Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- Liability and causation in a mesothelioma claim
- Fundamental dishonesty
- Liability in an off-road motorcycle event

Malcom Henké
Partner & Head of LACIG

Employers' Liability

Bannister (Deceased) v Freemans PLC (2020) EWHC 1256 (QB)

The deceased had contracted malignant mesothelioma and, after a prolonged illness, died on 12 March 2019, aged 73 years. It was alleged that he had been exposed to asbestos, negligently and/or in breach of statutory duty, probably more than 35 years ago in the course of his employment by the defendant.

The Deputy High Court Judge observed that two matters should be noted at the outset of the judgment.

First, such exposure did not involve the deceased working with asbestos or being regularly exposed to the clothes of a person who had worked with asbestos. He had been employed by the defendant as a manager in its accounts department. He alleged that, following the removal of a partition wall containing asbestos in his office at the weekend, on the following Monday he was exposed to a residue of asbestos dust on his desk and on the floor which was gradually removed over the course of the following days by the defendant`s cleaners who came into the office every evening.

Secondly, the defendant contended that asbestos fibres were found in the lungs of every adult, largely as a consequence of the past presence of asbestos in buildings, vehicles and in commerce, particularly in an urban environment and that a significant percentage of both male, and particularly female, mesothelioma cases could not positively be attributed to occupational or domestic asbestos exposure.

Quantum had been agreed, subject to liability.

The issues to be resolved at the trial were:

1. To what degree, if at all, was the deceased exposed to asbestos dust during the course of his employment by the defendant? There was a dispute as to whether or not the deceased was exposed to any asbestos dust.
2. Whether such exposure was caused by the defendant`s negligence and/or breach of statutory duty? On this issue the defendant conceded that it owed a duty to reduce the deceased`s exposure to asbestos to the lowest level reasonably practicable and that it would have been in breach of such duty if there was, as the deceased contended, visible residues of asbestos dust in his office after works in relation to the partitions of his office.
3. What was the extent of that exposure to asbestos dust?
4. Whether any such exposure constituted a `material increase in risk` of the deceased developing mesothelioma which is the modified test of causation in mesothelioma cases following the judgments of the House of Lords in Fairchild (2003) and of the Supreme Court in Sienkiewicz (2011).

After expressing some doubt as to the accuracy of the deceased`s recollection of events (provided on commission shortly before his death and probably prompted by another witness) the judge made the following findings of fact:

1. The deceased was given prior warning that the partition would be removed and that such warning was contained in a memo sent to him. The memo did refer to the infill panels in the partition containing asbestos. It was inconceivable that such memo would have so stated unless such was accurate. Although at that time asbestos might not have been perceived by laymen to have been as dangerous as it currently was, employers and building contractors would have been aware of the dangers of asbestos. However, in circumstances where the defendant had identified the presence of asbestos containing infill panels which required to be removed, it was very likely on the balance of probabilities that it would have appreciated the need to engage a specialist contractor to undertake the removal of the asbestos and undertake all appropriate and necessary precautions.
2. The partition works were probably carried out in 1983 or 1984. At the time the deceased was aged 37-38 years. These works involved the removal of some/all of the partition and its subsequent replacement. The weekend immediately after the memo was circulated to the deceased, the infill panels of the partition were removed. Such works would inevitably have produced asbestos dust and if the deceased returned to work on the Monday, it was possible that he could have been confronted with asbestos dust which had not been removed by the contractors who had undertaken the work. However, what had been removed that weekend was some short time later replaced, no doubt with non-asbestos containing material. That work too would inevitably have produced dust, although it would not have been asbestos dust because it is not suggested that any replacement materials contained asbestos.

'…the defendant probably used reputable and specialist contractors to undertake the works because there would have been little point in it advising employees…of the presence of asbestos in the partitions for it to then ignore the risks associated by asbestos…'

3. On the facts of this case, on the balance of probabilities, the defendant probably used reputable and specialist contractors to undertake the works because there would have been little point in it advising employees such as the deceased of the presence of asbestos in the partitions for it to then ignore the risks associated by asbestos and to engage non-reputable contractors who might not have understood such risks. It thus followed that on the balance of probabilities the deceased was not exposed to asbestos dust when he returned to work on the Monday morning. However, on any view of the evidence

the deceased was exposed to such other dust for a very short time.

That finding was sufficient to dispose of the claimant`s claim, but out of an abundance of caution the judge addressed the others matters raised in this case.

