

DISABILITY DISCRIMINATION:

The meaning of 'likely', 'time' and the use of 'and'

SCA PACKAGING LIMITED V BOYLE [2009] UKHL 37

Introduction

"Sets, Relations and Probability

1. We saw that the definition of conditional probability was this: $Pr(A/B) = Pr(A \cap B) / Pr(B)$. Now $Pr(A \cap B)$ is just the probability of A&B. Hence if we already know $Pr(A/B)$ we can calculate $Pr(A \cap B)$ by the following formula: $Pr(A \cap B) = Pr(A/B) \times Pr(B)$.

2. We saw in the last lecture how conditional probabilities can be surprising; they can also be practically useful. Suppose we know that 65% of people who get leukaemia have been exposed to radiation at some time in the past; and suppose we know that 1% of the general population (including those who have as well as those who have not suffered exposure to radiation) gets leukaemia; and suppose we know that 5% of the general population have been exposed to radiation. Then what is the probability that a given person A, who has been exposed to radiation, will get leukaemia? We reason as follows. We want to establish $Pr(A \text{ suffers from Leukaemia} / A \text{ is exposed to radiation})$. Write this as $Pr(L/R)$. Then:

$$(i) Pr(L/R) \times Pr(R) = Pr(R/L) \times Pr(L)$$

$$(ii) Pr(L/R) = Pr(R/L) \times Pr(L) / Pr(R)$$

$$(iii) Pr(L/R) = 65\% \times 1\% / 5\%$$

$$(iv) Pr(L/R) = 13\%$$

Step (i) is Bayes's Theorem: step (ii) follows from it by simple algebra; and steps (iii) and (iv) follow by substitution of the data.

3. Another use of conditional probabilities is.....”

This is an extract from Hume *'Enquiry Concerning Human Understanding'*.

1. It demonstrates to us that it is possible through the application of complex mathematical formulas and theorems to work out probabilities of the occurrence in the general population of leukaemia caused by radiation. I think it also establishes beyond doubt (pretty certainly) that most lawyers do not really understand about probabilities and risk.
2. One of my summer reads was 'Risk: The Science and Politics of Fear' by Dan Gardner. It is a surprisingly good read explaining how our perception/fear of a given risk has much more to do with the fact that we are basically primitive human beings than the true nature of the risk itself.
3. The application of chance in law does not usually benefit from a theorem or formula. This has and will lead to inconsistent and contradictory outcomes. Perhaps this can be explained by our basic instincts overriding our higher reasoning functions as suggested by Dan Gardner.
4. What Dan Gardner's book demonstrated to me was that as an advocate you must make sure that when you are going to start talking about risk/probability you at least have some idea of what you are talking about. Not an in depth understanding of risk but an appreciation that it is a complex subject upon which you may well require assistance from an expert.
5. I would like to think that someone had this mind when the DDA Guidance was produced dealing with the meaning of 'likely'. Unfortunately I think more likely that the draftsman used a

commonly understood legal meaning namely whether something was more likely than not to happen.

Relevant Parts of the DDA Guidance

Section C: Long term

Meaning of 'long-term effects'

C1. The Act states that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:

- which has lasted at least 12 months; or*
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or*
- which is likely to last for the rest of the life of the person affected (Sch1, Para 2).*

For the purpose of deciding whether a person has had a disability in the past, a long-term effect of an impairment is one which has lasted at least 12 months (Sch2, Para 5).

Meaning of 'likely'

C2. It is likely that an event will happen if it is more probable than not that it will happen.

Likelihood of recurrence

C8. Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the

impairment from having such effects (e.g. avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances. In addition, it is possible that the way in which a person can control or cope with the effects of an impairment may not always be successful: for example, because a routine is not followed or the person is in an unfamiliar environment. If there is an increased likelihood that the control will break down, it will be more likely that there will be a recurrence. That possibility should be taken into account when assessing the likelihood of a recurrence.

6. The application of the likely test was quite straightforward and uncontroversial during the first 10 or so years of the DDA. Whenever the issue of 'likely' came up for consideration the Tribunal would refer to the Guidance. When the Employment Appeal Tribunal came to look at the issue it had no problem with the meaning of 'likely'.
7. In Latchman v Reed Business Information Limited [2002] UKEAT 1303/00, it was described as '50%'. In Swift v Chief Constable of Wiltshire Constabulary [2004] Latchman was approved and the Guidance was followed.
8. It is interesting to note that the case of Eastern & Coastal Kent PCT v Grey [2009] which I discuss below in relation to another area of the DDA although drawing no conclusion on the matter, certainly appreciated that 'likely' might mean something other than more likely than not (see paragraphs 18 – 23).
9. This is not the test that was adopted by the House of Lords in Boyle.

The Facts

10. Ms Boyle suffered from an impairment to her vocal cords which had in the past caused a chronic problem of hoarseness. Ms Boyle had a number of operations to remove nodules from her vocal cords. The last operation was in 1992 after this Ms Boyle followed a strict management regime and so at the time of the alleged discrimination in 2001 and 2002 Ms Boyle had been free of the nodules for nearly 10 years.

