Neutral Citation Number: [2008] EWCA Civ 1144

Case No: B3/2007/2889

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SLOUGH COUNTY COURT
HIS HONOUR JUDGE CORRIE
5SL02121

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2008

Before :

LORD JUSTICE SEDLEY
LADY JUSTICE SMITH
and
LORD JUSTICE WALL

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Between :

Dickins	**Claimant/Respondent**
- and -	
O_2 PLC	**Defendant/Appellant**

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Bruce Gardiner (instructed by **Beachcroft LLP**) for the **Appellant**
Graham Aldous QC & Gaurang Naik (instructed by **Underwoods**) for the **Respondent**

Hearing date : 30 June 2008

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lady Justice Smith:

Introduction

1. This is an appeal brought by O_2 plc from the order of HH Judge Corrie, made on 13 December 2007 in the Slough County Court, in which he gave judgment for the claimant (now the respondent), Ms Susan Dickins, for £109,754.22 inclusive of interest. He found the appellant liable to its former employee for psychiatric injury negligently caused by excessive stress in the course of her employment as a regulatory finance manager during 2001 and 2002. Permission to appeal was granted by Tuckey LJ.

2. The respondent alleged that, before she suffered a breakdown in health, there had been warning signs that she was not coping with some aspects of her job; in effect she was 'at the end of her tether'. On about 23 April 2002, she had expressly warned her employers about this but, in breach of duty, they failed to relieve her situation. She had carried on and, a few weeks later, her health had broken down. The appellant denied that it had been in breach of its duty of care and also denied that any alleged failure to act had caused or contributed to the respondent's psychiatric illness. The appellant's case was that there were no warning signs of an impending breakdown in health and no express warning from the respondent. It had been up to the respondent to see her doctor if she thought she was not fit for work. The judge accepted the respondent's evidence and held that the appellant's failure to act had been a breach of duty for which it was liable. In assessing damages, the judge took account of various other non-tortious factors which, he said, had contributed to the respondent's illness and he reduced the damages by 50%.

3. The judge was referred to *Hatton v Sunderland* [2002] ICR 613 in which this court gave guidance as to the correct approach to claims for damages arising from allegations of excessive stress at work. The judge purported to follow that guidance.

4. In this appeal, the appellant seeks to attack each stage of the judgment. First, it is said that there was no proper evidential basis for the crucial finding of fact on the foreseeability of an impending injury to health. Second, it is said that the judge's approach to breach of duty was wrong. He had dealt with the respondent's allegations of breach compendiously when he should have considered each allegation individually. Third, it is said that the judge's approach to causation was wrong. He had held only that the appellant's breach had increased the risk of the respondent suffering injury to health; he had not found that it had made a material contribution to the injury.

The Facts

5. The respondent began work for the appellant in 1991, initially as a secretary. She was a diligent worker and proved to be good at figures and general administration. She was gradually promoted and, by 2000, had become a management accountant, although she had no formal qualifications in accountancy. Her annual reviews showed that she was well thought of. For some years, she worked at an office in Slough and she moved to that area in order to be near her work. However, at some stage before 2000, the department for which she worked was transferred to Hemel Hempstead and she found she had to travel round the M25 each day. Sometimes each

journey could take as much as an hour and a half. In August 2000, she was promoted to the position of Finance and Regulatory Manager. Until that time, she had been happy in her work and had had no significant absences.

6. In her new position, her duties included the preparation of material for the external audit carried out by the independent regulator, Oftel. She was unfamiliar with this work and found it very demanding. She did not receive the training or support she had expected. In the period of preparation for the first audit, in November 2000, she had a minor crisis at work, burst into tears and had to go home. She was off for two days and returned to work the following Monday. On her return it was agreed that she would not have to deal with the audit again and her work was confined to the preparation of management accounts. In the report of her annual review for that year, dated 31 March 2001, her managers noted that she had not coped with the audit; it was said that the audit had been 'a bridge too far' and 'had taken its toll on her'.

