus defendants will be well advised, before seeking to rely on *Hatton* proposition (11) at para.43, to consider their evidence carefully overall: an employer providing counselling is merely "unlikely" to be found in breach of duty.

C. WORKPLACE MANAGEMENT: CONTRACT/TORT: *DEADMAN v BRISTOL CITY COUNCIL*

Facts: The claimant was an employee of the defendant council for over 30 years, latterly as a team manager. An allegation of sexual harassment was made against him by a female fellow-employee, which he denied. The defendant's procedures for dealing with such complaints were not fully complied with: the panel was incorrectly constituted, and so after challenge by the claimant, the panel decision was set aside. The defendant then decided however that the claimant should face rehearing before a new panel. A letter notifying him was left waiting on his desk for him to read on his arrival at work. He alleged that this mode of communication had been very stressful for him. He consulted his doctor, his state declined, he went off work, and he did not return. At first instance the claimant recovered, on the basis that though there was no breach of the duty of care by the defendant, still damages were recoverable for breach of contract (the procedural errors).

Decision: In the Court of Appeal the defendant's appeal was allowed and it was held that there was no breach of contract which sounded in damages, nor of the duty of care.

As to contractual breach, the terms of the contract were restrictively construed: the Council was obliged to follow its procedures, not to undermine the relationship of mutual trust & confidence, to take reasonable care to avoid causing the claimant foreseeable harm, BUT NOT to investigate complaints of employment sensitively.

There was no finding to suggest that the defendant should have been aware that the claimant had been liable to be severely adversely affected by the operation of its complaints procedure. It was not suggested that the error in panel constitution would (reasonably foreseeably) have had adverse consequences for his health. It was not reasonably foreseeable that he would sustain psychiatric injury as a result of the manner of communication of the convening of new panel.

Comment:

This was another (failed) post-*Hatton* attempt at an alternative basis of claim. It is an interesting precursor to the observations of the House of Lords in *Johnston* on the potential for claims in contract as well as tort.

- The claim was framed in contract as well as in tort
- The claim in contract failed because the contractual terms (express and implied) were of narrow ambit, and there was no causative contractual breach
- Various *Hatton* propositions were discussed, and the Court of Appeal reminded itself under proposition (2) that the threshold question was whether *this* kind of harm to *this* particular employee was reasonably foreseeable
- On the foreseeability of injury to *this* employee, the evidence showed what was known and to be inferred about him: he had “robust good health”, and had been employed for 30+ years with only five days off for ill health. (This underlines the usefulness to defendants of an employee’s good health record.)

OTHER DUTY DECISIONS: HOMES, LIFESTYLE, & ACCIDENTS:

E. LOCAL AUTHORITIES & HIGHWAYS: *LEY v DEVON COUNTY COUNCIL*

A footpath on a council housing complex was not a highway maintainable at public expense under the Highways Act 1980, so that a claimant resident nearby could not recover from the highway authority for injuries sustained in a tripping accident on the path. The decision in *Gulliksen v Pembrokeshire CC*, and the dicta of Sedley LJ, did not provide a definition of the word highway, but the facts in every case need to be explored to ascertain whether the relevant area was a place where the public had a right to pass and re-pass unhindered. Here the area was clearly private property.

Comment: This decision may serve to limit the effect of the decision in *Gulliksen*, which was distinguished on the facts. It emphasizes the need for research on the facts. Thus the circumstances of the alleged highway area being laid down or paved, any notices posted, etc. need to be considered as soon as possible after the alleged accident before evidence goes stale or is lost.

E. LANDLORD’S DUTY TO REPAIR: *ALKER v COLLINGWOOD HOUSING ASSOCIATION*

A landlord’s duty of repair and maintenance under section 4(1) of the Defective Premises Act 1972 does not extend to intact and undamaged plain glass (not safety glass) in a front door. A tenant injured by accidentally breaking the glass with her arm could not recover for breach of the duty because the state of the glass panel (intact and undamaged) did not constitute a “relevant defect”.