Key Issue

11. What was required of Ms Boyle to demonstrate that the nodules were likely to recur and have a substantial effect?

The Outcome

12. It was decided that “likely” meant “could well happen”. The Guidance was held to be wrong and Latchman was overruled.

Analysis

13. It is worth noting first of all that this is a case where the House of Lords explain the place that guidance has when it comes to statutory interpretation. The emphasis being on what the intention of Parliament was not what the guidance indicates. With the ever growing reliance on Codes and Guidance in this area of the law it is another timely reminder to practitioners of the importance of the primary legislation (see Richmond Adult Community College v McDougall [2008] EWCA Civ 4 below as well).

14. The H of L accepted as a starting point the fact that likely has shades of meaning within the English language. Lord Rodger at paragraph 36

highlighted what Lord Nicholls had stated in Cream Holdings Limited v Banerjee [2004] UKHL 44 at paragraph 12.

"As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'. In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as 'very likely' or 'quite likely'."

15. Having established that meaning depended upon context, the H of L looked at the various legal contexts in which the term likely had been interpreted. It was clear from the analysis of Banerjee and In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 that what Parliament expected in the way of likelihood varied.
16. Banerjee which looked at the granting of interim injunctions and the application of S 12(3) Human Rights Act 1998 concluded that in most circumstances the general approach should be that courts would be exceedingly slow to make interim restraint orders where an applicant had not satisfied the court that he would probably, as in "more likely than not", succeed at trial.
17. There would, however, be cases in which, because the adverse consequences of publication might be extremely serious, a lesser prospect of success would satisfy the test. This flexible approach would give effect to Parliament's intention to have regard to the right to freedom of expression whilst balancing countervailing rights under the 1998 Act.
18. So in effect what Banerjee decided was that the rule was more likely than not but there were exceptions.

19. In re H the issue under analysis was sexual abuse of children. In this context the phrase 'is likely to suffer significant harm' did not mean that the occurrence of such harm had to be more likely than not. It was enough that the happening of the harm was a real possibility. Again the importance of the nature and gravity of the feared harm was a relevant factor when deciding upon that possibility.
20. What is being said here? My own view is that the concept of risk, possibility and outcome are being confused. The fact that the consequences of something are so dreadful that its occurrence is unthinkable does not make it anymore possible.
21. It is the consequence of the failure to act that makes it necessary for the Court to act (think about the costs of missile defence system to stop the unlikely but completely devastating impact from an asteroid – Dan Gardner's example!).
22. It seems to me that although the analysis carried out by the H of L was helpful in illustrating why in other areas of law the meaning of likely does vary. I do not believe the authorities actually help the practitioner understand why it should mean something different in the context of the DDA?
23. One could postulate from a policy view point that as this a necessary threshold to pass the hurdle should be set low. Perhaps you might think that the particular problems in predicting the future course of an impairment to set the barrier at more likely than not would make it difficult for a significant number of Claimant's on the margins to establish disability.
24. Although some form of policy in favour of assisting mentally or physically impaired employees does not seem to be high on the courts

agenda recently (see London Borough of Lewisham v Malcolm & The Equality & Human Rights Commission [2008] UKHL 43 & McDougall).

25. What I believe the H of L are doing in this case is appreciating the difficulties faced by a Claimant and effectively creating a rebuttable presumption as to recurrence of a disability. This is probably not that surprising as Lady Hale who was in the minority in Malcolm and gave the leading judgment in Archibald v Fife Council [2004] UKHL 32 again strongly supports wider inclusion and then explanation/justification (see paragraph 71).

26. The approach now is that it would be unlikely that a certain course of action or treatment would be prescribed by a doctor if there was not a significant risk that an effect would return or 'could well happen'.

27. This is summarised in paragraph 42 per Lord Rodger:

"... where someone is following a course of treatment on medical advice, in the absence of any indication to the contrary, an employer can assume that, without the treatment, the impairment is "likely" to recur. If the impairment had a substantial effect on the patient's day-to-day life before it was treated, the employer can also assume - again, in the absence of any contra-indication - that, if it does recur, its effect will be substantial."

28. This decision will mean that more employees will be categorised as disabled under the DDA. My own view is that this decision will have a real impact on cases where an individual has only been unwell for a period of less than 12 months. You will see from the way McDougall works below the importance of evidence that would have been available at the time of the act of discrimination.

29. Now a Claimant has to show not that any condition was more likely than not going to last for more than 12 months but that such an outcome 'could well happen'. Personal experience tells me that a medical expert is far more likely to conclude that something could well happen and be able to justify that opinion.

30. One particular area where I think it will have an impact is Claimant's with depression who are usually faced with the almost impossible task of proving that their first bout of depression will last 12 months or longer. It is widely accepted by professionals in the field of psychology that the first bout of depression lasts around 6 months.