7. In early 2001, the respondent began to suffer from irritable bowel syndrome (IBS). She was off work from time to time during the ensuing months. In March 2001, she applied for a post, advertised internally, which would enable her to return to the Slough office. The job was in regulatory finance and the respondent was aware that it would entail some audit work of a similar nature to that which she had found so difficult the previous November. The job description stated that an accountancy qualification was required, which she did not have. It appears that there were only two applicants and the respondent was appointed. She was told that she would be trained and supported by Ms Anna Saunders, a chartered accountant. She began her new job in August 2001. By this time, she was undergoing counselling arranged by her general practitioner because it was thought that her IBS might be stress related. Ms Saunders was aware of this. Unfortunately there was not as much training or support as the respondent had hoped and, in December 2001, Ms Saunders was moved to another department. As a result, the respondent had to cope with the February 2002 audit alone. The judge accepted that she found this extremely stressful. She had to work very long hours and by the time it was finished she was exhausted and 'at end of her tether'.

8. In early March 2002, the respondent had a short holiday but on her return still felt exhausted. On her first day back (11 March), she spoke to her manager Allen Brown about the possibility of moving to a different, less stressful, job. She told him of her difficulties and said that the volume of work was too much; she needed help. He said that there were no vacancies at present and asked her to wait for three months. In fact, he was expecting Oftel to withdraw its requirement for a quarterly audit and no doubt hoped that the respondent's problem would be resolved.

9. The respondent continued at work, still feeling exhausted. She was late for work almost every day as she was finding it difficult to get up. At her request she was assigned to a different line manager, named Keith Brown. He was supposed to provide her with additional help and support but, as the judge found, this did not amount to very much.

10. On (or about) 23 April the respondent had a meeting with Keith Brown in which she told him that she wanted to have six months off; she described what she wanted as 'a sabbatical'. She said that she was 'stressed out', that she was having a real struggle to get out of bed in the mornings and get to work on time because she felt so drained of

physical and mental energy. She said she did not know how long she could carry on before being off sick. He said that he would make enquiries of the Human Resources Department as to the procedure for arranging a sabbatical. He also suggested that the respondent should contact the counselling service which was available to the appellant's employees. She did not do so; she was of course already undergoing counselling arranged by her doctor. Keith Brown also informed his line manager, Allen Brown, about the conversation he had had with the respondent. There was a dispute between the parties as to the date of this meeting; the appellant was contending that this meeting took place in late May. The judge found that it happened on or about 23 April.

11. On 30 May, the respondent had her annual appraisal with Allen Brown. She told him that she was still feeling very stressed. She told him she was having counselling, which he already knew although he did not know why. Keith Brown entered the room at some stage and the respondent renewed her request for a six month 'sabbatical'. She repeated her description of her symptoms, the difficulty in getting up and coming in to work and also that this would lead to her being off sick sooner or later. It was agreed that she would be referred to the occupational health department. This discussion was not recorded on the appraisal report because, as both Allen and Keith Brown told the judge, they wanted to protect the respondent's employment prospects.

12. Although Keith Brown apparently made a referral to Occupational Health on 5 June, it was not acted upon and the respondent did not hear from them. A few days after her appraisal, the respondent felt unable to go into work; she was shaking and her IBS was bad. One day in the second week of June, she telephoned Occupational Health from home but was told that they had not received any paper work from Keith Brown. The following week, she attempted to return to work but became very sweaty and started trembling. On the advice of her counsellor, she consulted her general practitioner, who signed her off as unfit for work on account of anxiety and depression.

13. The respondent has never returned to work and her employment was terminated in November 2003. She commenced her action for damages in June 2005.

