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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **30/10/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

SEAN FRYERS

Plaintiff;

And

BELFAST HEALTH AND SOCIAL CARE TRUST

Defendant.

GILLEN J

[1] This is a civil bill appeal against a dismissal by Her Honour Judge Loughran sitting at Belfast County Court on 24 April 2008 of a claim in tort brought by the plaintiff against his employer. He complains that during his employment as a ward bedside hygiene operative at the Royal Victoria Hospital, he sustained a needle stick injury from a used injection needle on 4 August 2006. The needle was protruding from a bag of clinical waste being handled by the plaintiff.

[2] The injury sustained was a puncture wound which at the time was painful and bled. In accordance with the hospital protocol, he obtained immediate medical attention, prophylactic injections and follow up blood tests. It has since been confirmed that there is no risk of developing any disease connected with the needle stick injury.

[3] The claim was for damages for personal injury, loss and damage sustained by the plaintiff by reason of the negligence and breach of statutory duty of the defendant. By the Order of the Master of the High Court dated 19 September 2008, leave was granted to amend the proceedings to include a claim by the plaintiff for breach of contract against the defendant by reason of

the same facts. Obviously this aspect of the claim was not heard before Judge Loughran.

Issues for the court

[4] In the course of an analytical but always practical argument before me Mr Hill QC, who appeared on behalf of the plaintiff with Ms Kinney, submitted that the court required to determine four issues:

(1) Whether the plaintiff's physical injury constituted actionable damage in tort, and if so, whether his psychiatric symptoms were likewise actionable in tort.

(2) Whether the ruling of the House of Lords in the case of Rothwell v. Chemical and Insulating Co Ltd and others [2007] UK HL 39 ("Rothwell") applies to the plaintiff's case.

(3) Whether the ruling of the House of Lords in the case of Page v. Smith [1996] AC 155 ("Page") applies to the plaintiff's case.

(4) Whether, in the alternative to a claim on tort, the plaintiff has an actionable claim in contract and accordingly can recover damages for the injuries suffered by him.

Did this needle stick injury constitute actionable damage in tort? If so, were the plaintiff's psychiatric symptoms actionable in tort?

[5] Mr Hill and Mr Brangam QC, who appeared with Mr Dunlop for the defendant, had helpfully agreed that if the psychiatric symptoms suffered by the plaintiff - constituting an adjustment disorder according to the medical evidence - as a result of the stress occasioned by this needle stick injury were actionable in tort the injuries suffered by the plaintiff amounted to £3,000.

[6] I observe at the outset that discarded needles and other disposable sharp objects require 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 e.g. 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 stick into legs or hands of staff. The defendant had failed to perform that task in this instance notwithstanding 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 had sustained such an injury and had been obliged to undergo the same type of precautionary tests as him. Consequently I am satisfied that the defendant owed a duty of care to the plaintiff as an employee, had breached that duty and was vicariously liable for the negligence of some other employee who had exposed Mr Fryers to a risk of injury by a needle stick.

[7] In Rothwell's case, the claimants were negligently exposed to asbestos dust. They developed pleural plaques as a direct and foreseeable result of that exposure. The pathological process that gives rise to them is such that pleural plaques may be described as a disease or an injury. But they do not normally give rise to any physical symptom or any other asbestos induced conditions. They do not constitute more than evidence of exposure to asbestos.

[8] At paragraph 49 of the judgment Lord Hope of Craighead, addressing the maxim of de minimis non curat lex said –

> "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 partial 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."

[9] Clearly 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 the use of legal resources. Whilst of course a plaintiff with a tortuously

inflicted injury can recover for the future risk that the injury will deteriorate, it is the existence of the initial injury which must be the necessary trigger.

[10] Whilst the instant case did involve a penetration of the skin by a needle and did require a follow up series of prophylactic injections and blood tests, I consider that as a matter of fact this did not constitute more than a trivial injury. No reasonable person would ever have litigated purely for such a physical injury. I note that whilst Mr Hill contended that this physical injury was not insignificant, Judge Loughran in her judgment has recorded that counsel had, inevitably in my view, "accepted that a needle stick injury caused by a needle known to be sterile would be de minimis".