31. As a result of Boyle I believe it will be easier to show in particular cases that although it is usual for the first bout of depression to last around 6 months the fact is that other outcomes i.e. the impairment lasting 12 months or more could well happen.

Richmond Adult Community College v McDougall [2008] EWCA Civ 4

Introduction

32. When this case first came out I took very little notice of it. It had finally sorted out the question of what evidence a Tribunal can look at when determining the likelihood of an event recurring.

33. The decision had brought certainty and that was to be welcomed both by employers and employees.

Relevant Parts of the Disability Discrimination Act 1995 (DDA)

Schedule 1

Long-term effects

2 (1) The effect of an impairment is a long-term effect if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring shall be disregarded in prescribed circumstances.

Relevant Parts of Old DDA Guidance

B8 In assessing the likelihood of an effect lasting for a period, account should be taken of the total period for which the effect exists. This includes any time before the discriminatory behaviour occurred as well as time afterwards. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health, age).

The Facts

34. The Claimant had a history of mental health problems. Between November 2001 and February 2002, she was compulsorily admitted to and detained in hospital under the terms of the Mental Health Act 1983. She was then discharged from hospital into the care of a

consultant psychiatrist. Subsequently, she applied for a position as a database assistant at the Richmond Adult Community College. She was offered and accepted the position, subject to satisfactory medical clearance and references.

35. Having received a medical report, the college purported to withdraw the offer on the basis that the medical clearance was not available. The Claimant then had a relapse and was readmitted to hospital under the 1983 Act.

Key Issue

36. Are events that take place after an act of discrimination relevant to the issue of whether a condition was likely to recur under the DDA?

The Outcome

37. The Respondent succeeded and the Court of Appeal decided that events after an act of discrimination were not relevant to the issue of whether a condition was likely to recur.

38. The Court overruled Greenwood v British Airways Plc [1999] UKEAT 867/98 and followed Latchman.

Analysis

39. A Tribunal faced with a Claimant who is clearly disabled at the time of the hearing is naturally going to take account of what they see in front of them.
40. Wise after the event medical practitioners produce well crafted reports indicating the near certainty that the condition would have recurred or would have continued.
41. Again these reports are written with the benefit of hindsight and a clearly disabled patient.
42. The problem for the employer has always been the person who has only been unwell for a short period of time or whose symptoms had not recurred.
43. An employer would find themselves facing a DDA claim having dismissed 3 months into the commencement of an impairment. After the dismissal this impairment becomes a long term condition and by the time the hearing arrives the Claimant is clearly disabled.
44. The Court of Appeal went straight to the purpose of the DDA namely to protect people from acts of discrimination. It was not meant to present a cause of action after the event because a certain medical outcome had occurred.
45. The DDA focuses on acts of discrimination and on that basis the act must be judged by the evidence that was available at the time.
46. Incidentally this did not accord with paragraph B8 of the DDA Guidance. It is worth noting that the Court made it clear that in any conflict between the Guidance and the DDA, the Act will prevail.

47. All good stuff and very logical however this gives rise to consequences for both employees and employers alike.
48. What evidence can now be called on the question of disability? The employee is unlikely to have had a full medical examination that would have informed the employer as to his state of health. At best he would have provided a series of sick notes indicating the nature of his medical status at that time.
49. What if the employer finding himself with a recently depressed employee who he has employed for a few months decides to dismiss before things get worse?
50. This is in effect exactly what happened in McDougall having been made aware of a previous period of mental illness the offer was withdrawn before the Council was informed of her actual medical position!
51. The answer would be no disability and we welcome back subjectivity to the DDA.
52. The view of the 'ignorant and obtuse' is now the basis for a decision on whether the employer should have known at the time that a disability was likely to occur.
53. If I am recruiting and I am aware that one of the applicant's has just recovered from a spell of mental illness that lasted for say 6 months do I short list the applicant?
54. If you take the declaration of mental illness at face value and there is no other evidence in relation to likely recurrence then McDougall would appear to permit the employer to reject on the basis of a past mental

illness that did not amount to a disability! How would this interact with the lower threshold established by Boyle? As yet this is untested.

55. The impact on any Claimant in the Tribunal up until Boyle has been far reaching.

56. The Claimant may be permitted to produce reports at any disability hearing from an expert who at the time could have said that on the available evidence the condition was likely to recur or last for 12 months.

57. Will the Claimant be permitted to call evidence from an expert on the issue? It is after all the subjective view of the employer that would count. Surely the logical outcome will be a complete ban on any after acquired evidence with the Claimant relying solely on what evidence was available at the time.

58. This does not sit happily with the reliance on opinions in Boyle. It is likely in the light of Boyle that medical evidence will now play a more significant role in determining the question of whether something is 'likely' to happen.

59. The difficulties do not end there for the Claimant. What about a series of allegations linked to a disability over a period of time? The very real risk is that the Claimant will be able to establish discrimination towards the end of the 12 months but not the beginning (however see analysis of Boyle above).

60. I suppose it is even possible that an applicant could apply for two different jobs and be rejected for both but only discriminated against by the one that asked for further information!