The Judgment

14. This was an extempore judgment and it was accepted by both counsel on the appeal that it was not as explicitly reasoned as might have been wished. However the main findings of fact were as set out above. These entailed an acceptance of the respondent's evidence. As to the law, the judge mentioned that he had been referred to *Hatton* (*supra*) and also to *Barber v Somerset County Council* [2004] ICR 457 in which the House of Lords endorsed the guidance given by the Court of Appeal in *Hatton* although stressing that it was only guidance and that each case would turn on its own facts. The judge did not cite from either of these cases, but recorded to which paragraphs he had paid particular attention.

15. From paragraphs 28 to 35 of his judgment, the judge discussed the medical issues in the case, which were relevant to causation and apportionment if he were to find a breach of duty. He considered the respondent's personality, which, it was common ground, rendered her psychologically vulnerable. There had been episodes of anxiety

or depression, one in 1984 and the other in the late 1990s, apparently as the result of bereavement. The judge noted that there was a slight difference of opinion as to the precise diagnosis of the respondent's condition. Dr Gill, a consultant psychiatrist instructed by the respondent, described her condition as mixed anxiety and depression; Dr Fahy, the appellant's psychiatrist, thought it was a depressive illness.

16. The judge referred, with apparent approval, to the view of Dr Gill, that

> "...the patient has been successively promoted because of her personal qualities of hard work and good organisational skills; this has led to her being in a job role which is at the limits of her intrinsic capabilities."

As to the cause of the respondent's breakdown, the two psychiatrists agreed that

> "...perceived work problems, in combination with the prior psychological vulnerability resulted in the deterioration in (the respondent's) mental health."

17. The judge then considered the various factors which he considered that he would have to take into account on the question of apportionment, if he found breach of duty and causation to be proved. Other factors besides those related to work might have contributed to the respondent's breakdown. The respondent was psychologically vulnerable. He mentioned the respondent's IBS, which her medical advisers seem to have assumed had been stress-related. Dr Gill was of the view that the IBS had been caused by stress but Dr Fahy said that there was no medical consensus as to the cause or causes of IBS and the judge concluded (at paragraph 20) that the cause of the respondent's IBS was 'not straightforward'. The judge also mentioned the possibility of emotional stress at home; it appears that there had been some difficulties in the respondent's relationship with her partner. However the judge thought that those might have been related to the problems at work. He also mentioned the possible effect of a flood at the respondent's home in 2006 as a result of which the respondent had had to live in an hotel for 9 months. This, he said, might have prolonged her depression.

18. At paragraph 36, the judge turned to the question of breach of duty. He recited the four allegations of breach relied on by counsel, which covered various stages of the history starting in late 2001 and early 2002. It was said that the employer should have first reduced the respondent's workload and also planned for her future workload when Anna Saunders was about to depart. Third, it was said that the employer should have referred the respondent to Occupational Health in January or February 2002 and finally that it should have responded to her requests made on the 23 April by referring her to Occupational Health and by granting her time off soon afterwards.

19. The judge then discussed the parties' contentions about the facts and, at paragraph 39, reached his essential conclusion on breach of duty as follows:

> "As a consequence of finding that the conversation with Keith Brown was on 23 April 2002, action by the employer should have taken place much sooner than it was. Firstly, it should have been an immediate referral to Occupational Health .... and

> secondly the claimant should have been sent home... Here was an employee palpably under extreme stress, a valued employee about to crack up, perfectly obviously, she had said so, it was plain to those two gentlemen or should have been and nothing of any substance or of any effect was done."

20. The judge then turned immediately to causation and at paragraph 40 said:

> "It follows from that, although importantly this court is only dealing in probabilities, that she was, at the very least, deprived of the chance of a swift recovery from her psychiatric illness if it had already by then started but, more likely deprived of the chance of not plummeting to the depths to which she subsequently did."

21. Finally, after making some findings in respect of the date by which the respondent is likely to be fit to return to work, the judge referred back to the various factors he considered relevant to the apportionment of damages and held that respondent should recover 50% of the total damages.

