Case Comment

Leigh v London Ambulance Service NHS Trust

personal injury - damages - negligence
(QBD, Globe J, February 20 2014, [2014] EWHC 286 (QB))

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Subject: Personal injury. **Other related subjects:** Damages. Negligence
Keywords: Ambulance service; Causation; Delay; Material contribution; Measure of damages; Negligence; Post-traumatic stress disorder; Psychiatric harm
Cases: Leigh v London Ambulance Service NHS Trust [2014] EWHC 286 (QB); [2014] Med. L.R. 134 (QBD)
Bailey v Ministry of Defence [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052 (CA (Civ Div))
J.P.I.L. C161 At about 19.00 on November 17, 2008, the claimant, Ceri Leigh, boarded a bus at Wimbledon station on her way home from work. She was aged 45 years old at the date of the incident and 50 at the date of trial. As she went to sit down on a seat towards the back of the bus, she dislocated he***J.P.I.L. C162*** r right kneecap and as a result found herself trapped between the seats and was unable to move. She experienced severe pain. Several well-meaning passengers went to her aid, held her down and called an ambulance. She was informed that an ambulance was on its way on several occasions but no help arrived until 50 minutes after the incident. A number of calls were made during that 50 minutes before an ambulance arrived. Upon arrival paramedics were able to provide pain relief and manipulate the dislocation back into place.
The first emergency call was made at 19.02. The defendant has admitted that there was a negligent delay in the attendance of an ambulance, which should have attended by 19.33 at the latest. No ambulance arrived until 19.50, which was a delay of 17 minutes. Breach of duty was admitted in respect of the 17 minutes, which was about one third of the total period between the dislocation and the arrival of the paramedics. The claimant suffered pain and suffering from the dislocation and consequential psychiatric and psychological damage arising from the incident.
As a result of the events on the bus, Ceri Leigh went on to develop PTSD. This primarily characterised itself through flashbacks where she felt she was back on the bus and trapped, nightmares and a high level of anxiety and depression. Within a few months, she also began to suffer dissociative seizures where she would physically collapse and be unable to move or speak, but she could still hear and see her surroundings. Those symptoms occurred most days but over time their frequency and intensity varied. The seizures were not diagnosed by psychologists until around 18 months after the incident.
Having previously worked and lived in London, Ceri Leigh was forced to leave her job working at a museum, which she described as a job that she loved doing, and relocate with her family to Wales. She was unable to travel outside on her own and was largely housebound. When she went out with her family she might suddenly collapse in the street. She found it difficult to concentrate, plan and action ordinary activities such as housework and mentally tended to go round and round in circles. She became easily overwhelmed.
She claimed damages for the psychiatric and psychological damage. It was agreed that, arising from the incident, she had suffered PTSD. It was also agreed that, from a date that is in issue, she had suffered dissociative seizures.
There were three issues for determination:
1)
Whether there was a causative link in law, if any, between the defendant's admitted negligence and the claimant's PTSD.
2)
Whether there was a causative link in law, if any, between the defendant's admitted negligence and the claimant's dissociative seizures?
3)
The assessment of damages for any such causative link or links.
The Judge held that there was no injury that was caused on the bus. There were merely circumstances that arose which later led to the onset of the PTSD. He accepted that there are

