

Editorial:

A Claim Delayed May Be a Claim Denied

Diana Brahams
Old Square Chambers
brahams@oldsquare.co.uk

Restrictions on Claims

Over the years, the courts have developed rules to impose restrictions on circumstances in which claimants who seek financial compensation through the courts can recover damages for a personal injury that they allege was caused or materially contributed to directly or indirectly by another party's negligent act.

A claimant for a personal injury must not delay more than three years before starting a legal action or he risks having his case statute barred. The key provisions are found in sections 11 and 14 of the Limitation Act 1980 which have been subjected to considerable analysis and disputed interpretation when applied to the facts of individual cases. Section 11 allows a claimant three years in which to start legal proceedings dating from the actual date of the injury occurring or, if later, three years from the date when the claimant first knew that he had suffered a significant injury. It is important to keep in mind that the Act expressly provides that *it is not relevant that the claimant did not know that the relevant act or omission constituted a breach of duty* – in other words he does not need to know that the defendant has been negligent. A fairly recent case on this point is *Fennon v Anthony Hodari & Co*, 21 November 2000.

The definition of a “significant injury” is contained in s 14(2):

“An injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy judgment.”

Should this test be applied objectively or subjectively?

In the case of *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441 the Court of Appeal decided (see in particular the judgment of Dyson LJ) that the test was subjective and should have regard for that claimant's personal characteristic, history and circumstances. However, in *Adams v Bracknell Forest Borough Council* [2005] 1 AC 76, in which *Bryn Alyn* was cited but not expressly disapproved, the House of Lords held the test to be applied was substantially *objective*. The House of Lords explained that the definition in s 14(2) had to be interpreted consistently with, *inter alia*, s 14(3)(a), which states that “a person's knowledge includes knowledge which he might reasonably have been expected to acquire” and “(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek”. The words “reasonable” and “reasonably” in s 14(3)(a) and (b) and in s 14(2) indicated that an objective approach was appropriate. The standard that had to be applied was that of the reasonable behaviour of (in this case) a victim of child abuse who had suffered the degree of injury suffered by the claimant in question and of which he had knowledge. Where the question arose of whether a claimant was reasonably inhibited from instituting proceedings by the injury itself, the *Bryn Alyn* test, modified to take account of the House of Lords decision in *Adams*, showed that the s 14(2) requirement was not solely directed to the seriousness of the injury. Even so, the quantum of damages that could be recovered from the injury was highly material to determining at any time whether a claimant would reasonably have considered his injury sufficiently serious to start proceedings. In this case the claimant knew soon after December 1996 that his injury was “significant” and his claim was statute barred.

Since then, the Court of Appeal decisions of

McCoubrey v MOD [2007] EWCA Civ 17 and *Young v Catholic Care (Diocese of Leeds) and Another* [2006] EWCA Civ 1534 have applied an objective approach to s 14 of the 1980 Act, holding that a subjective approach was wrong and that unless the injury had impacted on the claimant's personality, character and intelligence, the intelligence and character of the claimant was not relevant when applying the test set out in s 14(2).

In answer to the question of when the claimant knew or alternatively when he should have known that he had suffered a significant injury that was sufficiently serious to litigate in the circumstances set out in s 14 of the Act the Court of Appeal held that the inclusion of the word "reasonably" in the definition (s 14(2)) made it clear that the test was an objective one based on a reasonable person of the same gender who shared the same objective circumstances as the claimant concerned and that the seriousness of the injury had to be considered in its own right and not defined by reference, even objectively, to its impact on the claimant's private life and career. By contrast, the trial judge had taken a more subjective (and sympathetic) approach when she held that the claimant, a soldier who suffered deafness in 1993, had acted reasonably when he did not regard his injury as sufficiently serious to justify proceedings until 2001 – the date when his employer told him that his hearing problems might exclude him from active service.

The Court of Appeal's recent and somewhat "purist" approach could be harsh on a claimant who may have (reasonably) believed his injury was not significant because he believed he would not recover much in the way of damages. Indeed, the House of Lords in *Adams* recognised that quantum recoverable for an injury is a significant factor in decision making, together with the adverse impact that an injury has on a claimant's life and earnings – that will be a key factor in prompting the start of legal proceedings for damages. Thus even in the nominal and unusual hypothetical circumstances provided in the Act this factor arguably cannot and should not be totally ignored or minimised, more particularly since the abolition of public funding for claimants seeking damages for a personal injury caused by negligence. The size of any potential award of damages will be a key factor when a claimant seeks a CFA from a solicitor and/or assistance from legal insurers, along with

proportionality – as it will be when the proportionality issues are taken into account when the Legal Services Commission considers an application for legal aid to support a claim injuries alleged to have resulted from clinical negligence. Smaller claims (i.e. below £20,000) are likely to be channelled down the new NHS Redress route soon (see the address given by Peter Walsh of AvMA in this issue).