The Appeal

22. There are 12 grounds of appeal but they are conveniently divided into four topics as follows.

Reasonable foreseeability

23. Mr Gardiner, who appeared for the appellant here and below, submitted first that the judge had erred in law in that he misunderstood the 'threshold question' relating to foreseeability of psychiatric harm. The respondent's evidence had not gone far enough to put the employer on clear notice that, unless something was done, it was foreseeable that her health would break down. He submitted that the judge had failed to cite or heed passages from *Hatton,* the most important of which in this context were at paragraphs 27 and 31. At paragraph 27, Hale LJ said

> "It is important to distinguish between sign of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health."

And at paragraph 31:

> "But in view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it."

24. I accept that these are important passages and it may have been better if the judge had cited them rather than referring collectively to the paragraphs which he had read. However, I cannot accept that the judge failed to appreciate the difference between stress and stress-related illness; nor did he fail to understand that the indication of impending illness must be clear before the employer is under a duty to do something

about it. The judge held, at his paragraph 39, which I have cited at paragraph 19 above, that on or about 23 April, the respondent was 'palpably under extreme stress' and 'about to crack up' as she had said. That was or should have been plain to her two managers, Allen and Keith Brown, but they did nothing of substance about it. In my judgment, the evidence was quite strong enough for the judge to conclude, as he did, that the appellant had received a clear indication of impending illness.

25. Mr Gardiner's second point under this topic appears to me to be misconceived. He complains that, in reaching his conclusion on the foreseeability of illness, the judge held that all four allegations of negligence had been proved. These related to incidents in the past, such as the occasion in November 2000 when the respondent had been in tears and the meeting in March 2002 when the respondent had asked for another, less stressful, job but had not said anything about her state of health. It seems to me quite clear that, in the course of his judgment, the judge was reciting those events as part of the history of which the employer was aware. He was not saying that those events amounted to a sufficient indication of impending illness as to put the appellant on notice that it must do something. It is true that, when he had finished his judgment and counsel asked him to clarify whether he had found all the allegations of negligence proved the judge said that he had accepted the submissions of Mr Naik, counsel for the claimant. But in fact he had not accepted that all the allegations of negligence were proved, only the final one, relating to the 23 April. He had accepted the respondent's account of those other incidents and had taken them into account as part of the history but there is nothing to suggest that he considered that the employer was on notice of an impending breakdown in health until 23 April. It was clearly that meeting that was crucial, when the respondent spelled out the seriousness of her condition and said in terms that she did not know how long she could go on. The background history was important in that these problems had not come out of the blue. The fact that the respondent had been mentioning difficulties over a period of time was the more significant because she was usually a conscientious, hardworking and reliable employee. The judge was entitled to take the whole of the background into account (so far as it was known to the appellant) when considering what its reaction should have been to what the respondent said on 23 April.

Breach of Duty

26. Mr Gardiner's second topic covered four separate submissions. I will take each in turn. First, he contended that the judge had failed to have any regard to the fact that the appellant offered its employees a counselling service. In *Hatton*, at paragraph 43(11), the Court said that an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty. The appellant had provided such a service and had submitted that this meant that it should not be held to be in breach of duty but the judge had not even dealt with the point. Had he dealt with it, he would have been bound to hold that the appellant had not been in breach of duty.

27. I accept that it is unfortunate that the judge did not deal with this point. However, in my judgment, the point takes the appellant nowhere, which may well be why the judge omitted to deal with it. At paragraph 17 of *Hatton,* where the desirability of an advice and counselling service was discussed, it was made plain that the advantage of such a service was because many employees were unwilling to admit to their line

managers that they were not coping with their work for fear of damaging their reputations. A confidential service would enable the employee to take advice without making any potentially damaging disclosure direct to the employer. However, in the present case, the respondent was not afraid to tell her line manager (on 23 April) that she was 'at the end of her tether'. Mr Keith Brown's response included the suggestion that she should seek counselling from the body engaged by the appellant. The respondent did not do so; she was already receiving counselling through her own doctor. Given the situation where the respondent was describing severe symptoms, alleging they were due to stress at work and was warning that she did not know for how long she could carry on, I do not think that a mere suggestion that she seek counselling could be regarded as an adequate response.