[11] This plaintiff was none the worse physically for having a needle stick injury. The existing pin prick merely evidences a degree of exposure to a dirty needle which carried with it the risk of developing diseases. It is thus an exposure to risk and no more. To that extent he is only a potential tort victim. He is one of an indeterminate group who might at some point suffer damage as a result of a tortuous conduct. The psychiatric illness which has been diagnosed has been caused by apprehension that the event may occur. The creation of such a risk is not in itself actionable.

Does the ruling in the Rothwell case apply in this instance? Does the ruling in the Page case apply in this instance?

[12] I consider that the analogy of Rothwell does apply in this instance whereas the analogy of Page does not.

[13] In Page there occurred a collision between two motor cars, brought about by negligent driving. It had not caused a physical injury to either driver but had caused one of them to suffer a recurrence of a psychiatric condition. The Court of Appeal had held that the defendant was not liable because it had not been reasonably foreseeable that the accident would cause psychiatric injury. The House of Lords, by a majority, allowed the appeal on the ground, per Lord Lloyd of Berwick at 187, that –

> "Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury".

[14] I consider the instant case is distinguishable because a psychiatric illness has not directly resulted from the needle stick injury. The plaintiff's psychiatric illness has resulted from the plaintiff's worry about his liability to future illness resulting from exposure to viruses which might be on the needle.

[15] I do not believe that psychiatric injury is immediately foreseeable in this instance any more than exposure to asbestos dust knowing that asbestos could occur is an immediately foreseeable risk of psychiatric injury in the Rothwell case. Pleural plaques per se do not engender anxiety save to the unforeseeably irrational or the unusually vulnerable because of apprehension they may suffer a tortuous injury (see Lord Hoffman at paragraphs 2 and 28). I agree with Mr Brangam's submission that the victim of a needle stick injury is in no better position than the victims in the Rothwell case merely because the realization of risk coincides with the exposure.

[16] The court in Rothwell made clear that the answers to a test of foreseeability will vary according to, first, the precise description of what should have been foreseen and, secondly, the degree of probability which makes it foreseeable: see Lord Hoffman at paragraph 29. The general rule requires the court to decide whether it was reasonably foreseeable that the event which actually occurred (in this case, the creation of a risk of disease causing entities) would cause psychiatric illness to a person of reasonable fortitude. The fact of the matter is that if the plaintiff did suffer one of these conditions, it could no doubt cause psychiatric as well as physical injury. But the event has not occurred. The psychiatric illness has been caused by apprehension that one of these events may occur. I do not believe that it was foreseeable that someone such as the plaintiff would be caused psychiatric injury as a result of a needle stick injury. The creation of such a risk is not in itself actionable in tort. I respectfully adopt the view of Lord Hoffman at paragraph 33 of Rothwell's case when he said that it would be an unwarranted extension of the principle in Page to apply it to psychiatric illness caused by apprehension of the possibility of an unfavourable event which had not actually happened.

[17] There is no evidence before me or facts from which I could deduce that employees of reasonable fortitude are liable to suffer psychiatric injury on realising that a pin prick carries with it a risk of developing other conditions. From the time of pin prick injury the plaintiff's apprehension of physical harm was ongoing and cumulative. The presence of a protocol by his employer does not establish that such a person who is exposed would so react. His situation is in stark contrast to that in an authority drawn to my attention namely Barber v. Somerset CC (2002) ICR 613 where a plaintiff had been exposed to stress at work and was granted damages for psychiatric injury. In my view this case can be distinguished from the instant case because I have concluded that the psychiatric damage suffered by the plaintiff was caused by a reaction which could not be reasonably foreseen in an employee of reasonable fortitude. This plaintiff's psychiatric condition was not because he was exposed to stress (as in the case of Barber v. Somerset) but because he was exposed to risk. I do not consider that the plaintiff is therefore within the determinate class of those for whom such recovery in a tortuous action has been allowed.

