Insight 183

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

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

- A judge's discretion under S33 Limitation Act 1980
- The EU Motor Directives
- Fact finding in an asbestosis claim

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Limitation/S33 Limitation Act

Azam v University Hospital Birmingham NHS Foundation Trust (2020) EWHC 3384 (QB)

This was an appeal by the defendant against the order of a Circuit Judge permitting the claimant's claim to proceed despite the expiry of the primary limitation period. The judge's order was made under S33(1) Limitation Act 1980 ('the LA 1980'), following the trial of a preliminary issue as to limitation.

The underlying claim arose from an operation which took place nearly 25 years ago, on 9 March 1996. The claim was issued on 20 July 2017.

The judge at first instance held that the primary limitation period had expired in March 1999 because the claimant had the necessary knowledge for the purposes of S14 of the LA 1980, almost immediately after the operation. He also held that there was no concealment for the purposes of S32 of the LA 1980. However, the judge concluded that it was equitable on the facts before him to give the claimant permission to pursue his negligence claim out of time, applying S33 of the LA 1980.

The defendant challenged this exercise of discretion. It submitted that when (at the end of his judgment) the judge came to assess the forensic prejudice faced by the defendant, he fell into error in two material respects.

(a) First, the judge was wrong to ignore the collateral forensic prejudice faced by the defendant. The judge had already found this to be a potential head of prejudice, and was wrong to exclude it from further consideration, alternatively did not afford it appropriate weight. It was complained under this head that the judge accepted a submission for the claimant that medical records were detailed and impressive. In fact, this was not common ground and the operation record contained scant detail.

(b) Second, the judge was wrong to decide that the loss of the operating surgeon as a witness in the case (he had died) did not amount to any or any significant forensic prejudice. Counsel for the defendant submitted that such a loss was the 'very epitome' of forensic prejudice. Were the surgeon still alive, it was said he would undoubtedly have been a witness in the case and would have been in a position to provide the experts and the court with an account of his standard practice in 1996, his reasons for advising and undertaking the surgery he did, and his account of the outcome.

The defendant submitted that the judge should have found that the following list of factors weighed heavily in the defendant's favour: the length of the delay (s.33(3)(a)) – egregiously long at eighteen years; the reasons for the delay (s.33(3)(a)) – none were advanced, other than that the claimant had accepted advice from the surgeons that this was a reasonable cosmetic result; the effect on the evidence (s.33(3)(b)); the defendant's conduct (s.33(3)(c)) – none; disability (s.33(3)(d)) – none; promptitude (s.33(3)(e)) – entirely lacking; steps taken by the claimant to take advice (s.33(3)(f)) – not relevant.

Overall, it was said that on those facts, had the judge performed the balancing exercise properly, he would have reached a different conclusion: the points all essentially went one way.

Having reviewed the basic principles concerning appellate challenges to the exercise of a discretion at first instance, the High Court Judge held that before turning to the two grounds of appeal, it was important to consider as a preliminary matter whether in the judge's general approach to the S33 question, there was any misdirection in law. In his judgment, it was clear there was no misdirection in law. The significance of this was that before one came to assess the discrete complaints about the exercise of the discretion (and the judge's assessment of the individual factors), one started from the position that the judge's directions in relation to the approach to the legal test upon which the discretion rested were impeccable.

Once that conclusion was reached, the task of the appellate court became heavily circumscribed: was the judge entitled to reach the determination on the basis of the individual factors evidenced before him, stepping back and looking at the overall fairness and justice?

'…a finding under S33(3)(b) that having regard to the delay…'the evidence adduced or <u>likely</u> to be adduced…is <u>likely</u> to be less cogent…', could not be made in reliance upon bare assertion in submissions'

Dismissing the defendant's appeal, the appellate judge held on ground 1 of the appeal that a finding under S33(3)(b) that having regard to the delay (underlining added), *'the evidence adduced or <u>likely</u> to be adduced…is <u>likely</u> to be less cogent…',* could not be made in reliance upon bare assertion in submissions. It required at the very least some evidential or sound inferential basis upon which to make findings about what evidence was not just possible, but likely; and that it was not just possible that it would be less cogent, but 'likely' so to be.

Putting to one side the surgeon's absence, the defendant adduced no evidence at all of any steps it had taken to try to trace any other witnesses it had identified (but which it could not trace), let alone any issue with their likely recall of events, if traced. Accordingly, the defendant's assertions concerning other witnesses (repeated on appeal) were pure speculation in the absence of evidence, which the judge would have been entitled to exclude entirely from consideration or weigh against the defendant.

