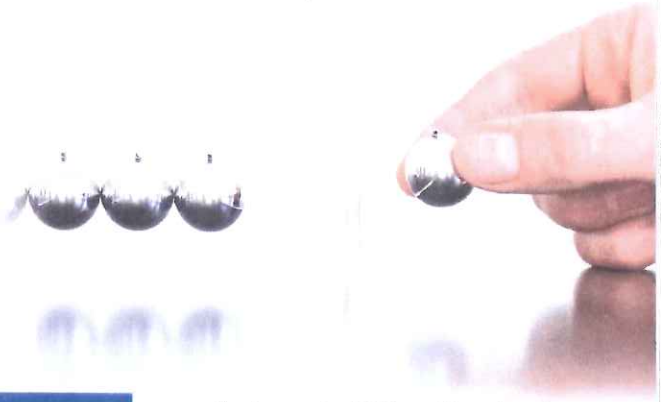
Personal injury

Chain reaction

Brent McDonald investigates a defendant's liability for injuries sustained by a claimant in a subsequent incident



IN BRIEF

- What is the point at which a claimant can no longer recover for the ongoing consequences of a defendant's tort?
- *Dalling v RJ Heale & Co* makes it clear that the test for causation in respect of further accidents or consequences is expressly linked with the likely finding of contributory negligence.

In *Dalling v RJ Heale & Co* [2011] EWCA Civ 365, [2011] All ER (D) 54 (Apr) the Court of Appeal was asked to determine whether the defendant was liable for injuries suffered in accidents that occurred three years apart.

Following on from *Corr v IBC Vehicles* [2008] 1 AC 884, [2008] 2 All ER 943, *Dalling* is a further appellate case dealing with the difficult question of the point at which a claimant can no longer recover for the ongoing consequences of a defendant's tort.

Facts of *Dalling*

On 4 March 2005, the claimant suffered a severe head injury while working for the defendant. The head injury included an extensive right petrous bone fracture and extensive frontal contusions leading to brain swelling.

Surprisingly the claimant suffered no significant cognitive or intellectual deficit, but was left with executive dysfunction. This led to poor concentration, short attention span, impaired memory, some loss of emotional control, variation of mood, fatigue, reduced ability to initiate activities or motivate himself, and an impaired ability to plan ahead. In addition to problems with aggression, he also suffered from problems relating to excessive drinking.

Before the accident, the claimant rarely drank to excess. Once he had made a sufficient physical recovery from the accident and was able to go out alone, Dalling began to go out drinking with friends, where he frequently drank to the point at which he was paralytic.

The judge preferred the claimant's medical evidence at first instance. He accepted that the claimant's injuries had reduced (but not eliminated) his ability to control his drinking habit. Dalling had also become more susceptible to the effects of alcohol, so that he became drunk much more quickly.

> "The claimant began to go out drinking with friends, where he frequently drank to the point at which he was paralytic"

Pub fall

On 25 October 2008, while in the corridor of a public house, Dalling fell over backwards and was again injured. It was accepted that he had had far too much to drink that evening. The judge rejected allegations regarding cocaine use, finding that alcohol was the sole cause.

The claimant argued that the defendant was also liable for the consequences of the second accident. His first argument was that he merely needed to show that the 2005 accident made a material contribution to the 2008 accident, based on *McGhee v National Coal* Board [1972] 3 All ER 1008, [1973] 1 WLR 1. The Court of Appeal approved of the judge's rejection of this argument.

Two stage test

The Court of Appeal referred to paras 69 and 70 of Lord Nicholls's speech in *Kuwait Airways Corporation v Iraqi Airways Co* [2002] UKHL 19, [2002] 3 All ER 209. This sets out a two stage test.

The first stage is a factual enquiry applying the familiar "but for" test. The second stage was described by Lord Nicholls as follows: "The second inquiry, although this is not always openly acknowledged by the courts involves a value judgment ('ought to be held liable'). Written large, the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are interchangeable)...The inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause, or because the loss

was the product of an intervening cause. The defendant's responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this."

Spencer

Sedley LJ's judgment in *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2009] All ER (D) 194 (Dec) was also referred to. It will be remembered that Spencer's injuries led to an above-knee amputation. He suffered a second accident when refuelling his car, due to the fact that he tripped over a manhole cover when not using sticks or his prosthesis.

