Case Comment

Wright v Barts Health NHS Trust

(QBD, Edis J, 26 July 2016, [2016] EWHC 1834 (QB))

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Wright v Barts Health NHS Trust [2016] EWHC 1834 (QB); [2016] Med. L.R. 545 (QBD)

J.P.I.L. C230 The claimant was a roofer. He was working as a sub-contractor for a roofing company. He was involved in an accident at work on 30 November 2011 when he fell through a skylight. He sustained multiple injuries, including a series of fractures at different levels of the spine as well as in the hip and pelvis. He was taken to the defendant's hospital for treatment.

At the end of his hospital treatment he had suffered a complete spinal cord injury and was a paraplegic. He initiated proceedings against the roofing company for the whole of his loss. The company began negotiations on the basis that he was liable in contributory negligence as he was the senior supervisor on site and was involved in the job's risk assessment. In the meantime, the claimant sent a letter of claim for damages to Barts Health NHS Trust, claiming that he had suffered negligent treatment that had caused the outcome of his accident to be much worse than it should have been.

In September 2014, he reached a compromise agreement in his claim against the roofing company. A substantial discount for contributory negligence was made in agreeing the settlement sum. In November 2014, he informed the trust of the compromise agreement and sent it details of it. He then issued proceedings against the trust.

The defendant trust issued an application seeking an order that the claim be struck out under CPR r.3.4 or, in the alternative, that summary judgment be entered for the defendant under CPR r.24. It is submitted that the claim is an abuse of process because the claimant has already accepted settlement in another claim for the injuries which form the subject matter of this action. Alternatively, it is submitted that the settlement operated to extinguish the loss and therefore as a defence to the claim. It said that the claimant had been ***J.P.I.L. C231*** compensated in full for his loss by the agreement with the roofing company and there should be no double recovery.

The judge pointed out that there was a pre-clinical negligence element of the damage caused to the claimant for which only the roofing company was liable. That element included the loss which occurred after the clinical negligence but which would have occurred anyway. After the clinical negligence, there was an additional loss which would not have occurred but for the clinical negligence.

Both the NHS trust and the roofing company were liable for that additional loss as, by causing the injury, the roofing company had exposed the roofer to the hazard of imperfect medical treatment. However, the roofing company was liable only for the proportion of the additional loss that remained due after the reduction for the claimant's contributory negligence. The trust however was liable for all of it.

The roofing company and the trust had each made a contribution to the additional loss by a different tortious act in breach of different duties to the claimant. They were therefore concurrent tortfeasors, and the release of one concurrent tortfeasor did not have in law the effect of releasing another.[1] The proper approach to a compromise case was to focus primarily on the construction of the agreement in its appropriate factual context.[2] The test was whether the agreement represented the full measure of the claimant's estimated loss.[3]

Edis J held that in the claimant's case, he had not been fully compensated. Because of the contributory negligence discount, the roofing company was not liable for the whole of the additional loss. It had neither paid nor purported to pay the whole loss caused by the hospital (on the assumption that the roofer's claim against the latter would succeed). It was therefore

impossible to construe the compromise agreement in its true factual context as providing full compensation for the loss being claimed against the trust.
The judge found that settlement with one concurrent tortfeasor did not release the others, unless it was clear that it was intended to have that effect, or unless the payment clearly satisfied the whole claim. There was no risk of double recovery as the claimant had agreed that appropriate credit would have to be given for the sum he had received from the roofing company if his claim succeeded. The application was dismissed.