4. On the basis of the experts' evidence, the deceased`s exposure to asbestos whilst in the employment of the defendant gave rise to a cumulative dose in the region of no more than 0.0004 fibre/ml years.

5. The burden was on the claimant to show on a balance of probabilities that any exposure to asbestos suffered by the deceased in the course of his employment by the defendant gave rise to a material increase in the risk of the deceased suffering from mesothelioma. The claimant had not established that any exposure which the deceased suffered in the employment of the defendant, caused a material increase in the risk of him developing mesothelioma.

The judge therefore concluded that he was not persuaded on the balance of probabilities that the deceased was exposed to asbestos dust during the course of his employment by the defendant and that he was also not persuaded on the balance of probabilities that even if the deceased had been exposed to asbestos dust in the course of his employment that such exposure resulted in a material increase in the risk of the deceased developing mesothelioma. Any such exposure was de minimis.

The claimant was represented by Fieldfisher LLP

The defendant was represented by BLM LLP

Comment

Fundamental to the outcome of this case was the judge's approach to the problem of the reliability of historical lay evidence. He found that the deceased had little independent recollection of events and had relied heavily on his supporting factual witness but their evidence still differed in some respects.

Fundamental Dishonesty

Garraway v Barrett Limited (Brighton County Court 1 April 2020)

The claimant was 63 years old when she was involved in an accident at the defendant's shop. She struck her head on a metal shutter in the doorway of the shop, which had been partly lowered just ahead of closing time.

Liability was admitted and the trial was of causation and quantum only.

By the time of the trial the claimant was unrepresented and the issues to be determined were:

a. Contributory negligence;

b. Causation;

c. The quantum of general damages for pain, suffering and loss of amenity for physical injury only. The claimant was debarred from claiming damages for psychiatric injury or special damages because she had failed to comply with a series of unless orders made by the court in relation to the service of evidence.

The claimant's case was that while she was completing her purchase of an item, the defendant's employee began to lower the metal shutter over the side entrance to the shop. (The defendant's evidence was that this was an extremely noisy process).

Having completed her purchase, the claimant stepped back on her right foot and looked towards the side entrance to see if it was clear and saw clear floor space stretching out into the shopping precinct in which the defendant's shop was situated. She then stepped forward towards the till to pick up her purchase and change and a free sample sweet before making her way towards the side entrance. When she reached it her face hit the metal shutter.

Some of the details of the accident were in dispute and this led the judge to consider the claimant's credibility in some detail. Having cited the relevant authorities, he held that the issue of the claimant's credibility in this case was determined by her evidence about her injuries and the cause of her injuries.

There was a very considerable discrepancy between what she said were her injuries caused by the accident and the documentary evidence of her injuries and the medical experts' view of them. The defendant had also obtained surveillance

footage which contradicted the claimant's evidence of her ability to do things and her account to each of the experts about her abilities.

The judge found a stark discrepancy between the way the claimant had described her medical condition in her witness statements and to the two medical experts and the video surveillance evidence, and between the medical notes and her own account now of how her back pain developed.

The claimant had also failed to disclose to either medical expert an incident of back pain 13 months before the accident. Instead she gave an account to them that she had suffered no previous back pain. This was significant because of the experts' view that she had a pre-existing condition in her spine. The judge was unable to accept as credible any evidence from the claimant unless it was clearly supported by cogent documentary or other reliable evidence.

The judge accepted the claimant's description of the accident as being accurate in the main. The question was what view did she have of the shutter? He held that it was a very clear one. She must have seen it and then forgotten about it, or misjudged its height (the latter was more likely) having bent over to sort out her bags.

The judge rejected the claimant's evidence that the view was obscured. Anyone looking towards the shutter, as she was and said she did immediately before bending over her bag would see that it had been lowered. It also made a considerable noise as it was lowered. The clamant ought to have been aware that it had been lowered.

The height of the shutter when lowered was probably lower than 1.66m from the floor. The claimant hit it with the bridge of her nose. She was 5ft 5 ½ in tall (1.66.37m).

As far as contributory negligence was concerned, the defendant argued for a reduction of 50% to reflect that the claimant looked at the shutter, would have heard the noise and would have been aware that it had been closed. The judge held that the real point was that unless the claimant deliberately walked into the shutter in order to injure herself, it was unlikely that she was aware of the risk immediately before she struck it. She must have been distracted and forgotten what she had previously known. This entrance would normally not be a hazard (at least from a lowered shutter) and therefore a pedestrian might not be looking out as much. That was why someone should have been standing there to warn but the employee involved in lowering the shutter was distracted.