innumerable variables in the circumstances that will give rise to the development of such a disorder and in the people who are likely to suffer it. It is impossible to predict on any scientific or mathematical basis the moment after which someone will go on to suffer it.
There was no dispute as to the legal framework of the case. The parties agreed that it is a "cumulative cause" type case in respect of which there should be the application of the principles summarised by Lord Justice Waller at [46] of the Court of Appeal case of *Bailey and The Ministry of Defence*:[1]
"… I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* [2] exemplifies such a situation. If the evidence ***J.P.I.L. C163*** demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."
Adopting the *Bailey* test, Globe J. was unable to find on the balance of probabilities that the PTSD would have occurred in any event before 19.33, which was the time by which the ambulance should have arrived. He was satisfied that this was a case where medical science could not establish the probability that "but for" the negligent failure of the ambulance to arrive before 19.33, the PTSD would not have happened. However, he held that it had been established that the contribution of the negligent failure was more than negligible. It made a material contribution to the development of the claimant's PTSD. The claimant therefore succeeded on the first issue.
During the trial the claimant gave evidence via video link. After about two and a half hours of questioning, Ceri Leigh had a seizure. It came completely without warning. One moment she was answering questions. The next, she was detached from reality. It manifested itself by her remaining seated in the video-link chair while appearing to be oblivious to what was going on around her. She was waving her hands as if to push something or someone away from her body. Her son was asked to enter the room to help her. He attempted to gain her attention. Suddenly, she collapsed in her seat and fell forwards onto the table in front of her.
The Judge had no doubt at the time from what appeared before him on the screen that what occurred was genuine. The proceedings were adjourned for further evidence the next day and with re-examination to take place two days later due to the unavailability of a video-link slot the following day. What happened, as the judge put it "proved to be illuminating". It helped him to gain a better understanding of the claimant's continuing psychiatric and psychological injury and assisted him greatly in reaching a conclusion over the second issue. His conclusion was that the dissociative seizures were all part of the claimant's PTSD and consequent upon it and were not related to her other life stressors as the defence had argued.
The evidence of the claimant's psychiatrist was that that her PTSD should be categorised as severe in accordance with *Ch.4(B)(a) of the Judicial College Guidelines*.[3] The psychiatrist was of the opinion that there were permanent effects that would prevent Ceri from working at all, or at least from functioning at anything approaching her pre-trauma level. He concluded that all aspects of her life were badly affected and only a small response to additional psychological therapy was expected. The expert's evidence was accepted by the Judge who awarded general damages of £60,000.

Comment

Though there has been some criticism in academic circles of Lord Justice Waller's judgment in *Bailey*, which applied an exception to the "but for" test in cases of indivisible injuries, both parties rightly accepted that the claimant's PTSD was the subject of "cumulative cause" pursuant to which the *Bailey* principles should apply. There are relatively few cases in which the application of *Bailey* has been reported, the principle ones being the clinical negligence birth defect cases of *Canning-Kishver v Sandwell & West Birmingham Hospitals NHS Trust*,[4] and *Popple v Birmingham Women's NHS Foundation Trust*.[5]
A similar approach to *Bailey* has been adopted in other psychiatric injury claims however, principally *Dickins v O2 Plc*.[6] In that case the claimant had suffered an indivisible injur***J.P.I.L. C164*** y (her seriously damaged mental state following mental breakdown) but with more than one cause. It was not possible to say that, but for the tort, she would

