Causation and Intervening Medical Treatment

Posted On: 17/02/2022
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As lawyers representing parties in clinical negligence cases, we will often encounter scenarios where the injured party has been involved in a road traffic accident or an accident at work and subsequently seeks medical assistance for the purpose of treating their injuries. As a result of negligent medical treatment, the Claimant's injuries are aggravated, or further injury is suffered. In such circumstances, there may be multiple potential Defendants to any legal claim.

When considering claims involving multiple Defendants, the first question that the court will be bound to consider is whether intervening medical treatment constituted a *novus actus interveniens* so as to break the chain of causation. If the chain of causation is held to have been broken, the original tortfeasor will not be liable for damage to the Claimant following that intervening act. If the intervening act is found not to have broken the chain of causation, the original tortfeasor will be potentially liable to the Claimant for all of the harm suffered.

Authorities

The following cases have determined the principles to be applied when seeking to apportion liability as between tortfeasors.

In *Webb v (1) Barclays Bank plc (2) Portsmouth Hospitals NHS Trust* [2002] PIQR P8, the Claimant injured a vulnerable knee whilst at work. Thereafter, her surgeon negligently advised her to undergo an above the knee amputation. The Court of Appeal held the surgeon's subsequent negligent advice "*did not eclipse the original wrongdoing*" and determined that the chain of causation had not been broken.

Lord Reid, in his dissenting judgment in *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588, considered that only a "*grave lack of skill and care*" in the provision of intervening medical treatment could serve to break the chain of causation. The authors of *Clerk & Lindsell on Torts* (22nd edition), para. 2-121, considered that Lord Reid's approach was correct: "*only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation.*" This passage was specifically approved by the Court of Appeal in *Webb*.

Accordingly, in *Webb*, the Claimant's employers were held liable for all the damage attributable to the fall and 25% of the damage attributable to the amputation.

Intervening medical treatment was also considered in the case of *Rahman v Arearose Ltd* [2001] QB 351. In this case, the Claimant was seriously assaulted in the course of his employment causing an injury to his right eye. His employers were held liable for the assault. The subsequent negligence of his surgeon resulted in the Clamant being rendered blind in his right eye. The Claimant developed severe psychiatric consequences, partly due to the assault and partly due to the loss of his eye. Laws LJ stated:

> "*On these materials it does not seem to me to be established as a rule of law that later negligence always extinguishes the causative potency of an earlier tort. Nor should it be. The law is that every tortfeasor should compensate the injured claimant in respect of the loss and damage for which he should justly be held responsible. To make that principle good, it is important that the elusive conception of causation should not be frozen into constricting rules.*"

He continued:

> "*So in all these cases the real question is, what is the damage for which the defendant under consideration should be held responsible. The nature of his duty (here, the common law duty of care) is relevant: causation, certainly, will be relevant – but it will fall to be viewed, and in truth can only be understood, in light of the answer to the question: from what kind of harm was it the defendant's duty to guard the claimant?*"

He considered that "novus actus interveniens, *the eggshell skull rule, and (in the case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered*."

The court in *Rahman* stated that there was "*nothing in the way of a sensible finding that while the second defendants obviously (and exclusively) caused the right-eye blindness, thereafter each tort had its role to play in the claimant's suffering*." Therefore, the First Defendant was held responsible for some of the damage beyond that which the Claimant would have suffered in any event had the surgeon not acted negligently.

The principles set out above have recently been considered in the case of *Widdowson's Executrix v Liberty Insurance Ltd* 2021 SLT 539. This is a Scottish authority, but Lady Wise helpfully reviewed the case law referred to above to reach her conclusions.

The First Defendant was the insurer of a driver who had lost control on a bend colliding with the vehicle in which the deceased was a passenger. The Second Defendant was the Health Board responsible for Gray's Hospital and the Third Defendant was the Health Board responsible for Raigmore Hospital. Following the road traffic accident, the deceased was taken to Gray's Hospital complaining of pain in the left hip area. No abdominal CT scan was undertaken, and the deceased was discharged. He presented to Raigmore Hospital the following day and a CT scan revealed abnormalities suggestive of mesenteric injury resulting in bowel obstruction. This was managed conservatively until 7 January 2016 when surgery was performed. A tear was identified, and the bowel resected. On 11 January 2016, the Claimant suffered a large bilious vomit which caused him to aspirate and suffer a cardiac arrest leading to his death.