[18] Similarly I do not find of assistance Norfolk and Railway Company v. Freeman Ayres 538 US 135 at (146) [2003]. In that case workers were negligently exposed to asbestos which caused them to contract the occupational disease asbestos. The question arose as to whether an asbestosis claimant may be compensated for fear of cancer. Liability was established in that case because the plaintiff was placed at immediate risk of physical harm and within the "zone of danger" as described by Ginsburg in that case. I do not believe that the needle stick injury in this case was within such a "zone of danger" such as the plaintiff in Page would have been. Thus although physical injury is a foreseeable consequence of a defendant's breach of duty, courts do not extend an actionable tort where the only injury that has actually occurred is of a psychiatric nature unless the plaintiff has been placed at immediate risk of physical harm such as in Page or within the zone of danger as in Norfolk and Railway Company v. Freeman Ayers.

[19] Thus I do not consider that the plaintiff in this case can be described as a primary victim. Primary victims are confined to persons who suffer psychiatric injury caused by fear or distress resulting from involvement in an accident brought about by the defendant's negligence or its immediate aftermath. A person such as Mr Grieves in the Rothwell case or the plaintiff in this case who suffered psychiatric injury because of something that he may experience in the future as a result of the defendant's past negligence is in an entirely different category (see Lord Hope of Craighead in Rothwell at paragraph 54). I do not believe the plaintiff was placed at immediate risk of physical harm or psychiatric damage arising from the prick of a needle. Such an event did not have the sudden and alarming elements present in Page.

[20] Finally in this regard, I note it is not permissible in law to add together various elements which add up to an injury caused by wrongful exposure to a needle stick injury. It is not possible, by adding together two or more components, none of which in itself is actionable, to arrive at something which is actionable. In terms one cannot add the needle stick injury however trivial to the psychiatric aspects by way of aggregation. (See Rothwell at paragraphs 17 and 42).

[21] I have therefore come to the conclusion that the learned county court judge was correct in dismissing the plaintiff's claim in tort.

Has the plaintiff in the alternative an actionable claim in contract so that he can recover damages for the injuries suffered by him?

[22] Rothwell was not argued before the House of Lords on the basis of a breach of contract.

[23] At paragraph 74 however Lord Scott of Foscote commented on the matter in the following terms –

> "Each of the appellants was employed under a contract of service. Each of the employers must surely have owed its employees a contractual duty of care, as well as and commensurate with the tortious duty on which the appellants based their claims. It is accepted that the tortious duty was broken by the exposure of the appellants to asbestos dust. I would have thought that it would follow that the employers were in breach also of their contractual duty. Damages is the gist of a negligence action in tort but damage does not have to be shown in order to establish a cause of action for breach of contract. All that is necessary is to prove the breach. The amount of damages recoverable, once the breach of contract has been proved, is subject to well known rules established by the leading cases and, applying these rules, it might well be arguable that the breach of a contractual duty to provide a safe working environment for the employees, an environment where reasonable precautions had been taken to avoid their exposure to injurious asbestos dust, would justify an award of contractual damages to compensate the employees for subjecting them to the risk of contracting in the future a life-threatening asbestos related disease. Damages for breach of contract should, in principle, compensate the victim for being deprived of the contractual benefit to which he was entitled."

[24] Lord Hope of Craighead said at paragraph 59 –

> "The question whether employees might have a remedy against their employers in contract has not been explored in the present context . . . There may be room for development of the common law in this area. In that connection it is worth noting a recent assessment of the potential for the development of contractual remedies for employees against their employers by Matthew Boyle, "Contractual Remedies of Employees at Common Law: Exploring the Boundaries" [2007] JR 145".

[25] That issue has now been raised before me by Mr Hill on behalf of the plaintiff and it is to that which I now turn.