28. In *Daw v Intel Corporation* [2007] ICR 1318, the Court of Appeal observed that the reference to counselling services in *Hatton* did not make such services a panacea by which employers can discharge their duty of care in all cases. In that case, the judge had been entitled to hold the employer in breach notwithstanding that it provided a counselling service. The employee's problems could only be dealt with by management intervention. The same is true here. Mr Gardiner's reliance on the summary in paragraph 43(11) serves to demonstrate how dangerous it is to apply guidance given by the court as though it were a statutory provision.

29. Mr Gardiner's second point under breach of duty was that the judge had not considered each allegation of negligence in turn (relating, as I have explained, to different stages of the history) and had not considered what the employer ought to have done at each stage. It is true that the judge did not do this but, as I have already said, it is clear that he held that the employer was not on notice of the need to respond to the respondent's complaints until 23 April 2002. As I have said earlier, he quite properly treated the earlier incidents as part of the history. Thus there was no need for him to consider what the employer ought to have done at those earlier stages; the answer would have been 'nothing'. The judge made it quite plain that, as of the 23 April, the appellant should have referred the respondent to Occupational Health and should have sent her home.

30. Mr Gardiner made the further point that there was no evidence on which the judge could conclude that taking those steps would have done any good. In my view, the judge was entitled to infer that a reference to Occupational Health would have been of value in that it would have set in motion a proper professional consideration of her problems by a doctor with specialist experience in occupational health matters.

31. As to the judge's finding that the appellant should have sent the respondent home, Mr Gardiner made a number of points. First, he submitted that this had never been part of the respondent's case; so the judge should not have made that finding. I find that impossible to accept. I accept that her case was that she had asked for 'a sabbatical'. However, it appears that neither she nor Mr Keith Brown really knew what a sabbatical was and Mr Brown said that he would have to find out what the procedure was for requesting one. It seems to me that the judge was entitled to conclude, as he apparently did, that the respondent was asking for a lengthy time off work because the short holiday she had taken in March had not enabled her to recover from her feelings of exhaustion. Included in that case was the implied contention that she needed time away from the pressure of work in which to recover. The appellant would have risked

further liability if, on her return to work, it had exposed her to the same stress as before.

32. Mr Gardiner also submitted that it was not open to the judge to hold that sending her home would have done any good. There was agreed evidence from the psychiatrists that even 6 months at home would not resolve her problems because, if she were to return to work to the same job with the same conditions, the same pressure would build up and she would have a breakdown in any event. However, that evidence does not deal with whether sending the respondent home would probably have prevented the sharp deterioration in health which occurred in June 2002. The psychiatrists were saying that more steps were needed to resolve her problems in the long term; in addition to a rest, she needed to have adjustments made to her job. However, that is not to say that sending her home would not have been effective in preventing the June breakdown. The judge was entitled to infer that to send the respondent home would be beneficial as it would remove the pressure she was under.

33. Mr Gardiner took a further point on the issue of sending the respondent home. He submitted that to do so, when the respondent was presenting herself at her place of work, would have been a breach of contract because an employer is under a duty to provide work. In the context of this case, this submission is nonsense. This was a woman who was asking for time off to recover from her feelings of exhaustion. To send her home on full pay pending investigation of her problem by Occupational Health could not possibly be described as a breach of contract.