> "The test for causation in respect of further accidents or consequences is expressly linked with the likely finding of contributory negligence"

Finding for Spencer, Sedley LJ had said: "Fairness, baldly stated, might be thought to take things little further than reasonableness. But what it does is acknowledge that a succession of consequences which in fact and in logic is infinite will be halted by the law when it becomes unfair to let it continue. In relation to tortious liability for personal injury, this point is reached when (though not only when) the claimant suffers a further injury which, while it would not have happened without the initial injury has been in substance brought about by the claimant and not the tortfeasor."

In *Dalling*, the judge found that the evidence established that although the claimant was also to blame for his drunkenness, the chain of causation remained intact and both stages of the test were satisfied. He reduced damages in respect of the second accident by one third for Dalling's contributory negligence.

On appeal, the defendant had relied upon the statement of principle by Lord Bingham in *Corr*: "The rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible. This is not the less so where the independent supervening cause is a voluntary informed decision taken by the victim as an adult of sound mind, making and giving effect to a personal decision about his own future."

Suicide related to depression

In the earlier case of *Corr v IBC Vehicles*, Corr had suffered a head injury at work for which his employers were liable. As a consequence of the head injury, he became depressed. About six years after the index accident he committed suicide. His widow brought a claim on behalf of her husband's estate for his injuries and loss and also sued on her own behalf under the Fatal Accidents Act 1976 in relation to the suicide. The defendants argued that the suicide had been an act of the deceased's free will, for which it was not liable. As such, they said the suicide was a *novus actus interveniens* which had broken the chain of causation. The House of Lords held that, although the suicide had been a deliberate conscious act, it had been the result of a depressive illness which was caused by the defendant's tort. Further, the House accepted that, in theory, a partial defence of contributory negligence was available to the defendant but declined to reduce the damages in that case (although Lord Scott would have made a 20% deduction).

The defendant accepted that fairness was the correct test, but submitted that it was illogical to hold that the claimant had both caused the second head injury on his own volition by drinking to excess, as must have been the case given the finding of contributory negligence, and yet find that the chain remained intact.

The Court of Appeal rejected any notion of applying absolutes in this area of the law. They pointed out that one of the considerations discussed in the authorities in determining what was fair or just was to ask whether the claimant was "substantially to blame". While it would be possible for a judge to hold that a claimant should not recover anything because the injury was substantially his own fault, even if but for causation was established, he could equally find both parties bore significant responsibility. Given his decision on apportionment, it would have been: "Quite illogical for [the judge] to say that it was not fair and just for the [defendant] to be liable if he thought that it was two thirds to blame."

Causation test linked to contributory negligence

Despite Lord Reid in *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 1970 SC (HL) 20 observing that for a claimant to recover for a second accident, he "must act reasonably and carefully", *Dalling* makes it clear that the test for causation in respect of further accidents or consequences is expressly linked with the likely finding of contributory negligence.

It is insufficient to procure a finding that the claimant has been unreasonable in order to break the chain. Defendants must go further and show that the second accident was substantially (perhaps almost entirely) the claimant's own fault where "but for" causation is established. It is a fair inference that were *McKew* to be heard today, it is likely that the claimant would have recovered at least something for the consequences of his leg giving way when descending the stairs without a handrail.

If the finding of contributory negligence is to be used as a touchstone as to whether or not the second stage is passed, then appellants will need to work hard to succeed given the reluctance of appellate courts to disturb findings of contributory negligence.

A further observation is that many claims settle where claimants continue to suffer from ongoing symptoms, either physical or psychiatric, which may lead to further accident and injury in later life. Had either Spencer or Dalling speedily resolved their claim, the defendants would have avoided paying for the effects of the second accident.

Does this mean that lawyers who advise clients with ongoing symptoms to settle, without providing for further recovery should a further accident occur, are failing their clients, in light of the apparent lowering of the second stage for recovering in these cases? Second, given the limited scope of applying for an award of provisional damages, it might also be asked by what mechanism one would achieve this? It seems likely that practitioners can expect the issues raised in *Dalling* to trouble the courts for some time yet. NLJ

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