Comment

It is not uncommon for a claimant injured by the actions one tortfeasor to suffer further injury at the hands of the medical staff who have stepped in to provide treatment. Sadly, it is also not uncommon for that further injury to have been caused by imperfect medical treatment. Indeed, imperfect medical treatment is now (and probably always was) an accepted and foreseeable hazard of life. Any injury can be regarded as carrying some risk that medical treatment might be negligently given. It is for this reason that incompetent medical treatment will rarely break the chain of causation between the initial tortious act and the full extent of injury and loss suffered by the claimant.
The Court of Appeal clarified the position in a not dissimilar case from the present, namely *Webb v Barclays Bank Plc*,[4] where it was held that medical treatment would only break the chain of causation if it were "so grossly negligent as to be a completely inappropriate response to the injury inflicted by the [original tortfeasor]".[5] Such "gross negligence" would need to eclipse the original wrongdoing.[6]
There was no suggestion in the present case that the actions of the defendant hospital trust were so grossly negligent as to break the chain of causation applicable to the roofing company. As such, the roofing company was probably going to be held liable for all of the consequences of the claimant's fall, subject***J.P.I.L. C232*** to primary liability—which was not conceded—and any discount for contributory negligence. The claimant accepted that there were significant risks on both issues and settled with the roofing company on the basis of an 80 per cent discount on liability. Edis J found that this discount reflected both the liability risk and contributory negligence. The net sum accepted by the claimant in the settlement was £400,000 against a claim pleaded in excess of £3 million.
The central issue in the application before Edis J was whether the compromise (which did not involve the trust or make any reference to the claimant's claim against the trust) represented the full measure of the claimant's loss. If it did, any subsequent claim by the claimant against the trust would offend the rule against double recovery (which the rule in *Heaton* was aimed at preventing). However, upon construing the terms of the settlement it was plain that the roofing company had not paid 100 per cent of the injury and loss suffered by the claimant. There was an 80 per cent discount, part of which was to represent contributory negligence. As the trust could not rely upon the contributory negligence relied upon by the roofing company, it was plain that the trust would be liable for an element of loss which was not included in the settlement. Edis J put it thus: "CCRL has neither paid nor purported to pay the whole loss caused by the hospital",[7] and concluded that the settlement had not provided the claimant with full compensation.
The judge also stated:[8]
"A collateral attack on a compromise is not an abuse of process. A collateral attack even on a judgment in civil proceedings is not necessarily an abuse of process… an assertion that substantial sums remain due from the defendant to the claimant does not mean that the claimant settled his claim against [the roofing company] for too little."
The decision of the court in this case was entirely logical and the judge appeared to have no doubts about the correctness of it. The trust's argument that the claimant had already been fully compensated by the roofing company was untenable.
It had a secondary argument which was that the claimant would be unable to prove any loss arising purely from the trust's negligence. As a matter of fact, establishing the proper extent of the loss caused by the trust was likely to prove something of a challenge, but assessment was nevertheless technically possible albeit a matter for another judge on another day. Such assessment can be made more straightforward by a detailed breakdown of precisely what damages the claimant was compensated for in the first settlement.
This is something parties ought to do whenever proceedings are to be pursued against concurrent or successive tortfeasors (or contract-breakers) at a later stage. We are used to

taking such steps (or ought to be) when recording settlements to which provisional damages will apply so that the loss can be readily quantified if further damages are applied for.

Practice points

- Construction of the compromise agreement in its appropriate factual context is clearly the key to determining what has been compromised. As such, it is vital to record a detailed and comprehensive memorandum of agreement in all cases, but particularly if a claim is still to be pursued against other defendants. It would be as well to record, for the avoidance of doubt, what loss suffered by the claimant is not covered by the agreement. If the claimant were, in the memorandum of agreement, to expressly reserve his right to pursue another defendant for aspects of his loss, this would fortify the inference that he is not treating the sum recovered in the settlement as the full measure of loss. However, absence of such a ***J.P.I.L. C233*** reservation will not strictly matter as he does not need to expressly reserve a right to which he is entitled by law.
- Clear memoranda of agreement are important not just to the claimant but to the paying party as well (in this case the roofing company) in case they seek a contribution against a concurrent tortfeasor liable for the same damage, or are subject to contribution claim.
- The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor. Ditto with successive contract-breakers. By contrast, the release of one joint tortfeasor by way of accord and satisfaction will generally release all of the others.

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1. *Heaton v Axa Equity & Law Life Assurance Society Plc [2002] UKHL 15; [2002] 2 A.C. 329* applied.
2. *Heaton v Axa Equity & Law Life Assurance Society Plc [2002] UKHL 15; [2002] 2 A.C. 329* applied.
3. *Appleby v Northern Devon Healthcare NHS Trust [2012] EWHC 4356 (QB)* applied.
4. *Webb v Barclays Bank Plc [2001] EWCA Civ 1141*
5. *Webb v Barclays Bank Plc [2001] EWCA Civ 1141* at [55].
6. *Webb v Barclays Bank Plc [2001] EWCA Civ 1141* at [57].
7. *Wright v Barts Health NHS Trust [2016] EWHC 1834 (QB)* at [19].
8. *Wright v Barts Health NHS Trust [2016] EWHC 1834 (QB)* at [18].