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PERSONAL INJURY UPDATE

Ian Huffer provides his regular Personal Injury Law update. This month he considers *Apportionment in Psychiatric Injury Cases*.

Whether apportionment of damage is possible where there are or may be two or more potential causes of psychiatric injury suffered is often not straight forward. This article addresses one of the difficulties, legal uncertainty in how the courts treats psychiatric injury but this is itself a reflection of the underlying limitations of medical science. "The problem exposed here, properly analysed, is not so much a problem of law as a problem of medicine or science" (Lord Justice Irwin in BAE Systems v Konczak).

The resulting uncertainty is not just a challenge for practitioners acting for clients in work stress and sexual abuse claims but may also now be an issue in mainstream personal injury claims where an unready psychologically compromised or vulnerable claimant suffers trauma resulting in psychiatric injury.

The legal confusion is the reflection of two different approaches to the question adopted by the courts. In one (supported by the obiter but powerfully persuasive judgment of Lady Justice Hale in the Court of Appeal decision in Sutherland v Hatton, Barber v Somerset County Council[1] and reflected in the earlier case of Rahman v Arearose[2]) it was stated that where more than one cause of psychiatric injury is identified, a sensible attempt to apportion should be made. The alternative approach (supported by the Court of Appeal in Dickens v O2 PLC[3] and extra-judicially by Lady Justice Smith in a lecture in 2008) is that apportionment is not possible in practice because psychiatric injury is always indivisible.

BAE Systems v Konczak

In BAE Systems v Konczak (2017)[4] the Court of Appeal made some attempt to bridge this difference of approach- "the difference is that Smith L.J. believes that in the case of psychiatric injury the harm will always be indivisible whereas the encouragement in Hatton to find a basis for apportionment where possible means that the court believed that the harm would be divisible at least sometimes" (Underhill L.J.) although it was possible to infer, in his lordship's opinion, that the court in Hatton thought apportionment possible in the generality of cases. To the extent that there was a difference between the approach in Dickens and in Hatton, the court held that it should follow Hatton which, although obiter, represented "the considered and fully reasoned opinion of the court in what was intended to be a decision giving guidance for the future in cases of psychiatric injury".

So what guidance is now given to practitioners? The BAE systems case should, for the time being as the Court of Appeal's most recent consideration of the question, be regarded as setting out the legal approach to apportionment in personal injury claims for psychiatric injury. Although Mrs Konczak's case was in employment law and was a claim based on the statutory tort of discrimination, it would be difficult to argue that the approach to a claim founded upon a common law cause of action

1 [2004] 1 W.L.R. 1089.
2 [2001] Q.B. 351
3 [2009] I.R.L.R. 58
4 [2017] EWCA Civ 1188

should be different. The view expressed in Charlesworth on Negligence that "the courts usually treat psychiatric injury as indivisible and an apportionment as inappropriate"[5] accordingly requires to be qualified in the light of the Court of Appeal's decision.

Before I endeavour to summarise the current approach to apportionment in psychiatric injury cases that should be followed is in the light of the BAE case, it is important to recognise and distinguish the two different, though often interrelated, questions which arise in these sorts of psychiatric injury cases. First is the situation where there are, as the Court of Appeal says, "multiple extrinsic causes", when there is more than one cause, tortious or non -tortious, of psychiatric injury and where issues of apportionment might arise. Secondly, is the case of a Claimant with pre-existing vulnerability to psychiatric injury including cases where there may be issues of acceleration and aggravation.

Apportionment

My distillation of the approach set out in the BAE case to apportionment in cases of psychiatric injury is as follows;

