

***Corr v IBC* – A Basis for Civil Liability for Employee Suicide?**

Introduction

The English Court of Appeal decision in *Corr v IBC Vehicles Ltd*¹ held that an employer could be found liable for the suicide of an employee.² Sedley and Wilson LJ (with Ward LJ dissenting) overturned the trial court decision of Baker J. who had held that suicide was not a foreseeable kind of harm for which the employer could be held liable. The majority held that suicide did not have to be foreseeable as a different ‘kind of damage’, it would suffice that the depressive illness which gave rise to the suicide was foreseeable. This was based on the acceptance by the majority that suicide is a type of harm which flows from a depressive illness. The Court also held that suicide did not automatically attract the qualities of a *novus actus interveniens* so as to break the chain of causation.

Facts

The facts of the case are tragic and unusual. The claimant’s husband, a man described as being of “ordinary fortitude” survived a near fatal accident at work³ in 1996 leading over the next six years to his suffering an escalating depressive illness which culminated in 2002 in his taking his own life. He had returned to work following his initial accident, and while suffering from mood swings did not state that he had thoughts of suicide. He underwent psychological counselling in 1997 and 1999 and was transferred to an office based job in 2001. In February 2002 he was off work due to stress and depression and appears to have made a suicide attempt at that time (he was admitted to hospital following a drugs overdose). He committed suicide in May 2002. The claimant, his wife, brought an action against his employers on behalf of his estate. The defendants admitted liability for the initial injury but denied liability for the suicide.

Trial court submissions and decision

The claimant’s case was one of negligence. Counsel for the claimant argued that the employer owed a general duty to protect the physical and psychological well being of employees on the basis of the decision in *Page v Smith*,⁴ and that this had been breached by the circumstances of the accident. They contended that this breach caused the deceased to take his own life (on the basis of the “but-for” and “material contribution” tests) and that the question of remoteness had also been satisfied, as the depression which gave rise to the suicide was foreseeable. They argued that so long as some psychiatric injury of the type which occurred was foreseeable (depression in this case), then liability should automatically attach for the suicide.

¹ [2007] 1 QB 46.

² This decision is being appealed to the House of Lords and is listed for hearing in December 2007.

³ While attempting to repair a malfunctioning metal press the deceased narrowly avoided decapitation when a sheet metal panel shot out from the press. Most of his ear however, was severed requiring extensive surgery.

⁴ [1996] AC 155.

The defendants argued that while a duty of care applied in most cases, a duty did not extend to prevent the deceased from taking his own life. They further argued that the remoteness question had not been satisfied, that suicide was not the same ‘type of injury’ as depression and was not otherwise foreseeable.

The trial judge, Nigel Barker Q.C., rejected the claimant’s action for damages arising from the suicide. He held that the foreseeability of the act of suicide “is relevant to the questions whether a duty of care exists and if it does whether damage is recoverable.”⁵ He cited with approval the decision in *Reeves v Commissioner of Police of the Metropolis*⁶ where the court was at pains to stress that the duty to prevent a suicide was “a very unusual one.”⁷ Accepting that a duty would arise in certain cases where suicide was a foreseeable risk (where a prisoner in police custody was a known suicide risk for example), in this incidence it was not, as the deceased at the time of the accident was a “happy, well-balanced” family man with no known psychiatric problems.

Similarly, as regards the question of remoteness, Barker J. held that the test to be applied was that of the “grand rule” as described in *The Wagon Mound*⁸ i.e. whether the injury was of a type that was foreseeable. As it was not in this case, the suicide was too remote and could not be compensated.

The claimant appealed to the Court of Appeal.

Court of Appeal decision

Duty of care

The Court of Appeal rejected the trial court’s determination that the injury would have to be foreseeable for a duty of care to arise. Ward LJ held that the issue of foreseeability of injury was better suited to the “compensation” question rather than “culpability”. He quoted with approval Stapleton’s argument which strongly favoured the separation of the duty and remoteness questions.⁹ Consequently, he held that the court did not have to consider whether the employer had a duty to protect against the risk of suicide, the employer’s duty in this case was no different to that of other cases, which was simply to “take reasonable care of the physical safety of his employees.”¹⁰ Sedley LJ was equally of the view that the employer did not have to owe a duty of care to prevent suicide, stating that in the English courts, the decision in *Page v Smith*¹¹ was pivotal in settling once and for all that a distinction should no longer be drawn between physical and psychological injury. He stated that the claimant’s argument was not that a duty of care to prevent suicide was owed, and it was irrelevant that no duty of care to prevent suicide was owed in this case (he accepted that such a duty might arise however, such as in the custodian cases).¹² He held that

⁵ *Corr v IBC Vehicles Ltd* Queen’s Bench Division Transcript, 28 April 2005 at para 13.

⁶ [2000] 1 AC 360.

⁷ *Corr v IBC Vehicles Ltd* Queen’s Bench Division Transcript, 28 April 2005 at para 16.

⁸ [1961] AC 388.

⁹ Ward LJ at para 15 citing Stapleton J., “Cause-In-Fact and the Scope for Consequences” (2003) 119. LQR 388 at 390.

