

Neutral Citation No. [2009] NICA 57

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Judgment: approved by the Court for handing down

Delivered: 07/12/09

(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND
ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

BETWEEN:

SEAN FRYERS

Plaintiff/Respondent

and

BELFAST HEALTH & SOCIAL CARE TRUST

Defendant/Applicant

MORGAN LCJ, GIRVAN LJ & COGHLIN LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This matter comes before the court by way of a case stated by Gillen J. It arises out of civil bill proceedings in which the plaintiff, the respondent and cross-appellant to the appeal ("the plaintiff") claimed damages for personal injuries loss and damage arising out of an accident at work, his employer being the Belfast Health & Social Care Trust ("the Trust") which was the defendant in the proceedings and the appellant in this appeal and respondent to the cross-appeal. The plaintiff, who was employed as a ward bedside hygiene operator at the Royal Victoria Hospital ("the hospital") in the course of his employment sustained a needle stick injury on 4 August 2006 from a used injection needle which was protruding from a bag of clinical waste which was being handled by the plaintiff.

[2] The plaintiff sustained a puncture wound which at the time was painful and bled. In accordance with the hospital's protocol he obtained immediate medical attention, prophylactic injections and follow up with blood tests. At the time of sustaining the initial wound it was not known whether or not the needle was contaminated. Since it could have been contaminated and could thus have infected the plaintiff with possibly a life-threatening blood born disease such as HIV or

Hepatitis B or Hepatitis C, it was a matter of real concern both to the hospital authorities and to the plaintiff. It was the plaintiff's case that he developed an adjustment disorder as a consequence of the fears and anxiety engendered in him by the knowledge of his exposure to the grave risks involved. It was not in dispute in the proceedings that he had suffered an adjustment disorder. It was also agreed that if the court were to award damages in respect of his disorder, the measure of damages would be £3,000.

The lower courts' decision

[3] The civil bill proceedings were heard by Judge Loughran. She concluded that, at its height, the legal status of the plaintiff's claim was that he had been exposed during the course of his employment to risk but not to stress. The stress or anxiety disorder which he had undoubtedly suffered were caused by his fear about the development of disease as a consequence of his exposure to risk. She concluded that it was clear from the House of Lords decision in Rothwell v Chemical & Insulation Co Ltd & Others: re Pleural Plaques Litigation [2008] AC 281 ("Rothwell") that it would be an unwarranted extension of the principle in the case of Page v Smith [1996] AC 155 ("Page") to apply it to psychiatric illness caused by apprehension of the possibility of an unfavourable event which had not actually happened.

[4] Before Judge Loughran, counsel for the plaintiff accepted that a needle stick injury by a needle known to be sterile would be de minimis. Counsel for the Trust argued that the needle stick injury in this case was symptomless and de minimis. The judge in her judgment appears impliedly, although not expressly, to have concluded that the injury caused by the needle entering the plaintiff was de minimis. The question whether the plaintiff had any contractual claim was not raised before her.

[5] The plaintiff appealed to the High Court by way of civil bill appeal which came on for hearing before Gillen J. In addition to pursuing his claim in negligence the plaintiff sought and was granted leave to add a claim in contract. Gillen J considered firstly whether the plaintiff's physical injury constituted actionable damage in tort, and, if so, whether his psychiatric symptoms were actionable in tort. He considered whether the ruling in Rothwell precluded the plaintiff succeeding in tort or whether the House of Lords ruling in Page applied to the plaintiff's case. He then considered whether the plaintiff had an alternative actionable claim framed in contract.

[6] Gillen J concluded that the plaintiff could not succeed in tort. He was satisfied that the Trust owed a duty of care to the plaintiff and had breached that duty by exposing the plaintiff to risk of injury by a needle stick. He concluded that whilst the plaintiff's skin had been penetrated by a needle that as a matter of fact did not constitute more than a trivial injury notwithstanding that he did require a follow up series of prophylactic injections and blood tests. He concluded that the plaintiff

was none the worse physically from having had a needle stick injury. The pin prick merely evidenced a degree of exposure to a dirty needle which carried with it a risk of developing disease. It was thus an exposure to risk and no more. The creation of the risk was not actionable and the psychiatric illness which the plaintiff had suffered was caused by apprehension that an adverse outcome might occur. The plaintiff could not recover damages for that. The judge considered that the analogy with Rothwell did apply whereas the analogy with Page did not. He concluded that it was not foreseeable that in the circumstances someone such as the plaintiff would be caused psychiatric injury. The condition suffered by the plaintiff was caused by a reaction which could not be reasonably foreseen in an employee of reasonable fortitude. One could not add the trivial needlestick injury to the psychiatric aspects to produce a viable claim by way of aggregation. The judge then proceeded to consider the breach of contract claim and concluded that the employer owed a contractual duty to take reasonable care for the safety of the plaintiff and a duty of trust and confidence. Those duties had been broken. While the plaintiff is generally only entitled to nominal damages where no actual damages are proved, in this case, in which a recognised psychiatric injury was brought on by a result of the stress occasioned by the breach of the contractual duty of care, more than nominal damages should be awarded. The judge measured damages at £3,000 which was understood to be the agreed value between the parties.