The claimant must bear some of the responsibility for the accident and causation, but the appropriate figure was 25%.

In her particulars of claim the claimant asserted that she had sustained a long list of injuries to her head and back, as well as psychiatric injuries. The judge dismissed most of the allegations of injury, finding that the claimant had suffered bruising from the collision of the bridge of her nose with the shutter. This caused a soft tissue injury with bruising spreading either side of her nose and black eyes.

The claimant's back injuries were not caused by the accident. The claimant had convinced herself that it did, but that belief was not consistent with the chronological development of the symptoms and the medical evidence.

As a result, the claimant had missed no opportunity to justify her belief and to persuade the court that she had proved her case. This had led her to exaggerate her condition to the experts and to attribute symptoms to the accident which there was no rational reason to do.

'(The claimant) had been fundamentally dishonest in the presentation of this case and in her presentation of her condition both to the court and to the experts'

The claimant had exaggerated her symptoms and misled the experts. She had been fundamentally dishonest in the presentation of this case and in her presentation of her condition both to the court and to the experts. She might not have recognised that she was being dishonest because she had become obsessed with this case, and with attributing her current medical condition to the accident. There was a considerable psychiatric element to this. Nevertheless, what she had done was objectively dishonest and in doing so, she has misled the experts. Nothing could be more fundamental in a personal injury claim of this nature than to give the experts a false impression of her condition.

The defendant had proved dishonesty and that the presentation of the claimant's condition falsely went to the root of this case. While she had suffered an injury as a result of walking into the shutter, the soft tissue injury to her face was a very minor claim compared to the much more significant claim relating to the back injury – even the other heads of loss were ignored.

The court would have awarded damages of £650 for the face injury, which was a soft tissue injury which resolved relatively quickly.

There were no grounds for finding that it would cause the claimant significant injustice to dismiss the whole of the claim.

The claimant was fundamentally dishonest in relation to the back-injury claim, and that as a result the claim should be dismissed, including the claim for £650 which was not otherwise tainted with the dishonesty. She should also pay the costs of the proceedings.

The claimant appeared in person

The defendant was represented by Kennedys

Comment

This is an interesting example of a valid claim becoming tainted by fundamental dishonesty through gross exaggeration of the injuries sustained. The claimant may not have been assisted by the fact that her claim was initially submitted by solicitors through the PL claims portal, but both the solicitors and direct access counsel had withdrawn before the trial.

Public Liability

Wells v Full Moon Events Ltd and others (2020) EWHC 1265 (QB)

On 26th September 2015 the claimant took part in an off-road motorcycle event which was operated by the second defendant (the only defendant against which the action proceeded). The event involved riding for approximately 20 miles over varying terrain, including narrow tracks, open grassland, trails through forests and byways which were open to all traffic.

During the afternoon, while riding along a byway which was open to all traffic, the claimant had a motorcycle accident in consequence of which he suffered catastrophic injuries which have caused him tetraplegia.

He rode through a section of the byway which contained muddy water and it was his case that the front wheel of his motorcycle struck an object concealed within the water which caused the handlebars to jerk violently out of his hands, causing him to lose control of his motorcycle before he had any time to react. The claimant came into collision with a tree standing beside the track, in consequence of which he suffered his severe injuries.

The claimant's case was that the accident was caused by the negligence of the second defendant and that it acted in breach of an implied term of the agreement with the claimant that it would organise the event with due regard to the safety of the claimant and other participants.

The second defendant admitted the implied term in the agreement pleaded by the claimant, that it would organise the event with due regard to the safety of the participants, but denied that the accident causing those injuries was due to any negligence or breach of contract on its part.

The defendant's case was that:

" By reason of the Signing on Form and the Declaration and Indemnity signed by the Claimant, the Claimant confirmed that he was aware:

(1) Motorsport, including Motocross/ Enduro/Trials was and is dangerous and hazardous and participation might result in injuries and/or fatalities.

(2) That he was attending a physically demanding hazardous and dangerous Event."

The defendant did not admit the circumstances of the accident alleged by the claimant. Its case was that even if the claimant was able to prove that he struck a concealed object in the water, there was no duty owed to the claimant in relation to the risk posed by the possible presence of concealed objects in the water, because it was an obvious risk to an adult that muddy water might conceal objects.