¹⁰ *Corr v IBC Vehicles Ltd* [2007] 1 QB 46 at para 14.

¹¹ [1996] AC 155.

¹² *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 can be contrasted with *Orange v Chief Constable of West Yorkshire Police* [2001] EWCA Civ 611 in this regard, in the latter case the prisoner was not known to be a suicide risk so no duty of care arose.

the employer owed a duty to prevent injury, and that this general duty had been breached.

Causation

The Court of Appeal accepted on the basis of the evidence that the breach of duty by the employer was a cause of the suicide. This had not been energetically contested in any event by the employers. A clinical psychologist and a clinical psychiatrist gave expert testimony that the a person who suffers from severe depression has a one in six to a one in ten chance of committing suicide. In the case of Mr. Corr, of particular relevance was the conclusion of the clinical psychologist that "...on the balance of probabilities, Mr. Corr's suicide was a consequence of the material accident, and his profound difficulties in coping thereafter."¹³

The court rejected the argument that the suicide could be deemed to be a 'novus actus interveniens' capable of breaking the chain of causation. The determination of the issue of whether a novus actus interveniens arose involved considerations of "policy and value judgements."¹⁴ After carrying out a comprehensive review of leading cases in the common law jurisdictions Ward LJ was of the view that to break the causal connection the act had to be "wholly unreasonable."¹⁵ Criminal insanity based on the M'Naughten rules¹⁶ could no longer be the test, instead the question to be asked was whether the deceased's act was the product of "full free and informed thought." The fact that he knew the nature and quality of the act could not of itself be proof that this was the case. Sedley LJ was of a similar view. He stated that only a finding that the deceased was not "overcome by depression" could deny a remedy. In other words, if the defendants could demonstrate that the deceased was acting of sound mind, only then could the act be classed as one which was unreasonable and therefore a novus actus interveniens. This was particularly the case as the decriminalisation of suicide removed any policy reason to exclude it as an actionable harm. As the evidence demonstrated that it was the depression which drove the deceased to suicide he could not have been said to have acted of his own volition. The deceased was clearly "in the grip of a profound sense of hopelessness brought on by the depression."

Remoteness

The claimant's argument was that foreseeability of suicide did not have to be established. Instead it was argued that if it could be shown as a 'matter of fact' that the suicide flowed from the depression, both injuries could be classed as being of the same type and compensable, regardless of the specific foreseeability of the suicide.

¹³ *Corr v IBC Vehicles Ltd* [2007] 1 QB 46 at para 24.

¹⁴ *Corr v IBC Vehicles Ltd* [2007] 1 QB 46 per Sedley LJ at para 72, a similar finding was made by Ward LJ at para 45.

¹⁵ *Ibid* per Ward LJ at para 35.

¹⁶ Satisfaction of the M'Naughten rules requires that the deceased either did not know the nature or quality of his act or that he could not distinguish right from wrong.

Alternatively they argued that as death by decapitation was foreseeable, equally death by suicide was foreseeable as again, it was the same 'type' of damage, i.e. death.

Sedley LJ dealt with the remoteness question by distinguishing the "outcomes" from the "type of harm" which it is required that a defendant can foresee before s/he can be found liable. He stated "In an action for damages founded on negligence, the question is not whether the particular outcome was foreseeable....It is whether the kind of harm for which damages are sought was foreseeable: and if it was, whether the eventual harm is nevertheless to be regarded, on grounds of policy or of fact, as too remote."¹⁷ Citing with approval decisions of the courts of British Columbia¹⁸ and Queensland¹⁹ he held that if depression were compensable then only "logic or policy or....evidence" could exclude death by suicide as a compensable harm. In this case while the particular outcome (suicide) may not have been foreseeable, the depression had been. Sedley LJ (with whom Wilson LJ concurred) held that as suicide arose as a result of the depression it constituted the 'same type' of injury and was therefore compensable.

Ward LJ, in the minority, held that the suicide which arose could not be held to have been reasonably foreseeable, which was the test to be applied as per the "grand rule" in *The Wagon Mound*.²⁰ Ward LJ cited but was unconvinced by the reasoning in *Lisle v Brice*²¹ where the court found that suicide following a depressive illness arising from a motor accident was foreseeable on the basis that "in this day and age" depressive illnesses and the possibility of suicide had to be considered as foreseeable by defendants. He rejected the claimant's argument that death by decapitation was of the same type as death by suicide but accepted that this conclusion was more "visceral than cerebral" and arrived at as a matter of impression. As to whether the suicide was a "kind of damage" that was foreseeable, this decision in the view of Ward LJ was one of "policy" requiring the court to consider whether it was "fair, just and reasonable" to hold the defendants responsible.²² Ward LJ was influenced in this regard by the "extent to which Britain is in the grip of a "compensation culture".²³ He ultimately however, reached his decision on the unarguably principled basis that at the time of the accident, it could not be foreseen that a man of Mr. Corr's personality would have committed suicide as a result of the accident which befell him.