34. Finally under this topic, Mr Gardiner submitted that the judge should not have found the appellant to be in breach of duty by failing to respond adequately to her request (or cry for help) on April 23. He relied on two passages in *Hatton* at paragraphs 17 and 34 where, he submitted, the Court emphasised that the employee is in the best position to decide whether to continue working. The judge should have held that it was up to the respondent to decide to take a period of sick leave and to seek the help of her GP. If that were the law, it would be impossible for any claimant ever to establish liability for illness due to stress at work; the responsibility for his health and for continuing at work in the face of signs of excessive stress would lie only on the claimant himself. That is not the law, as cases such as *Hatton* and *Barber* have made clear. There may be cases in which the employee is able to make appropriate decisions but the judge was quite entitled to take the view that, after the respondent had told Mr Keith Brown about the condition she was in, some responsibility passed to the employer. In my judgment, Mr Gardiner has taken brief passages from the judgment in *Hatton* quite out of context. There is no merit in this point.

Causation

35. At paragraph 40 of the judgment (already cited at paragraph 20 above) the judge, referring back to his findings about the appellant's failure to do anything of substance following the meeting of 23 April, said:

> "It follows from that, although importantly, this court is only dealing in probabilities, that she was, at the very least, deprived of the chance of a swift recovery from her psychiatric illness if it had already by then started but, more likely, deprived (her) of

> the chance of not plummeting to the depths to which she subsequently did."

36. Mr Gardiner complains, with some justification, that the judge has not there applied the right test for causation. The judge had been referred to paragraph 35 of *Hatton* where the Court of Appeal had said:

> "It is still necessary to show that the particular breach of duty found caused the harm. It is not enough to show that occupational stress caused the harm. Where there are several different possible causes, as will often be the case with stress related illness of any kind, the claimant may have difficulty in proving that the employer's fault was one of them. This will be a particular problem if the main cause was a vulnerable personality which the employer knew nothing about. However, the employee does not have to show that the breach of duty was the whole cause of his ill-health: it is enough to show that it made a material contribution."

37. Thus the judge's task was to identify the breach of duty and to decide whether that breach had made a material contribution to the respondent's ill-health. It seems to me that the judge did identify the breach of duty adequately because, at the start of paragraph 40, he referred back to paragraph 39 where he had held that that the breach of duty was a failure to respond following the meeting of 23 April. The employer ought to have referred the respondent to Occupational Health and should have sent her home. So the breach was identified. However, Mr Gardiner is right to say that the judge did not then ask whether that failure had made a material contribution to the onset of illness. Instead he spoke of the respondent losing the chance of a swift recovery and the chance of not plummeting to the depths of her subsequent illness. By doing so, he entered (unnecessarily) into the difficult area of damages for loss of a chance. This was not a 'loss of a chance' case; it was a case where more than one factor had causative potency in the development of the illness. So, I would accept Mr Gardiner's criticism that the judge did not appear to apply the correct test.

38. That said, when one reads the judgment as a whole and particularly the passages relating to the contribution to the illness made by other non-tortious factors, it is clear from the judge's findings and the psychiatric evidence that the identified breach had made a material contribution to the severe illness which began in June 2002. In my view, such a finding was inevitable. Here was a woman with a good work record. She had been promoted to work at the very limit of her capability. She had told the appellant that she needed help with her work and no or insufficient help had been provided. At the end of the February 2002 audit, she was exhausted and a short holiday did not make her any better. In March, she asked for a less stressful job and was asked to hold on for 3 months. On 23 April, she asked for a 'sabbatical' and told her employer, in effect, that she was at the end of her tether. She described an inability to drag herself into work which was quite uncharacteristic of her. Nothing was done; she remained at work and her state of exhaustion continued. On 30 May, she repeated her request for a sabbatical and repeated her descriptions of her condition. At that late stage, she was referred to Occupational Health but not as a matter of urgency and within a few days she was completely unfit and indeed unable to attend work. It seems to me that the history shows that, at that time, she tipped over

the edge from suffering from stress into complete breakdown. The obvious inference is that she tipped over the edge because nothing significant had been done to recognise and address her need for a rest and for a change to her work requirements. It seems to me that it would have been perverse to hold that the failure to address her problems had not materially contributed to the tipping over into psychiatric illness. It plainly had. It is true that there were other factors in play. The respondent's vulnerable personality was no doubt an underlying cause of her breakdown. Her relationship with her partner could have been another; so might her IBS although that could be seen as an effect of stress rather than a cause of it. But the appellant's failure plainly made a material contribution.