As to the submission that the quality of the claimant's evidence was bound to have gone stale with time, it was clear that the judge's reason for finding against him on the S14 date of knowledge issue was not on the basis of a rejection of his evidence as likely to have gone stale.

The submission was also rejected that the judge ignored or did not give appropriate weight to collateral forensic prejudice and wrongly held that the medical records were detailed and impressive. This does not accurately record the judge's finding. What he said was: (underlining added): *'The medical records of the defendant pre-operation and the operation itself and as to what happened thereafter <u>appear on their face to be relatively comprehensive</u> and have been kept and will be available to the court at the trial'.* The underlined words were important. The judge was not making final findings on how comprehensive the records were but noting his impression. In any event, if the defendant was right that the records contained little detail, any forensic prejudice arising would not have resulted from the delay in commencing proceedings, as it must do to weigh against the exercise of the discretion.

But even ignoring the absence of a link with culpable delay, it would be wrong in principle if the defendant could rely upon its own clinician's shortcomings in record keeping as a ground of prejudice in its favour. This would encourage poor practice and make it forensically advantageous, which would be perverse.

Even if the claim had been brought before the surgeon's death, it would have been difficult for him to add

significant information which did not appear in those records because:

(a) as the judge found, it is highly unlikely that he would have recalled the operation, even if the claim had been brought in time; and

(b) any such additional information if material should have been recorded in the records.

At the level of principle, prejudice was not self-proving by reason of the death of the clinician or in every such case the S33 discretion would be automatically exercised in favour of the defendant. It was clearly an important factor and might in some cases be of very substantial weight. In clinical negligence it was not determinative.

The defendant's assertions about what assistance the surgeon's evidence would have provided to any of its experts were a matter of speculation upon which the defendant called no evidence and could not make out the evidential burden.

The defendant chose not to call expert evidence to make good the evidential burden of asserted prejudice. That was a litigation decision open to it, but it carried risks in a trial situation. If it had called such evidence, experts might have opined that the surgeon's factual evidence was needed for the defence to be properly advanced. The defendant had to establish its case on prejudice flowing from the surgeon's death by evidence and not mere assertion.

The judge also had no hesitation in rejecting ground 2. It proceeded on the ambitious basis that the judge '*failed to perform the balancing exercise*'. Yet, throughout the material parts of the judgment, that was exactly what the judge was doing.

There was no need for the judge (when he came to the negligence claim) to restate all the legal principles which he had clearly and correctly stated and applied a few paragraphs earlier when dealing with the informed consent claim.

The claimant was represented by Direct Access.

The defendant was represented by Bevan Brittan.

Comment

Although this was a clinical negligence case, it provides a general reminder that a defendant must prove prejudice if contesting an application under S33. The passage of time and even the death of a key witness may not suffice: it is not enough for the defendant merely to assert that there must be prejudice as a result.

RTA/Effect of EU Motor Directives

Colley v Shuker (1), UK Insurance Limited (2) and Motor Insurers Bureau (3) (2020) EWHC

The Claimant ('C') had been a passenger in a car driven by its registered owner, the first defendant ('D'). The vehicle had been insured by the father of D with UK Insurance ('UKI'), the second defendant. When D's father took out the insurance with UKI, he misrepresented that he was the owner and registered keeper. Moreover, the policy did not insure D, who in any event had no licence. C knew that D was uninsured. UKI therefore applied for and obtained a section 152(2) declaration that it was entitled to avoid the policy, thereby avoiding an RTA liability but also, then enabling it to avoid a liability as Article 75 insurer to meet any claim as agent of the MIB pursuant to the Uninsured Drivers' Agreement 1999 ('the UDA 1999') on the basis that C had knowledge that D was uninsured and was therefore not entitled to claim under the UDA. On a strike out application, C's claim against UKI was dismissed – C could not seek to argue that UKI's declaration was unenforceable on the basis that it was contrary to the EU Directive because UKI was entitled to rely on domestic law; EU law could not be enforced against UKI as a private individual (see further the decision in Colley v Shuker [2019] EWHC 781; for a section 152(2) declaration to now be effective, it must be obtained pre-accident as of 1st November 2019).

This judgment dealt with the trial of preliminary issues against the third defendant, the MIB. The preliminary issues raised questions of EU law, which turned on the proper construction of the EU Motor Insurance Directive ('the Directive'). At issue were two points: firstly, whether the MIB was liable to indemnity the claimant in the circumstances of this case as an emanation of the state; secondly, whether the MIB had a defence under Article 10(2) of Directive 2009/103/EC (the 2009 Directive).