(1) The probative burden is upon the Claimant to establish causation of injury. In the context of psychiatric injury, this will usually mean establishing that the breach of duty made a material (more than de minimis) contribution to the Claimant's psychiatric injury;
(2) It is for the Defendant to identify any other cause they allege is relevant and raise the question of apportionment[6];
(3) It is for the court to identify whether there is "a rational basis" upon which the harm suffered can be apportioned between that part caused by the tortious act and that part the Defendant says is not so caused;
(4) It is not necessarily clear from the judgment in the BAE case what a rational basis could mean other than a logical and reasoned basis for division supported by expert medical opinion. The court accepted that a rational basis for division is "less easy in the case of psychiatric harm". The Rahman case, where apportionment took place, is identified as a case where it was possible because the medical evidence distinguished between different elements in the claimant's overall condition, but it was accepted that in most cases the court would not have that degree of assistance.
(5) It is implicit from the approach taken by the court that it believed that there was a rational basis for division and apportionment on a much wider basis than that envisaged possible by Lady Justice Janet Smith including the facts of Hatton itself. Lord Justice Irwin referred to divisibility "even on a rough and ready approach". Lord Justice Underhill referred to the approach taken in industrial disease cases (Allen – NIHL, Holtby – asbestosis) where lack of precise basis for division was held not to be a bar to apportionment and justice was stated to demand that the court should adopt its best estimate on the evidence. However, there was a rational basis that underpinned apportionment in these cases based upon amount or length of exposure. I am not aware of a similar rational basis for division in many cases of psychiatric injury where causative stress factors in a person's life are sometimes cumulative and often interrelated and there will rarely be a rational division based on time periods. Also, as Lady Justice Smith noted in her 2008 lecture, there does not appear to be a rational statistical basis for division.
(6) Expert psychiatric evidence is going to be key in these cases – "whether [a rational basis for apportionment] is possible will depend upon the facts and the evidence" (L.J. Underhill).
(7) The court accepted that there would be cases where the psychiatric injury was "truly indivisible" requiring the Claimant to be compensated for the whole of the injury. This might possibly include the type of claimant in the occupational stress claim referred to in Lady Justice Smith's judgment, who cracks up suddenly, tipped over from being under stress into being ill.

Pre-existing vulnerability

Cases of pre-existing vulnerability ought not to present causation difficulty where the egg-shell skull principle applies.

Where a Claimant with a pre-existing vulnerability suffers psychiatric injury resulting in acceleration and aggravation of their symptoms, the extent of the acceleration/ aggravation (in terms of severity and duration) should be capable of quantification by medical evidence directed to the issue.

5 6-19 (13th Edition) 6 Sutherland v Hatton

Medical evidence is also generally capable of addressing whether a psychiatrically vulnerable Claimant's pre-existing health is such that psychiatric injury (including breakdown) would have occurred in any event being a risk which might justify a reduction in some heads of future loss. Lord Justice Irwin said, "I further support the proposition that it will often be appropriate to look closely, particularly in a case where a psychiatric injury proves indivisible, to establish whether the pre-existing state may not nevertheless demonstrate a high degree of vulnerability to, and probability of, future injury: if not today, then tomorrow"

Medical evidence

With causation being raised more often in psychiatric injury cases, care should be taken in choice of experts but also care in ensuring identification of the correct issues upon which expert opinion is sought. In appropriate cases, the instructed psychiatrist, with access to the claimant's full medical records, will need to address the relevant causative factors including the alleged breach of duty and consider whether there is rational basis for apportionment of the injury between different causative factors. In many of the same cases, the expert will also need to consider those issues that might be relevant to causation and quantification that arise from a Claimant's pre-existing psychiatric vulnerability.

I believe it is important that those acting for claimants and the experts they instruct seek to challenge any opinion on apportionment that does not have a rational and logical basis supported by medical science. I fear the slow creep of the broad brush of the rough and ready approach and 'the best estimate' supported by skewed logic as experts feel under pressure to identify a basis for division and apportionment in cases where it does not really exist or where it is not supported by internationally recognised psychiatric diagnostic systems such as DSM 5.

Lord Justice Irwin concludes his judgment with some pertinent observations. "The territory between the non-pathological but sensitised and vulnerable individual and the person with a defined pathology constitutes highly debatable land. It should be closely and carefully mapped by the relevant experts, and it is imperative that they should bring to bear as much clinical and diagnostic precision as possible, paying close attention to one or both of the internationally recognised psychiatric diagnostic systems. In particular, it is necessary to consider whether a less serious but nevertheless established and defined disorder may not have been achieved before progression to the diagnostic end-state. In addition, it should be routine for the experts to assess the level of risk of crossing the borderland between non-pathology and pathology through some other stimulus than the tortious act or omission. It will be recognised that exercise is often difficult and uncertain, but it will often be possible to give such advice within reasonable parameters of time and to the level of probability."

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