The Case Stated

[7] Following the decision both the Trust and the plaintiff requisitioned a case stated, specifying in the case of the plaintiff no less than ten questions and in the case of the Trust six. The case stated which was drafted before the guidance given by this court in Rogan v South East Health and Social Care Trust [2009] NICA sets out the finding of fact and legal conclusions of the court together with the legal arguments presented by the parties. Where, as in the present case, the court's judgment set out in detail the findings of fact and the evidence founding those findings, the simpler course, as recommended in Rogan, is for the case stated to simply incorporate the judgment in the case by reference and then set out the questions to be posed for the opinion of the court. That is the practice which should be followed in future.

[8] Although a large number of questions was posed in the case stated, the questions can be reduced to essentially two. The first question is whether the judge was correct in law in dismissing the plaintiff's claim in tort. The second question, which only arises if the plaintiff's tortious claim fails, is whether the court was correct in upholding a claim for breach of contract. In answering those questions it will, of course, be necessary to address some but not all of the other questions or issues which were raised in the sub-questions in the case stated.

[9] Paragraphs [3] to [5] of the case stated sets out the key findings of fact which have already been set out in the judgment. Thus:

“[3] The plaintiff in the course of his employment with the defendants sustained a puncture wound when handling a bag of clinical waste from which a used injection needle protruded on 4 August 2006. He gave evidence that he suffered the puncture wound, which was initially painful and visible. It bled and was subsequently evacuated, washed and treated at the accident and emergency department. Thereafter he was treated in accordance with the Trust’s protocol which included counselling for anxiety in respect of the fear of developing HIV, Hepatitis B and Hepatitis C and a series of prophylactic injections and blood tests. It has since been confirmed that there is no risk of developing any disease connected with the needle stick injury.

[4] Counsel for both parties had agreed that if the psychiatric symptoms suffered by the plaintiff – constituting an adjustment disorder according to the medical evidence before me as a result of the distress occasioned by this needle stick injury – were actionable in tort the injury suffered by the plaintiff amounted to £3,000.

[5] As a matter of fact I found that the discarded needles and other disposal sharp objections required a risk management assessment by the defendant. Sharp injuries of all sorts can be dangerous because needles are often contaminated with matters which can transmit disease causing entities, eg HIV, Hepatitis B and Hepatitis C. I consider that such needles should be placed in plastic sharp boxes or otherwise disposed of carefully and certainly not put in plastic bags where they can protrude and puncture the legs and hands of staff. The defendant had failed to perform that task in this instance, notwithstanding that it was aware of the danger and indeed had drawn up a safety protocol addressing steps to be taken in the event of such injury. The plaintiff knew of a woman in the past who sustained such an injury and had been obliged to undergo the same type of precautionary tests as him.”

In paragraph [18] of the case stated the judge purported to find as a matter of fact that the needle stick injury did not constitute actionable damages in tort:

“[18] The needle stick injury did not constitute actionable damage in tort. While the instant case did involve a penetration of the skin by a needle and did require a series of follow up prophylactic injections and blood tests, I did not believe that it constituted as a matter of fact more than a trivial injury. No reasonable person would ever have litigated purely for such a physical injury. The plaintiff was none the worse physically over having a needle stick injury.”

[10] The judge made certain findings in relation to the breach of contract claim which, for reasons which will become apparent, it is not necessary to set out in detail.

Was the needlestick injury a trivial injury?

[11] It is clear from Rothwell that before a plaintiff can establish a viable tortious claim rising out of a personal injury, he must establish that the injury is more than trivial. In Rothwell the plaintiff had developed pleural plaques which were not malignant, were asymptomatic and required no medical treatment. The House of Lords considered that they were de minimis and trivial. Lord Hope at paragraph 49 in his speech, addressing the maxim de minimis non curat lex:

“Whatever its strict meaning may be, the maxim in its less literal sense can be appealed to in the present context as an expression of legal policy. It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strictly legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the slightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful, has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless.”

It was correctly accepted by the plaintiff that if a party is accidentally pricked by a sterile needle causing no pain or suffering apart from the transient sensation of the needle pricking the skin, the injury is of such a trivial and transient nature that it would give rise to no claim. The lower courts were attracted by the Trust’s argument that what happened to the plaintiff should be viewed in exactly the same light and that, accordingly, the plaintiff could establish no compensatable injury, the consequent adjustment disorder being the consequence of worry about the risk of infection and not a consequence of the injury.