It was submitted on behalf of C that the MIB was an emanation of the State as per Lewis v Tindale. Further, it was submitted that the UK government had conferred on the MIB the task under the Directive to remedy its failure to implement its obligations under the Directive consequent upon any incompatibility which, in this case, arose from the UK government's failure to amend section 152(2) of the Road Traffic Act 1988 to prevent UKI escaping the RTA liability it would otherwise have. Unlike in the case of UKI where there could be no direct claim, there was no impediment to C having directly effective rights against the MIB in the circumstances of this case. A Francovich claim against the Secretary of State for Transport ('SoSfT') had been stayed pending the determination of the preliminary issue with the SoSfT agreeing to be bound by the outcome of the preliminary issue trial.

Having considered in detail the relevant law, including both domestic and EU case law, the High Court Judge held that it was common ground that the obligation of the guarantee body (MIB) was not unlimited. It was specific and it was confined to two instances, namely compensation for damage to property or

personal injuries caused by (a) an unidentified vehicle, or (b) a vehicle for which the insurance obligation provided for in Article 3 had not been satisfied. The issue was whether the second of these was confined to an uninsured vehicle or also covered a vehicle which was insured but not in respect of the liabilities to the relevant claimant (e.g. because the insurer had subsequently elected to avoid the policy).

It did not suffice for the guarantee body simply to compensate for damage or injury caused by an unidentified driver or an vehicle which was not insured at all (as was the case in Lewis); it extended also to a case where the vehicle was insured, but where the law of the Member State allowed the insurer to avoid liability, thereby leaving the third party without a remedy.

The words in Article 10(1) of 'a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied' were broad enough to include any breakdown in the system whether due to the vehicle being uninsured because of the driver or its owner or the vagaries of the national legislation, in this case one that created the declaration in section 152(2) (other examples might include the vehicle being used outside the scope of cover or a deliberate acts exclusion applying).

The effect of the existence of section 152(2) and the declaration in this case was that this was a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied and/or the vehicle was equivalent to or treated as an uninsured vehicle.

The above references to the insurance obligation not being satisfied being a reference to an uninsured vehicle were either because this was the most common example of where this breakdown occurred: alternatively, they were to be understood as a shorthand capable of referring both to the absence of insurance cover or the equivalent thereof where the insurance cover was inadequate.

It therefore followed that the answer to issue 1 was in the positive, and C was able to rely upon Articles 3(1), 10 and 12 of Directive 2009/103/EC to require the MIB, an emanation of the State and compensation body for the purposes of Article 10, to pay compensation in the circumstances of the present case.

Issue 2 related to the defence if the first issue was resolved against the MIB. The MIB said that it was entitled to rely on the exclusion which defeated this claim in that 'the Claimant voluntarily entered the vehicle which caused [him] the… injury when [the MIB] can prove that [he] knew the vehicle was uninsured.'

The judge held that the wording of the exclusion in the second sub-paragraph of Article 10(2) was a reference to the vehicle being uninsured and not to the driver being uninsured. The exclusion was therefore where there was knowledge that the vehicle was uninsured rather than the driver not being a named or an insured driver.

'(The vehicle)…was at that point in time insured until such time as the court issued a declaration pursuant to S152(2) of the RTA 1988'

There was a distinction between the two. That was stated very clearly in Churchill v Wilkinson and in Fidelidade. The consequence as regards issue 2 was that the vehicle was insured at the time of the accident. It was at that point in time insured until such time as the court issued a declaration pursuant to S152(2) of the RTA 1988. This meant that at the point in time of C entering the vehicle and the time of the accident, the vehicle was insured, and C could not have known that the vehicle was uninsured because as a matter of fact it was insured.

This is significant: it means that the exclusion in Clause 6(1(e))(e)(ii) of the UDA 1999 and Clause 8(1)(b) of the 2015 Agreement, the latter stating in essentially the same terms the exclusion for passengers who knew or had reason to believe that 'the vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the 1988 Act.' Is contrary to the Directive, thereby significant reducing the potential instances where it could apply.

This was a case where issues 1 and 2 were resolved in favour of C, and without any inherent inconsistency.

At para. 21(b) of the MIB's Re-Amended Defence, the MIB contended that the 'use' of the vehicle was uninsured (i.e. following the wording found in the UDA 1999 and 2015). It was clear from the case law cited, that the test was not whether the use of the vehicle at the time of the accident was insured, but whether there was in existence a policy of insurance in relation to the vehicle at the

time of the accident, which there indeed was at the time of the collision.