probably not have suffered the breakdown, but it was possible to say that the tort had made a material contribution to it.
In the present case, counsel for the defendant sought to prove that the ingredients of the claimant's PTSD were complete by the 19.33 hours, which was the time the ambulance would have arrived but for the defendant's breach of duty. His argument was that at 19.00—in the immediate moment before the claimant's knee became dislocated—the chance of developing PTSD was 0 per cent, but that by 19.50—the time the ambulance actually arrived—the chance was 100 per cent. This represented a period of 50 minutes and each minute beyond 19.00 amounted to an additional two per cent chance of the PTSD occurring. Hence, it was argued that by 19.33 hours there was a greater than 50 per cent chance of the PTSD occurring.
This clever argument might have found favour if there had been an evidential basis for the mathematical approach adopted. Unfortunately there was no reliable evidence to support the defendant's linear mathematical model (and had there been the "but for" test, rather than the *Bailey* exception, could have been applied). The defendant's expert psychiatrist (Dr Latcham) was able to offer no statistics, papers, studies or research work to support the contention that the claimant had experienced all the ingredients of her PTSD before 17.33 hours, and there was no guidance in the DSM-IV or DSM-V definitions of PTSD that assisted.
The judge preferred the view of the claimant's expert (Dr Sumner) that this was an indivisible injury which did not occur at any fixed time. Moreover, the PTSD did not occur on the bus, it was a disorder which developed as a consequence of one indivisible event on the bus as to which the whole time spent there was relevant. In the circumstances the Judge accepted that this was a case where medical science could not establish the probability required for the "but for" test. Instead, there was a material contribution to the PTSD from the defendant's delay and causation was duly established.
The time/exposure method of calculating degree (dose) of contribution is by no means a new concept. It can often be applied to divisible injuries which are dose related such as asbestosis. Quite rightly, however, the Judge rejected the application for an indivisible injury. One of the real issues in the present case had been whether PTSD was truly indivisible.
In relation to causation of the dissociative seizures, the defendant's expert psychiatrist had, in his report for the Court and in the experts' joint statement:[7]
"concluded with absolute certainty that the claimant's dissociative seizures were not related to her PTSD and were solely related to the other life stressors."
This conclusion was completely undermined by the seizure the claimant experienced during her cross examination. The defendant's expert was forced to accept that the seizure was a dissociative flashback related to her PTSD. Thus he had to concede that not all of her dissociative seizures were unrelated to her PTSD.
In discussion, the Trial Judge said that the evidence of the defendant's expert required "the closest possible scrutiny" because of the fact that his conclusions regarding the cause of the claimant's PTSD were not supported by statistics, papers, studies or research. And the scrutiny was all the more necessary given his "abandonment" of part of his conclusions about the dissociative seizures. The Judge said that in contrast he found the claimant's expert to be a compelling expert witness, and he preferred his evidence. He therefore accepted that the dissociative seizures were all part of the claimant's PTSD which he had already decided was caused (or materially contributed to) by the defendant's breach of duty.
This case reminds us of the degree to which experts need to investigate and research the state of medical knowledge regarding the cause of the medical condition in issue. The defendant's expert c***J.P.I.L. C165*** ame unstuck because he adopted a position not supported by any epidemiological data, but sought to apply what he termed "logic".
We are also reminded of the uncertainties involved in going to trial. The fact that the claimant experienced a full-blown seizure live in front of the Judge during evidence seriously undermined the defendant's case in a way that probably could not have been predicted.

Practice points

- The situations in which the *Bailey* exception to the "but for" test can be applied will remain extremely limited.
- In a case of indivisible psychiatric injury, it is inappropriate to apportion damages between negligent and non-negligent causes.

- If there is a proper evidential basis upon which the claimant's condition can be categorised as "divisible" and it is possible to determine the relative contributions made for different sources to its development, the "but for" test should be used.
- An approach based on common sense, while appropriate in an accident case, will prove unsatisfactory in cases where there may be a number of mechanisms by which a medical condition could have arisen, or where scientific knowledge remains uncertain.
- It is unwise to try and over-simplify the cause of medical conditions when such cause is not supported by the medical literature. The defendant attempted to apply a linear ti***J.P.I.L. C166*** me/exposure mathematical approach to a condition caused in a non-linear and uncertain way.
- Trials pose the risk of the unknown.

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J.P.I. Law 2014, 3, C161-C165

1.
Bailey v Ministry of Defence [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052; [2008] LS Law Medical 481.
2.
Hotson v East Berkshire AHA [1987] A.C. 750; [1987] 3 W.L.R. 232; [1987] 2 All E.R. 909.
3.
Judicial College, Guidelines for the Assessment of General Damages in Personal Injury Cases, 12th edn (Oxford: Oxford University Press, 2013).
4.
Canning-Kishver v Sandwell & West Birmingham Hospitals NHS Trust [2008] EWHC 2384 (QB).
5.
Popple v Birmingham Women's NHS Foundation Trust [2011] EWHC 2320 (QB).
6.
Dickins v O2 Plc [2008] EWCA Civ 1144; [2009] I.R.L.R. 58; (2008) 105(41) L.S.G. 19.
7.
Leigh v London Ambulance Service NHS Trust [2014] EWHC 286 at [53].