Commentary

This case raises important question as to how the duty of care issue is decided. The claimant had argued that the employers owed the deceased a duty of care arising from the employment relationship and that contrary to the trial judge's assertion, the nature of the injury did not have to be considered when imposing a duty of care. The defendants on the other hand argued that while a duty of care was owed to prevent

¹⁷ *Corr v IBC Vehicles Ltd* [2007] 1 QB 46 at para 66.

¹⁸ *Wright Estate v Davidson* 88 DLR (4th) 698 where a claim for suicide following a road traffic accident was rejected because the deceased was found to be acting without any "disabling mental illness" when she took her own life.

¹⁹ *Lisle v Brice* [2002] 2 Qd R 168 where a victim of a road accident had committed suicide three years after the accident. In that case it was held that if depression was foreseeable then suicide was also foreseeable.

²⁰ [1961] AC 388.

²¹ [2002] 2 Qd R 168

²² *Corr v IBC Vehicles Ltd* [2007] 1 QB 46 at para 61.

²³ *Ibid* at para 63.

injury, it also had to be further considered, separate from the remoteness issue, whether a duty of care to prevent suicide was owed. While the Court of Appeal ultimately held that the duty question ought not to attract questions as to the type of injury suffered, the general principle that an employer owes an employee an irrefutable duty of care has not taken hold in the courts in cases of psychiatric injury. This is particularly evident when the psychiatric injury occurs without any related physical injury. The English courts in *Rothwell v Chemical & Insulating Co Ltd*²⁴ for instance have approved the Irish position that no duty should be owed in so-called ‘fear of disease’ cases in the absence of any physical injury. In *Rothwell* the court cited with approval the Irish decision of *Fletcher v Commissioners for Public Works*²⁵ where Keane CJ dispensed with the plaintiff’s case by holding *inter alia* that a duty to protect the employee from ‘an irrational fear’ was not owed. In *Fletcher* a rejection of the existence of a duty of care was based largely on policy considerations,²⁶ in the *Rothwell* case the court held that a duty should not be owed as the injury in question was not proven to be ‘foreseeable’.²⁷ Such an analysis has been rejected by the Court of Appeal in *Corr* but it remains to be seen whether this will withstand the attention of the House of Lords.

If the view is accepted that the question of a duty of care is answered by reference to whether the type of harm which occurred was one which was foreseeable, then the existence of a duty of care in employment cases is no longer certain. From a legal principle perspective inserting considerations of foreseeability of damage into the duty of care question, merges two issues which should logically be kept separate. Such a methodology arguably makes the remoteness issue redundant altogether and poses great difficulties when one considers the application of the egg-shell skull rule to questions of injury.

Value judgements and policy arguments also featured in the decision of the Court of Appeal. In particular Ward LJ (in the minority) seemed swayed by the policy arguments against encouraging a compensation culture. In language reminiscent of the floodgates fears and reflective of the Irish approach in *Fletcher*, he warned against allowing a situation which encouraged people to litigate. However, courts should be cautious in reining in claims not on the basis of the application of principle but on the basis of the economic consequences of their decisions. If indeed the injury which befell Mr. Corr was foreseeable then the cost this would generate surely ought to be irrelevant. If Mr. Corr’s case had to fail, it was in the gift of the courts to have examined further the extent to which an injury can be held to be foreseeable on the basis of the statistical likelihood of its occurrence. The generic figure of 10-17% of cases of severe depression ending in suicide was applied without any rigorous analysis. The likelihood of someone of Mr. Corr’s demeanour attempting suicide does not seem to have been examined in any great detail by the majority (Ward LJ in the minority found against the appellant largely on this basis). Given his particular background (a married man with children and no history of depression) it seems unlikely that suicide would have been foreseeable. Instead the majority reached their decision as to the satisfaction of the remoteness issue by questionable means. Sedley and Wilson LJ held that as the suicide was caused by the depression which in turn

²⁴ [2006] ICR 1458

²⁵ [2003] 1 I.R. 465

²⁶ *Ibid* at 482

²⁷ *Rothwell v Chemical & Insulating Co Ltd* [2006] ICR 1458 at para 94 per Phillips CJ.

was caused by the accident, liability should attach. They held that once foreseeability of depression had been established then it simply fell to the claimant to establish as a matter of fact that the suicide had been caused by the depression. This formulation adequately addresses the causation question but it is submitted that it does little to satisfy the question of remoteness. This question ought to be framed separately: it asks whether the type of injury which arose was foreseeable. This question was not posed by the majority.

If the House of Lords affirms the Court of Appeal decision in *Corr* then the implications for employers are significant. Recent reports indicate that one in five suicides may be linked to bullying and harassment at work leading to the deaths of up to one hundred employees annually.²⁸ It is submitted that Mr. Corr was not a likely candidate for suicide at the time the breach of duty (i.e. the accident) occurred and yet liability was imposed. Where the breach of duty is ongoing (as is the case in incidences of bullying or negligently inflicted stress related injury) it is arguable that liability (subject to overcoming the rigours of the duty of care hurdle) would be imposed more readily.

²⁸ The Irish Times, August 31st, 2007. The figures given were drawn from a report published by clinical psychologist Michael Mullally.