The court was required to consider the relative blameworthiness and the causative potency of the respective breaches of duty. The undisputed facts indicated a high degree of blameworthiness on the part of the First Defendant. He had been driving at high speed, in excess of 80 mph, and recklessly. There was no suggestion that there was any other cause of the road traffic accident.

The Second Defendant failed to undertake a CT scan, which was mandated, and the Third Defendant should not have followed a plan of conservative management: immediate surgery was the only reasonable action. Absent the negligent omissions, the deceased would have, on balance, survived his serious injuries. However, the failings were no "*more than honest mistakes*" on the part of Dr Dar, the Second Defendant's employee. The Third Defendant's team made "*the wrong decision*" on 4 January 2016 but there were no "*criticisms of conduct*".

The First Defendant was "*by far the most culpable*" and categorised by the Court as "*extremely reckless*". By contrast, the failures of the medical teams "*who tried but failed to save him following that are far less blameworthy*".

In respect of causative potency, the court stated: "*In short, the life threatening injuries having been caused by the first defenders' insured, there were opportunities to remedy that and save Mr Widdowson's life that were not grasped*". The court was required to grapple with the very significant proportion of fault that attached to the actions of the First Defendant and the easily identifiable causal potency of all three Defendants' negligence in relation to the deceased's death. The First Defendant was held liable for 70% and the Second and Third Defendants were each liable for 15% of the damages awarded.

How Would the Court Apportion Liability in the Following Scenario?

The Claimant, a school child aged 11, is play fighting on a climbing frame at school. He knows that fighting on the climbing frame is forbidden. He falls from the climbing frame landing on his outstretched, dominant hand, suffering multiple fractures. Had he been adequately supervised, the incident would have been avoided. The climbing frame was also placed on an unsuitably hard surface, which had not been risk assessed. Of course, had the Claimant not been play fighting, the incident is unlikely to have occurred.

The Claimant attends the Emergency Department at his local hospital and mandated investigations are not undertaken. The Claimant later attends at another Emergency Department of a different Trust, and further to investigations, he is placed in plaster when surgery is mandated. Had investigations taken place at the first Trust, the Claimant is likely to have undergone surgery forthwith.

The Orthopaedic evidence is that the failure to undertake investigations and surgery at the different Trusts amount to breaches of duty owed to the Claimant. Further, if the Claimant had undergone surgery at either Trust, he would have made a full recovery from his injuries. As it is, the Claimant has been left with very significant ongoing symptoms to his right arm, which are likely to be permanent and which will impact upon the nature of any future employment. The Claimant issues proceedings against all three Defendants.

In my view, the court is likely to approach this case in the following way:

- Negligence is likely to be established against the Local Authority/Academy/Trust responsible for the school, the First Defendant. There is likely to be a finding of contributory negligence against the Claimant. Given the activity in which he was engaged, contributory negligence could be between 33% and 50%.
- The negligence of the respective Trusts is unlikely to amount to gross negligence so as to break the chain of causation. Therefore, the First Defendant is likely to be held responsible for the original fracture, and it is likely to be held responsible for some of the damage beyond that which the Claimant would have suffered in any event had the Trusts not acted negligently. The Claimant's own negligence continues to have causative potency.
- There is no extremely reckless behaviour on the part of the First Defendant. The causative potency of each Defendant is easily identifiable. Therefore, I consider that, in this scenario, liability is likely to be apportioned more evenly between the Defendants. Of course, the First Defendant's ongoing liability is likely to be reduced by the extent to which the Claimant is found to be negligent.

Conclusions

From the Claimant’s point of view and given that there are very few claims in which the chain of causation is likely to be broken, an early Letter of Claim to the original tortfeasor holding them responsible for the entirety of the injuries is likely to be appropriate.

It would also be sensible to test the evidence of your expert in conference to determine the strength of any argument that the subsequent medical treatment amounted to negligence, gross or otherwise. An assessment can then be made of the strength of the case against each potential Defendant to determine against whom proceedings should be issued. The nature of the injuries suffered at the hands of each tortfeasor is also likely to be a relevant consideration in this decision-making process. The potential cost consequences were the Claimant to lose against a particular Defendant will play a significant role in this process, too.

From the original tortfeasor's point of view, it may be appropriate to settle the Claimant's claim in full. Thereafter, the original tortfeasor would have two years from the date of settlement in which to bring a claim for contribution pursuant to the Civil Liability (Contribution) Act 1978 against the other potential Defendants to the claim.

From the point of view of the those responsible for the intervening medical treatment, it will be important to look at the blameworthiness of all parties and the respective causative potency of all actions to determine how best to protect themselves by way of a costs-protective Part 36 offer.