The claimant was now 50 years old. Prior to his accident he was a roadside technician with the AA. He gave evidence that he considered himself to be an experienced motorcyclist, both on and off-road.

No issue of volenti non fit injuria was raised by the defendant in relation to the terms and conditions of participation in the event signed by the claimant. In cross-examination the claimant acknowledged he knew that off-road riding carried the risk of serious injury and that if he made a mistake there was a risk inherent in what he was doing that he may fall off and injure himself.

Finding in favour of the second defendant, the Deputy High Court Judge held that on the basis of the factual and expert evidence, the claimant had failed to discharge the burden on him to prove that he struck an object concealed in the water which was large enough to precipitate his fall. Although there was no burden of proof on the defendant, it was more probable that the claimant's fall was precipitated by him striking the rocks on the eastern side of the puddle, due to making an error in the manner in which he negotiated the puddle.

Although the claimant had failed to prove the cause of the loss of control as pleaded, the judge considered the issues which would have arisen if he had been satisfied on the balance of probabilities that his loss of control was due to encountering a concealed object beneath the muddy water. The judge considered various authorities, in particular Tomlinson v Congleton BC (2004). He then made the following findings

1. On the basis of the claimant's own evidence, the signing on form and the Indemnity signed by the claimant showed that he fully accepted there was an inherent risk in motorcycling off-road and that he was aware of those risks.
2. In cross-examination the claimant accepted that with all his motorcycling experience he would know there might be something concealed beneath a muddy puddle and that he did not need a warning about that. It was an obvious risk to an adult (as accepted by the claimant) that muddy water might conceal objects.
3. The claimant's evidence was that he had many years' experience of riding sports bike, trials bikes and motocross bikes, he considered himself to possess the skills to describe himself as experienced and competent – a good all-rounder. He was sufficiently experienced and skilled to negotiate the track and accident site without any difficulty. On the alternative factual basis that the claimant struck a concealed object beneath the muddy water, the accident was due to his own error in the manner in which he negotiated the puddle.
4. The second defendant's operation was well run, with a high regard for the safety of the participants in the event. It was reasonable for the second defendant's instructor to bring the group, including the claimant, back along the path where the claimant had his accident. The track was a public byway which had been used frequently by the instructor and very many riders without any history of accidents. It was not difficult to negotiate and was nothing out of the ordinary.

The activity of off-roading involved wet and dry conditions. The claimant accepted this was part of the activity and that he enjoyed succeeding in negotiating off-road obstacles.

'…undertaking detailed risk assessments (and)… instructing experienced riders… would negate the experience… and would not be a reasonable requirement to impose on the defendant'

5. The defendant's submission was accepted that undertaking detailed risk

assessments, identifying all hazards, guarding against all hazards, instructing experienced riders on how to negotiate all sections of the course or expressly to avoid parts of the course which ordinarily would be regarded as part of the off-road experience would negate the experience of such an event and would not be a reasonable requirement to impose on the defendant. This took into account the social value of the event as a reasonable sporting or recreational activity.

6. It was not necessary for the defendant to carry out a risk assessment nor to give any warning in relation to the obvious risk that a water-filled muddy rut may contain a concealed object, as that risk was both inherent and obvious.

7. Even if the defendant was under a duty to provide the warning and there was a failure to provide the warning, it would be of no assistance to the claimant who was already aware of what he would have been warned of, and therefore there could be no breach.

8. Even if there was a breach of duty, it did not cause the claimant's accident. The claimant's evidence was that as he approached the puddle, he was aware of the risks and made his own assessment on how to negotiate it. The principles set out by Lord Hoffman in the case of Tomlinson were applicable to the facts of this case. There was no duty on the defendant to protect against the risk that the muddy water on the track might contain a concealed object as that risk was inherent and obvious to the claimant in the event activity which he had freely undertaken.

The claimant was represented by Novum Law

The second defendant was represented by Weightmans LPP

Comment

This appears to be a common sense decision that there are types of activity that carry with them inevitable risks. The judge was correct to note the sporting and recreational benefits that would be lost if event organisers were found liable in circumstances such as this.

Useful links:

Bannister (Deceased) v Freemans PLC (2020) EWHC 1256 (QB)

Wells v Full Moon Events LTD and others (2020) EWHC 1265 (QB)

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