other side of a general election, this note appears in print, is at present anybody's guess.

J.R. SPENCER

CAUSATION: IS IT FAIR?

A claimant suffers an injury for which D is liable, but before damages are settled the claimant engages in an act which aggravates the damage – is the defendant liable for that further damage? This was the problem with which the Court of Appeal was faced in *Spencer* v. *Wincanton Holdings Ltd* [2009] EWCA Civ 1404.

The claimant was a former employee of the defendant. In March 2000 the claimant suffered a knee injury as a result of the negligence of one of the defendant's employees. The injury caused the claimant such pain that he had to have his leg amputated. The defendant accepted liability for the loss of the leg.

Following the amputation the claimant had a prosthetic leg fitted and he used a pair of sticks. However, the claimant could not wear the prosthetic leg whilst driving and in October 2003 he arrived at a petrol station and attempted to fill his petrol tank without the aid of his prosthesis or his sticks. Unfortunately, he tripped and the fall was such that he was permanently confined to a wheelchair.

In the County Court, Judge Bullimore held that the defendant was liable for the second injury but he reduced damages by one third to reflect the claimant's negligence. The Court of Appeal unanimously rejected the defendant's appeal on liability and upheld the trial judge's reduction in damages for contributory negligence.

Aikens L.J. was the only judge expressly to respond to the defendant's first argument that the injury was too remote because its consequences were of a kind that were not reasonably foreseeable. He resolved that the defendant was taking too narrow an approach: the defendant did not need to foresee the second injury but simply had to foresee personal injury. Thus, if personal injury and its consequences (*i.e.* the amputation) were foreseeable at the time of the first accident then it must follow that personal injury following on from that amputation must also have been reasonably foreseeable.

The defendant's second argument was based upon the House of Lords' decision in *McKew* v. *Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All E.R. 1621. McKew had a weak leg as a result of the defendant's negligence. McKew knew that his leg could give way without warning yet, whilst his claim was pending, he descended a steep staircase which had no handrail. Despite the presence

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of his wife and brother-in-law he descended the stairs without adult support. His leg gave way and he fractured his ankle badly. The Lords held that McKew's act was unreasonable and therefore the chain of causation was broken. Given the factual similarities one may have thought that if McKew's act was unreasonable then Spencer's was too. However, Sedley L.J. thought that "unreasonable" was too vague a concept as "its nuances run from irrationality to simple incaution or unwisdom" (at [11]). Following Lord Bingham in *Corr* v. *IBC Vehicles* [2008] UKHL 13, [2008] A.C. 884, he preferred to ground his reasoning in fairness:

> 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 become 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 (at [15]).

Moreover, Sedley L.J. cast doubt on *McKew*, implying that if contributory negligence had been pleaded in *McKew* then there may have been a different outcome.

Aikens L.J. acknowledged that "fairness" was vague but he agreed with Sedley L.J. that the courts have to make a value judgment. The judges were, surely, right to admit this. However, the courts need to be clear about what role fairness plays at this stage. Given that considerations of fairness can arise at distinct stages in negligence, one has to be clear as to what question is being posed at each stage. Otherwise the entire inquiry may be collapsed into a value judgment. The judges provided two formulations of the causation question in *Spencer*. Sedley L.J. posed it as whether the further injury has been "brought about by the claimant and not the tortfeasor" (at [15]). Aikens L.J. identified it as, "what is the extent of the loss for which a defendant ought fairly, or reasonably, or justly to be held liable?" (at [38]). Sedley L.J.'s formulation is a question of fact that operates on the presumption that a positive answer breaks the chain of causation. Aiken L.J.'s approach is less prescriptive and allows for a more holistic inquiry. Sedley L.J.'s question is probably a sub-question of Aiken L.J.'s inquiry. This is implicit in Sedley L.J.'s reference to the fact that attribution to the claimant is only one of the situations in which it "becomes unfair to let (liability) continue" (at [15]). These questions will require further elaboration in subsequent cases.

Ultimately, a finding of liability was perhaps not surprising given the role afforded to fairness and the fact that here was a claimant who

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had been confined to a wheelchair as a result of events spiralling out of personal injury in the workplace. Moreover, the loss would be borne by the employer's insurer.

Finally, it is worth noting that the insurers had taken what Sedley L.J. regarded as "the sensible view that, with a stoical claimant who was evidently determined to rehabilitate himself as far as he could, their best course lay in assisting him to do so and in not settling too soon" (at [6]). With hindsight the insurers may take a different view; if they had agreed damages before the second injury then they would only have had to pay out a notional sum to cover the possibility of further injury; that sum would have been significantly lower than that for which they are now liable. Insurers will no doubt be wary of this possibility in future cases where initial liability is accepted.

KIRSTY HUGHES

BATTLE OF THE FORMS: RESTATING THE ORTHODOX

Butler Machine Tool Company v. *Ex-cell-O Corporation* [1979] 1 W.L.R. 401 adopts a "last shot" approach to "battle of forms" cases. An offer to buy containing the purchaser's terms, which is followed by an acknowledgement containing the seller's terms, which is followed by delivery, generally results in a contract on the seller's terms, the seller's terms being a counter-offer.

The question in *Tekdata Interconnection Ltd* v. *Amphenol* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 was whether in the "battle of forms" there can be circumstances in which a traditional offer and acceptance analysis can be displaced by reference to the conduct of the parties over a long-term relationship.

The parties to the case were part of a chain of suppliers and had been doing business for many years. Tekdata acquired components from Amphenol. Tekdata's purchase orders stated that the purchase was to be on Tekdata's own terms. Amphenol acknowledged the orders by sending an acknowledgment to Tekdata which stated that Amphenol's terms were to apply. A dispute arose and both parties alleged that the contract was on their own terms.

The traditional view is that if no further documentation passed between the parties and if Tekdata took delivery of the components, the contract would be on the terms of Amphenol's acknowledgement. However, in *Butler*, whilst siding with the majority, Lord Denning M.R. gave an alternative analysis. He saw the traditional analysis of offer, counter-offer, rejection and acceptance as out of date, and declared that even though there may be differences between the forms

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