The SoSfT had accepted that the regime of section 152(2) constituted a failure of the UK Government to institute in full a compulsory insurance regime, that is to say one that guaranteed compensation to passenger victims. The MIB had the task under Article 10 to remedy the failure of the government to institute in full a compulsory insurance regime earlier. C was entitled to invoke his directly effective Article 3, 10 and 12 rights in the circumstances of this case against the MIB as an emanation of the State which had the obligation to provide compensation in these circumstances.

The judge went on to hold that the test for a reference to the European Court of Justice for clarification of the law had not been satisfied. He has also refused leave to appeal although the MIB are, we understand, seeking leave to appeal to the Court of Appeal given the significant implications of the decision.

The claimant was represented by Irwin Mitchell.

The MIB was represented by Weightmans.

Comment

The Claimant's reliance on the decision in Lewis v Tindale to extend the scope of the MIB's liabilities was not unexpected. The MIB's argument that the Article 3 obligations were satisfied because there was a policy applying to the vehicle involved even if it did not respond to the claim, thereby relieving it of any liability to the Claimant will not come as a surprise to many.

Of perhaps greater significance is the court's determination that the MIB can only exclude a passenger claim where that passenger knew the vehicle itself was not insured, not merely the driver. In any given case it will be much more difficult for the MIB to prove such knowledge on the part of the passenger claimant and for example, being able to point to the passenger knowing the driver was unlicensed and therefore uninsured will not be the automatic grounds for success it once was.

This decision will, assuming it stands, also have wider implications: who should foot the cost of these claims? Should it be the UK government, the MIB (and therefore insurers via the levy to be passed on to their policyholders) or should, in a case such as this, the liability actually rest with the insurer of the vehicle as an agent of the MIB. The latter would require the MIB to amend Article 75 because at present an insurer such as UKI would only have a liability as Article 75 insurer if the MIB were required to satisfy a judgment the claimant first obtains against the negligent tortfeasor whereas in a case such as this, the claimant has a directly enforceable right against the MIB. Of course, come 1st January 2021, were the government so minded (which one has to doubt), the Road Traffic Act 1988 could be amended by new primary legislation to depart from the Directive to weaken the clearly increased rights of victims of road traffic collisions. Assuming that is not the case, we may well soon have left the EU but the impact of EU law on motor insurance law with, for the foreseeable future, remain as strong as it ever has.

Employers' Liability/ Asbestosis

Pinnegar v Kellogg International Corporation and another (2020) EWHC 3431 (QB)

This claim was brought by the deceased's daughter on behalf of her father's estate pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and on behalf of her mother pursuant to the Fatal Accidents Act 1976. Throughout his working life he had worked as a plumber/pipe fitter. For several months during the tax year 1966/67 he worked as a pipe fitter for the first defendant at the second defendant's site.

The claimant's case was that during that employment her father was exposed to asbestos when working alongside pipe laggers which materially increased his risk of developing mesothelioma. It was alleged that the exposure was caused by breaches by the defendants of the statutory and common law duties which they owed to him. Liability was denied by both defendants but damages were agreed, subject to liability, in the sum of £180,000.

The fundamental issue in the case was the extent to which the court accepted the deceased's account of his exposure to asbestos which he gave in his witness statement signed shortly before his death. The defendants challenged the reliability of that account but conceded that if it was accepted, then that would constitute breach of duty and liability would be established.

The consideration of the deceased's account was essentially a fact-finding exercise. In assessing the evidence, the Deputy High Court Judge recognised that he must take into account the following factors:

(a) The passage of time between his employment and when he was first asked to remember his history of asbestos exposure. He only had to recall this history after his diagnosis of mesothelioma, some 50 years after his employment at the site.

(b) At the time he made his witness statement he was very ill.

(c) It was probable the he had the assistance of his solicitor and that there were discussions between them before his statement was prepared and signed. That was an inevitable part of the litigation process. The extent to which those discussions might have informed the content of the statement and the words used by the deceases in his statement was a factor.

(d) The defendants had commented that the claimant refused a request for disclosure of attendance notes of the meetings between her father and his solicitor. This request was justifiably refused on the grounds of legal

professional privilege. The defendants invited the judge to take this into account when assessing the deceased's evidence. The judge found that it would not be proper to give any weight to it. To do so would tend to undermine the privilege and, in any event, it did not add anything to his assessment of the evidence in this case.

(e) It was probable that the deceased knew why the statement was being prepared. The claimant's own evidence was that she recalled the first meeting with the solicitor who came to the house once they became aware of her father's mesothelioma diagnosis. She recalled the circumstances of the meeting and that her father knew exactly what the purpose of the meeting was and recalled the detailed account given.