[26] The case requires the application of some well understood principles to these unusual facts. The starting point for the boundaries of contractual

remedies of employees in the courts outside a Tribunal setting is Addis v. Gramophone Company Limited [1909] AC 488. The facts of that much discussed case are too well known to need rehearsal by me. In that case the House of Lords decisively rejected a claim for injuries to the plaintiff's feelings and reputation stemming from his dismissal. From that it was assumed that damages in contract would not be awarded for mental distress or anguish. The reason for such a general rule was that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction.

[27] However the common law evolves with time and the boundaries of contractual remedies for employees at common law have been regularly revisited and extended thereafter. Addis v Gramophone Computer Limited has not been allowed to constitute a conceptual strait jacket. In my view there is now ample evidence that where the contract is not primarily a commercial one in the sense that it affects for example a party's rights to health and safety in the work place, there is no reason why damages should not be awarded for injuries such as the instant case where the contracting parties had personal injuries in their contemplation. I shall now turn to cite those authorities which map the development of this trend.

[28] Matthews v Kuwait Bechtel Corporation [1959] 2 QB 57 is authority for the proposition in the Court of Appeal in England and Wales that liability co-exists in both tort and contract (and the plaintiff may chose one or other) in master/servant cases.

[29] In Watts v. Morrow [1991] 4 All ER 937 Lord Justice Bingham stated –

> "A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of contract is to provide pleasure, piece of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is provided instead".

[30] Mr Hill drew my attention to the well known spoilt holiday cases such as Jarvis v Swan Tours [1973]1 All ER 71 in this context.

[31] Farley v Skinner [2002]2 AC 732 advanced matters further. In this case a surveyor who negligently advised a purchaser of property that he was

unlikely to be adversely affected by aircraft noise was held liable for non pecuniary loss in contract. Lord Steyn said at paragraph 22 -

> "There is no excuse in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important part of the contract is to give pleasure, relaxation or peace of mind."

[32] A new development emerged when contractual damages for pecuniary loss (*which of course is different from the non pecuniary loss allegedly suffered in the instant case*) caused by injury to reputation became available following the decision of the House of Lords in Mahmud v. BCCI S.A [1998] AC 20. The facts concerned a group of employees whose contracts were terminated on the ground of their redundancy. The employees alleged that the corrupt way in which their employer, a bank, had been run was a breach of the mutual duty of trust and confidence. In that case it had been agreed between the parties that the contracts of employment of these two former employees each contained an implied term to the effect that the bank would not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Lord Nicholls of Birkenhead, at p39G, described such a term as "a useful tool well established now in employment law".

[33] Lord Steyn, dealing with the term, said at p45 H –

> "The evolution of the term is a comparatively recent development . . . The development is part of the history of the development of employment in this century. The notion of a "master and servant" relationship became obsolete. Lord Slynn of Hadley recently noted "the changes which have taken place in the employer–employee relationship with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee."

[34] The plaintiffs in Mahmud claimed damages for the pecuniary loss caused by the difficulty they faced in finding new jobs in the financial services industry due to the stigma which had attached to them as a result of their association with the corruption. A majority of the Law Lords held that the employees were entitled to recover such damages on the basis that this claim was based not on the manner of wrongful dismissal but on a breach of contract which was separate from and independent of the termination of the contract.

[35] Johnson v Unisys [2001] 2 All ER 801 was a case where the plaintiff sued his employer for damages for breach of contract or negligence. The former was based on his assertion that in dismissing him without a fair hearing the defendant was in breach of various implied terms of his contract of employment including the implied term of trust and confidence. In consequence of his dismissal he suffered a mental breakdown. Although in that instance the House of Lords found no such breach, Lord Hoffman said at paragraph 44 –

> "If wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation. On the other hand if such damage is loss flowing from a breach of another implied term of the contract, Addis' case does not stand in the way. That is why in Mahmud's case itself, damages were recoverable for financial loss flowing from damage to reputation caused by a breach of the implied term of trust and confidence."