[12] However, as Gillen J correctly stated in paragraph [9] of his judgment, physical injuries are of an infinite variety, stretching from the most trivial to the most serious. The court has to consider the facts in each case and decide the point at which the injury alleged constitutes a harm sufficient to justify damages.

[13] Although the judge purported to conclude that as a matter of fact the injury from the needle was trivial, his conclusion that it was an injury that did not trigger a claim for damages is a conclusion of law from the primary facts. We conclude that he was wrong in law in reaching the decision that it was so trivial that it could not lead to damages. As has been frequently said in many situations, context is everything. This was not a mere needlestick injury caused by a sterile needle. The plaintiff was injured by a non-sterile needle in a bag of other items for disposal. It constituted hospital waste and it may well have been contaminated by blood-borne organisms liable to cause serious infection. The existence of the Trust's protocol to deal with such a situation is clear evidence of the gravity of the risk presented to persons who are accidentally injected by such a needle. The wound itself bled for a short period of time. Following the penetration the plaintiff had to undergo assessment, treatment by prophylactic injections and follow up with blood tests and assessment. The risks generated by the accident required advice in relation to his intimate sexual relations and necessitated precautions in that regard. Lord Hope in paragraph [49] of his speech pointed out that while damages are not given for injuries that are harmless they are awarded for injuries that cause harm. As Mr Brangam QC on behalf of the Trust accepted in argument it cannot be said that the plaintiff sustained a harmless injury in the present context. The result of the injury necessitated various invasive procedures on his body: counselling and assessment over a significant period of time and interference with the amenities of life and its impact on his private life. We conclude accordingly that the evidence pointed inevitably to the conclusion that he suffered an injury that was not so insignificant that the policy of law should deny him a remedy in damages.

[15] Once it is established that the plaintiff suffered a compensatable personal injury, it becomes clear that he is entitled to damages to compensate him for the medical sequelae of the injury. The defendant must take the plaintiff as he finds him and there is no difference in principle between an eggshell skull and an eggshell personality: Love v Port of London Authority [1959] 2 Lloyds Reports 541. If physical injury to the plaintiff is clearly foreseeable, there is no onus on the plaintiff to prove that the Trust should have foreseen psychiatric illness. There is no dispute in the present case that the plaintiff's adjustment disorder, a recognised psychiatric illness, flowed from the injury he sustained by being penetrated by the needle, a risk against which the Trust negligently failed to safeguard him.

[16] The decision in Rothwell is, accordingly, irrelevant in this appeal. That decision was founded on the conclusion that the plaintiffs, having developed non-malignant, asymptomatic pleural plaques which required no treatment, were not able to show any injury compensatable in law, the effect of the pleural plaques on the plaintiff's anatomy being of no physical significance. That is not this case.

[17] Nor is the decision in Page germane. It concerned a plaintiff who sustained psychiatric injury as a result of a collision in which physical injury could have been sustained. The House of Lords upheld the plaintiff's claim concluding that once the defendant was under a duty of care to avoid causing personal injury to the plaintiff,

it did not matter whether the injury in fact sustained was physical or psychiatric or both. We have concluded that the plaintiff did sustain a physical injury that was not so trivial that it failed to qualify as compensatable. If, contrary to the conclusion which we have reached, the plaintiff did not sustain a physical injury compensatable as such, the Trust was under a duty of care to avoid causing personal injury to the plaintiff. The Trust by permitting the plaintiff to be exposed to the risk of being penetrated by non-sterile potentially contaminated needle, was in breach of its duty of care to avoid causing personal injury to him. A person in the plaintiff's position could sustain personal injuries by the penetration of such a needle which could cause infection or could cause bodily damage to the plaintiff, for example, by puncturing an artery or damaging a nerve. That being the case, as Page demonstrated the Trust is liable for whatever injury is sustained whether physical or psychiatric or both.

[18] In view of the conclusion which we have reached in relation to the plaintiff's claim in tort, it is not necessary to consider further the question of his contractual claim on which we heard no detailed argument. In the absence of full argument we express no conclusion on the correctness or otherwise at the judge's conclusions on that claim. The question raises issues of some complexity, not least in relation to the correct measure of damages in such contractual claims and the correct test of foreseeability.

[19] We will reformulate the question posed in the case stated to read as follows:

“Did the court err in law in dismissing the plaintiff's claim in negligence?”

For the reasons given we answer that question “Yes”. In the circumstances the other questions raised in the case stated do not arise. We, accordingly, allow the plaintiff's appeal in negligence and the plaintiff is entitled to judgment in the sum of £3,000 the agreed sum. The plaintiff is entitled to his costs of the appeal and in the proceedings in the courts below.