F. HOLIDAYS AND THE OCCUPIERS LIABILITY ANALOGY: *EVANS v KOSMAR VILLA HOLIDAYS PLC*

The contractual duty of a tour operator under a package tour holiday contract does not extend to protecting a holidaymaker from harming himself by diving into a swimming pool. A person who so injured himself was not able to complain of insufficiency of “no diving” signage around the pool, could assess the risk of using the pool himself, had to accept responsibility for the risk he took, and could not establish liability under the Package Travel, Package Holidays and Package Tours Regulations 1992 reg.15 for improper performance of the holiday contract. The tour operator owed no duty to protect the holidaymaker from obvious risks, and the jurisprudence relating to the liability of occupiers applied, as in *Ratcliff v McConnell* and *Tomlinson v Congleton BC*.

G. HORSE-RIDING: ACCIDENTS CAN HAPPEN: *MACCLANCY v CARENZA*

Facts: A horse rider suffered serious injury and claimed against her riding instructor alleging duty to warn of hazard posed by a low-hanging branch. The route had previously been ridden, but the claimant contended that the branch was leafier in summer and so more dangerous. Evidence on fact and causation included copious witness, expert and photo evidence: was the branch dangerous?

Decision: The Judge found against the claimant. He considered that there might be “an element of confabulation” in her account (possibly assisted by the fact that her damages claim included claims of inability to extend a leasehold, and of lost business opportunities, when before the accident she had not been working: he commented adversely on this part of her evidence). His judgment however also includes the observation that “... the English countryside is not carefully manicured so as to be free from hazards ...”, and that accidents can happen:

“Riding, particularly riding in open country, is not risk free. Of course, an instructor must take steps to reduce the risk to what is reasonable and acceptable ... I am acutely aware of the dreadful effect that this accident has had upon the claimant but I find that it was just that: an accident. Riders do sometimes fall from horses, even during riding lessons, it does not follow that the reason for their fall can always be identified, still less that the riding instructor is to blame ...”(paras. 67, 75)

H. THE VILLAGE GREEN & THE MAYPOLE: ACCIDENTS CAN HAPPEN: *COLE v DAVIS-GILBERT & ROYAL BRITISH LEGION*

Facts: The lady claimant tripped in a hole on a village green infilled after a previous May Day fete but exposed thereafter by persons or causes unknown.

Comment: The case preparation of the defendants merits a mention here, and is reflected in the lyrical prose of the individual judgments. The Court of Appeal were evidently impressed by the photographs of village life disclosed about the fete, the President of the QBD noting “the intensity of concentration on the children’s faces as they wait their turn to dance round the maypole ... and ... the proud smiles of their families ...”.

Decision: There was on the evidence no breach of duty by the Royal British Legion, previous organizer of the fete, for the hole, which had been exposed only shortly before the accident, nor were the owners of the village green liable for the hole. The relevant policy considerations as to the ascertainment of the standard of care were discussed, in terms that

“... Accidents happen, and sometimes they are what can be described as pure accidents in the sense that the victim cannot recover damages for the resulting injury because fault cannot be established. If the law were to set a higher standard of care than that which is reasonable in cases such as the present, the consequences would quickly become inhibited. There would be no fêtes, no maypole dancing and none of the activities that have come to be associated with the English village green ...”
(per Scott Baker LJ)

“... the law imposes no absolute duty in circumstances like this to keep the area of land in question safe. I would respectfully wish to emphasise ... the potential ill consequences of setting the duty of care at too high a level.” (per Laws LJ)

I. CONCLUSION

2006 was the year of the Compensation Act, with its attempt at section 1 to tackle the perceived perils of the compensation culture. Even without reference to the section (and with the exception of *Welsh v Stokes* an Animals Act claim for which space does not permit discussion here, and *Daw v Intel*) it will be seen that the higher courts in 2007 seem in practice – even if not always acknowledging such a policy – to have on liability issues adopted a restrictive approach.

All cases depend on their own facts, however. In the course of discussion here I have referred to some of the evidential points which are liable to arise, which may provide practical points of guidance.