[36] Mr Hill placed great reliance on yet a further development in Eastwood v Magnox Electric plc [2004]3 All ER 991. In this case the plaintiffs claimed damages for negligence and breach of contract for a stress related psychiatric illnesses, injury caused by a campaign on the part of an employer to demoralise him before dismissing him in breach of a duty of trust and confidence. Distinguishing the steps leading to dismissal from that of the dismissal itself, the House of Lords concluded that the claimant had an independent common law cause of action for breach of contract where the employer had acted unfairly. At paragraph 29 Lord Nicholls of Birkenhead declared that such a cause of action could arise where "an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment". It was Mr Hill's contention that this case was clear authority for the validity in contract of a claim for stress related injury in the employer/employee context.

Conclusions on the Issue of breach of Contract

[37] Unfortunately in this case I was not furnished with the contract of employment of the plaintiff. No evidence was called on behalf of the defendant on the matter although I did offer counsel the opportunity to consider this issue.

[38] In the absence of any such documentation I am satisfied that the employer in this instance, under a conventional contract of service, owes a contractual duty to take reasonable care for the safety of plaintiff as an

employee. Usually the parallel duty in tort overshadows the contractual duty. Liability however coexists in both fields.

[39] Given the nature of the duties of the plaintiff in this case I am satisfied that the defendant owed him a contractual duty commensurate with its tortuous duty. Thus the defendant in contract must take reasonable care to provide for the plaintiff's health and safety at common law and under statute, protect him from injury in order to give him peace of mind and avoid personal injury to him caused by the risk of diseases resulting from contact with potentially contaminated needles. It must have been within the contemplation of this employer that needle stick injuries could cause personal injuries.

[40] I consider that Mr Hill was also correct to assert that additionally in a contract of service of this type there is an implied duty of trust and confidence (see Colin McCaul "Pleural Plaques are Back" New Law Journal 9 November 2007 Mahmud v BCCI SA (in liq) [1997] 3 WLR 95 and the other authorities to which I have adverted in paragraphs 31-35 of this judgment).

[41] I am satisfied that the defendant has breached all such contractual terms in this instance for the same reasons that I determined it had breached its duty of care in tort as set out in paragraph 6 of this judgment. The defendant had subjected the plaintiff to the risk of contracting in the future one of the diseases to which I have earlier referred and the plaintiff is to be compensated for being deprived of the contractual benefits to which he is entitled.

[42] I see no justification for artificially removing from the damages recoverable for breach of contract that part of the loss which might or might not be recoverable in a tortuous claim. The fact that the breach of contract occurs in circumstances where no remedy in tort lies is no reason for excluding from the damages recoverable for breach of contract compensation for non pecuniary loss which on ordinary principles would be recoverable. Transplants from the field of tort do not necessarily take root in the field of contract.

[43] Where a defendant is liable for breach of contract, a plaintiff is in general entitled to only nominal damages where no actual damage is proved. This may or may not be the situation in the pleural plaque cases instanced in the Rothwell case.

[44] However I am satisfied that Eastwood v Magnox Electric is authority for the proposition that where, as in this instance, a recognised psychiatric injury is brought on as the result of the stress occasioned by breach of the contractual duty of care in negligently exposing him to potentially disease laden needles, more than nominal damages must be awarded in contract. I have thus been persuaded that the failure to take appropriate precautions in this case to prevent exposure to the risk of contracting one of the serious diseases which may be borne on a contaminated needle in this setting justifies an award of

contractual damages. He must as far as possible be put back into the position he was prior to the breach. To do so does not offend any fundamental principle of public policy or promote uncertainty in the workplace. On the contrary it serves to encourage health and safety for workmen in contracts of service whilst not opening the floodgates to every needle stick case.

[45] I measure damages in this instance in the sum of £3,000 representing the value of his psychiatric injury and accordingly I reverse the finding of the learned County Court judge.