39. Following the guidance given in *Hatton,* the judge took those other matters into account when apportioning the damages as to 50% being due to the tort and 50% due to non-tortious factors. Before the judge, both parties had accepted that it was right to apportion the damages. The dispute between them was only as to how they should be apportioned.

40. In the course of argument on this appeal, the court briefly raised the question of whether apportionment of the whole of the damages was appropriate in a case of this kind. We did so because two members of this court had recently sat (with Waller LJ) on the case of *Bailey v Ministry of Defence* [2008] EWCA Civ 883. That was a clinical negligence case in which the claimant had suffered brain damage as the result of cardiac arrest following inhalation of vomit. It was common ground that she had inhaled her vomit because she was in a very weakened state. Two causes had contributed to her weakness, one tortious, the other not. The judge below held that the tortious cause had made a material contribution to the weakness and the claimant succeeded in full. This constitution of the Court of Appeal upheld him. It was not possible to say with any confidence whether, without the tortious contribution, the claimant would have been so weak as to inhale her vomit. It was not suggested either in this court or below that the damages should be apportioned.

41. At paragraph 46 of his judgment (which was handed down after the argument had been heard in the instant appeal), Waller LJ said:

> "I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."

42. My immediate reaction to the question of apportionment in the instant appeal was to wonder whether this case was any different from *Bailey.* Was this not a case of an

indivisible injury (the respondent's seriously damaged state following her breakdown) with more than one cause? It was not possible to say that, but for the tort, the respondent would probably not have suffered the breakdown but it was possible to say that the tort had made a material contribution to it. If that is a correct analysis, should not the starting point have been that the respondent was entitled to recover in full?

43. In *Hatton*, Hale LJ said that a claimant could establish causation by showing that the tort had made a material contribution to the injury. She was presupposing that there were other non-tortious factors in play and that it would not be possible for the claimant to succeed outright on causation by showing that, but for the tort, he would probably not have suffered the injury. That means that a claimant can succeed on causation even though he cannot demonstrate what the causative potency of the tort was, save to say that it had some effect which went beyond the minimal. It seems to me that, if in one breath the judge holds that all that can be said about the effect of the tort is that it made an unspecified material contribution, it is illogical for him, in the next breath, to attempt to assess the percentage effect of the tort as a basis for apportionment of the whole of the damages. That is not to say that it is not important to have in mind in assessing damages the condition of the claimant before any tortious act occurred. In particular it might be appropriate, where the judge holds that non-tortious factors have been in play, to discount particular heads of damage, for example, to reflect the risk that the claimant might in any event have suffered a breakdown at some time in the future and would then have suffered some loss of earnings or incurred some expense.

44. In my experience, apportionment of the whole of the damages is usually carried out only in cases where the injury is divisible. In such cases the seriousness of the medical condition in question is often related to the degree of exposure to the agent causing it; in other words the condition is 'dose-related'. The true nature of such cases is that the tort has caused only part of the overall injury. The only practicable way of assessing the right sum for the relevant part may be to assess the damages for the whole injury and to apportion them on the basis of an assessment of the tortious and non-tortious exposures. This is possible in cases such as dust exposure, noise-induced deafness and hand/arm vibration syndrome. In other cases, the true nature of the case may be that the tort has aggravated an existing condition or injury and it may be that the only practicable way of assessing the effect of the aggravation is by an across the board apportionment of the total loss. I am doubtful of the applicability of this type of approach to a case of psychiatric injury where there are multiple causes of the breakdown.