Perhaps the Court of Appeal in the case of *Young* adopted a slightly more flexible attitude than that in *McCoubrey*, though the precise issue was not addressed. Dyson LJ said the court would take into account "the inhibiting and other consequences of the injury" when deciding whether an injury was serious enough to be significant. This would fit with the House of Lords' reasoning in *Adams*.

An Unfortunate Chain of Events

Another issue that has preoccupied the courts is whether the injury is or should be divisible – especially where there are a series of potential defendants and it is difficult to identify the extent of the injury caused by them, though it is clear that together they have negligently injured a claimant. This has been reviewed in the context of the mesothelioma litigation, where defunct companies and their insurers have been held liable many years later.

A different aspect of a divisible injury arises when two sequential negligent acts that both cause injuries follow one another and the first will try to argue that the chain of causation has been broken by a "*novus actus interveniens*" – a new cause of action that severs the effect of his own. In *Rahman v Arearose Ltd and University College London NHS Trust* [2000] 3 WLR 1184, the Court of Appeal was asked to decide to apportion liability when the claimant had been brought into hospital following a vicious assault that but for the alleged negligence of his employer would not have happened. His eye was badly damaged. He received negligent treatment on admission to hospital and lost the sight in one eye. A more common sequence (that I have personally acted on) is where a person trips and breaks her leg due to occupier's negligence and is admitted to hospital for treatment where she receives negligent medical treatment that resulted in her suffering a thrombus and ultimately the amputation of her broken leg. The negligent medical treatment has added to the hitherto

foreseeable consequences of the original injury which, with competent care, would and should have had a good outcome. Although these claims are quite common, there has been little litigation on them, presumably because they are usually sensibly settled and apportioned between the defendants. In *Rahman*, the parties appear to have assumed that the court would divide up the injury between the defendants. There was a very substantial psychiatric injury, but the defendants had instructed one psychiatrist to attempt to attribute the different aspects of the psychiatric injury to the different torts of assault and negligent medical treatment. The judgment given only by Laws LJ did not make any reference to material contribution and having declared (under the Civil Liability (Contribution) Act 1978) that the defendants were not concurrent tortfeasors, was concerned to apportion their liability vis-à-vis the claimant – there being no question that each was liable for the whole of the injury, subject to apportionment among themselves. After a complex review of what was in truth a single injury that was not obviously divisible, the Court of Appeal upheld the trial judge's original apportionment of 25% to the employer and 75% to the hospital.

In the very recent case of *Corr (Administratrix of the Estate of Thomas Corr, Deceased) v IBC Vehicles Ltd* [2006] EWCA Civ 331 (31 March 2006) the concept of whether there had been a *novus actus* to break the chain of causation and damages was considered in a very different context. The claimant appealed successfully against a decision that she was not entitled to recover damages that resulted from the suicide of her husband. He had been badly injured in a (negligence admitted) factory accident following which injury he had become very depressed. The deceased husband had suffered post traumatic stress disorder and was treated in hospital for depression. Six years after the accident he committed suicide. The widow claimed damages under the Fatal Accidents Act 1976 on behalf of her deceased husband's estate.

The trial judge held that the defendant had been in breach of its duty of care but said this duty of care did not extend to taking care to prevent the deceased's suicide and further held that his suicide was not reasonably foreseeable, although the depression that preceded it was. The claimant contended it was sufficient for her to prove that there was foreseeability of some injury and that depression and the consequent suicide lay within the scope of the employer's duty. The defendant employer averred that his duty of care did not extend to protecting the deceased from self-harm and that the suicide *broke the chain of causation between the negligence and its consequences*.

The Court of Appeal held the chain of causation had not been broken, with Ward LJ dissenting on the question of reasonable foresight. It said that: (i) On the evidence, the deceased's suicide did not break the chain of causation between the defendant's negligence and the consequences of the suicide (*Holdlen Pty Ltd v Walsh* [2000] 19 NSWCCR 639 (Aus) considered). (ii) The claimant did not need to prove that at the time of the deceased's accident his suicide was reasonably foreseeable as a kind of damage separate from the psychiatric and personal injury. The defendant's responsibility for the effects of the suicide depended on whether it flowed from a condition for which the defendant was responsible (having regard to the criteria for appropriate reasonable foreseeability). The claimant's case was here founded on the deceased's depression which was admitted to be a foreseeable consequence of the defendant's negligent breach of duty of care. It was not disputed that suicide was a common consequence of severe depression; since the depression was indisputably compensatable, so therefore was the suicide that flowed from it together with its consequences.

Effectively, the Court of Appeal held that the suicide was another link in the chain of causation emanating from the original breach of duty in the workplace.