Based on the deceased's evidence and Inland Revenue records he probably started working at the site in the summer of 1966 and probably did not work for the first defendant at the site after the end of February 1967 at the latest. Where the deceased had worked informed the nature of the work he was doing and thus the potential for asbestos exposure.

The deceased was a pipefitter. It is not suggested that he worked directly with asbestos during his employment at the site. His case was that he worked alongside laggers who were variously involved in stripping, cutting and mixing asbestos.

On the evidence, on the balance of probabilities, there was at least one system of pipework within the Butadiene 2 plant at the site which required insulation. There may have been more. The deceased's recollection that he worked in

close proximity to laggers was probably accurate. He was able to describe what the laggers did when stripping or 'knocking off' old insulation, applying new pre-formed insulation and mixing paste for insulation. He had no other experience of working with laggers and the fact that he was able to describe this work in the way that he did added weight to the accuracy of his recollection. His description of talking to laggers, to them all working in the same part of the plant at the same time and that 'our jobs overlapped' was entirely plausible. The 'knocking off' of old insulation probably referred to the branching of steam pipes from the existing network. Although his description did lack detail as to the frequency and duration of such contact that was not surprising given the passage of time.

As to the deceased's exposure, there were two issues: first, what was the material that the laggers were working with? And, second, if such material did contain asbestos to what extent, if at all was the deceased exposed to it?

As to the nature of the insulation material, the experts agreed that the lagging to the pre-existing steam pipe work was likely to have contained asbestos. They also agreed that if the deceased worked in close proximity to others removing that asbestos lagging, he was likely to have been exposed to asbestos dust. There was no evidence to support a conclusion that any dust to which the deceased was exposed came from a non-asbestos based material. On the evidence, such materials were not available at the relevant time or, if they were, they were not consistent with what the deceased described as a white dust.

Accordingly, on the balance of probabilities, if the

deceased was exposed to white dust from the lagging works as he claimed then it was asbestos-based material. The suggestion that this was concrete dust was rejected.

As to the extent of the deceased's exposure, the judge made the following observations:

(a) The deceased's description of his working history generally appeared to be accurate and appeared to be consistent with his daughter's recollection that he had 'a very good recollection of his work history'.

(b) The lack of detail as to the nature and duration and frequency of his exposure at the site was entirely to be expected of a person seeking to recollect events that occurred some 50 years earlier.

(c) His account was consistent with the very brief account he gave in support of an application for Industrial Injuries Disablement Benefit.

(d) In certain matters of detail concerning this employment he had been shown to be accurate.

(e) He did not work with laggers at any other time during his working life and therefore his description of the work they did and their use of insulating materials could only have come from his observation of laggers working at the site.

(f) His description that 'I can recall watching them tip large asbestos bags out into drums…' implied not just a vague recollection but an actual memory of something which in fact happened which he witnessed.

'The fact that the deceased was able to recollect detail that had no relevance to the claim…added weight to his general reliability'

(g) The fact that the deceased was able to recollect detail that had no relevance to the claim such as his recollection that the pipework being worked on by the first defendant was painted green and his recollection that there was some animosity between pipefitters or plumbers on the one hand and the laggers on the other added weight to his general reliability. This part of his evidence was unlikely to have been misremembered or fabricated.

(h) Although the way the work was described in the statement might have been informed by discussions between the deceased and his advisers, that of itself was unremarkable. What was important was that he had signed a statement of truth confirming that he believed the facts stated in the statement to be true. His description of what the laggers were doing and the way they worked was entirely consistent with normal practice at the time.

(i) The material used by the laggers was in fact probably asbestos as the deceased described.

Looking at the totality of the evidence the deceased's account was broadly reliable. Importantly, his evidence was accepted that 'at the end of a typical day my work clothing, hair and face would be covered in white asbestos dust'. It may well be that his exposure was less frequent than that sentence implied, but the judge was satisfied that on many occasions the deceased's clothing, face and hair were covered in a white dust at the end of the day and that that dust was probably asbestos which emanated from the work of laggers. That probably happened as a result of laggers either stripping asbestos in order to enable the steam pipes to be branched out of and into the existing network; and/or cutting pre-formed asbestos sections with hacksaws; and/or tipping large asbestos bags out into drums in order to mix it on site.

It followed that the claim succeeded and there would be judgment for the claimant in the agreed sum of £180,000.

The claimant was represented by Beecham Peacock Solicitors.

The defendant was represented by BLM Solicitors.

Comment

Early in this judgment reference was made to a fact-finding exercise. It can be seen that the judge then went on to make a number of findings of fact, testing the deceased's account against other available evidence. Findings of fact are very difficult to appeal.

Horwich Farrelly

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