45. In *Hatton,* Hale LJ said that, where multiple causes were at work in a case of psychiatric injury, a sensible attempt at apportionment should be made. She recognised that most cases of apportionment involved divisible injuries but observed that there were other cases where that was not so. She mentioned *Rahman v Arearose* [2001] QB 351 where two tortfeasors had injured the claimant and had contributed to the development of an indivisible psychiatric injury. The Court of Appeal approved a broad brush apportionment between tortfeasors so as to avoid injustice as between them. Whether such a case can be used to justify a general rule that apportionment should be carried out in cases of indivisible psychiatric injury where excessive stress has been a contributory cause, I am not at all certain. It should be noted however that Hale LJ's remarks were *obiter*; apportionment did not arise in any of the four appeals

under consideration. Moreover, the House of Lords in *Barber* expressly declined to endorse that aspect of Hale LJ's guidance, saying that they had heard no argument on the topic (*per* Lord Walker of Gestingthorpe at paragraph 63).

46. I respectfully wish (*obiter*) to express my doubts as to the correctness of Hale LJ's approach to apportionment. My provisional view (given without the benefit of argument) is that, in a case which has had to be decided on the basis that the tort has made a material contribution but it is not scientifically possible to say how much that contribution is (apart from the assessment that it was more than *de minimis*) and where the injury to which that has lead is indivisible, it will be inappropriate simply to apportion the damages across the board. It may well be appropriate to bear in mind that the claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a reduction in some heads of damage for future risks of non-tortious loss. But my provisional view is that there should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play.

47. Thus I have grave doubts as to the appropriateness of the exercise that was carried out in the instant case, although ultimately the result of a different approach might not have been very different. I can see, for example, that it might well have been appropriate for the judge to discount the future losses to some extent on the basis that the respondent might well have suffered a breakdown at some time in the future; alternatively that the flooding of her home in 2006 had prolonged her psychiatric illness so that the appellant was liable only for a reduced period of suffering and absence from work.

48. The observations of Hale LJ (and Brooke and Kay LJJ who agreed with her), were bound to carry considerable weight, even though *obiter,* and I can therefore understand why, in the present case, counsel and the judge agreed that across the board apportionment should be undertaken in this case. Neither party has criticised the judge's approach to apportionment and I shall say no more on that issue.

Factual Findings

49. In his grounds of appeal and skeleton argument, Mr Gardiner submitted that the judge had made a number of findings of fact which were not justified on the evidence. He did not pursue these points in oral argument, wisely in my view, as they were all quite peripheral points, none of which, even if the findings were unfounded, could sensibly be thought to have had any effect on the outcome of the case. I will not lengthen this judgment by discussing them in detail.

Conclusion

50. For the reasons I have given, I would dismiss this appeal.

Lord Justice Wall:

51. I have had the advantage of reading Smith LJ's judgment in draft. I am in complete agreement with it, and for the reasons she gives I, too, would dismiss the appeal. As I was not party to the decision of this court in *Bailey v Ministry of Defence* [2008[

EWCA Civ 883, I do not think it would be appropriate for me to offer any comment on paragraphs 40 to 48 of Smith LJ's judgment.

Lord Justice Sedley:

52. I agree with the conclusions of Lady Justice Smith and with her reasons for reaching them.

53. Like her, I am troubled by the shared assumption about the appropriateness of apportionment on which the case has proceeded. While the law does not expect tortfeasors to pay for damage that they have not caused, it regards them as having caused damage to which they have materially contributed. Such damage may be limited in its arithmetical purchase where one can quantify the possibility that it would have occurred sooner or later in any event; but that is quite different from apportioning the damage itself between tortious and non-tortious causes. The latter may become admissible where the aetiology of the injury makes it truly divisible, but that is not this case.

54. While the obiter dicta of Hale LJ in *Hatton* are, as always, entitled to the greatest respect, the *stare decisis* principle requires courts of first instance, at least for the present, to take their cue in this regard from *Bailey*.