court circular

ZURICH MUNICIPAL

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THE LATEST JUDGMENTS AND WHAT THEY MEAN TO YOU

Welcome to the Autumn 2017 issue of Court Circular.

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Contents

Readers can go directly to any article simply by clicking on the heading in the contents list on the next page. Claims involving our customers are clearly marked in the subject heading. At the top of each page icons may be used to contact us, to email the publication to a colleague, to navigate, and to print.

Court Circular is our regular publication examining the latest relevant judgments and what they mean to you. Full judgments of some of the claims featured may be found at: http://www.bailii.org/

We begin this edition with a variety of Employers' Liability claims, covering disputes arising from a wide range of allegations. First, we feature a Court of Appeal decision examining liability for psychiatric injury allegedly caused by sex discrimination and victimisation at work (*BAE Systems*, p.3). This is followed by two claims highlighting the type of steps employers may take, including injunctive measures, against employees who wrongly copy and misuse their employer's confidential information (*WE Cox Claims*, p.3 and *OCS Group*, p.4).

We also revisit the question of an employer's vicarious liability for the wrongdoing of its employee, where the court applies the two-stage test for establishing the reality of the relationship between the employer and the alleged wrongdoer (*Various Claimants*, p.4). The final claim in this section concerns a claimant's lung disease through mesothelioma and tobacco smoking, revisiting the question of the extent to which smoking should be regarded as the claimant's negligent contribution to the medical condition (*Blackmore*, p.5).

In the area of Housing, another claim arising from mesothelioma argues it was caused by negligent exposure to asbestos allegedly disturbed when works were carried out by the defendant landlord (*Lugay*, p.5). We also include the outcome of an appeal in a claim we have previously featured, regarding the duty to install handrails (*Dodd*, p.6).

We then feature a number of Highways claims. These include a claimant who stepped from a footpath and fell into a brook, and a claimant who fell from one highway to another situated two metres below (*Singh*, p.6 and *Robinson*, p.7).

In the area of Police liability, we include the result of an appeal, again in a claim we have previously featured, regarding alleged race discrimination connected with the arrest and detention of a suspect (*Durrant*, P.8). There is also a ruling in a claim by a woman and her son, alleging wrongful arrest and unlawful conduct concerning a search warrant (*Stewart*, p.9).

In Motor, a High Court judgment from Northern Ireland emphasises the importance of a young child being properly seated in the correct child seat (*ES*, p.10).

We include two Civil Procedure decisions – the first illustrates the costs protection provided by Part 36 to a party making a Part 36 offer when the offer is accepted beyond the prescribed time limit (*Briggs*, p.10). The second examines the circumstances in which a court will permit a party to withdraw a pre-action admission of liability after proceedings have commenced (*Blake*, p.11).

We conclude with a selection of damages awards for a variety of injuries of differing severity. We hope you will find this edition interesting and informative.

Richard Shanks

Contents

EMPLOYERS' LIABILITY

LIABILITY FOR PSYCHIATRIC INJURY – DISCRIMINATION AND VICTIMISATION

BAE Systems (Operations) Ltd v Konczak, 31.07.17, Court of Appeal

The respondent, C, was employed by the appellant company, R, for nearly 20 years. From 1999, C was a secretary working with officers from the Royal Saudi Air Force (RSAF). C alleged she was bullied and harassed by RSAF officers. In early 2005, at the RSAF's request, C was moved to one of R's other offices but was unhappy and asked to return, but not to work with the RSAF. In a meeting with her line manager, M, in 2006, C became tearful. M attempted to reassure her but made a comment suggesting that women respond more emotionally than men.

The next day, C was absent from work. Her GP certified her as suffering from work-related stress and she did not return to work. In July 2007 she was dismissed on the grounds that it was not "appropriate" for C to return to her previous role and there were no other roles for her.

C claimed damages against R for psychiatric injury. Her allegations included sex discrimination, victimisation, disability discrimination, unfair dismissal, and breach of contract.

R denied liability.

The initial employment tribunal (ET) upheld C's unfair dismissal and disability discrimination claim in relation to R's failure to make reasonable adjustments. It dismissed most of C's allegations of sex discrimination except as to M's comment in the 2006 meeting.

When assessing damages, the ET noted C's admission to a history of stress and difficulties at work before M's comment. The ET awarded C just over £360,000. It declined to apportion damages, saying psychiatric injury was indivisible.

R unsuccessfully appealed to the Employment Appeal Tribunal (the EAT).

R appealed to the Court of Appeal. The Court referred to its decision in *Hatton v Sutherland* (2002) involving multiple claimants, one of whom appealed to the House of Lords (*Barber v Somerset County Council*, *Court Circular*, May 2004).

In *Hatton* the Court set out guidelines – "propositions" – when assessing workplace psychiatric injury claims. One proposition states that, where the psychiatric harm had more than one cause, the employer should only be liable for the proportion of harm caused by its wrongdoing, unless the harm was truly indivisible. The guidance on apportionment was made as an *obiter* comment in *Hatton*, therefore informal and not binding. It was criticised by the Court of Appeal in *Dickins v O2* (*Court Circular*, January 2009), which said psychiatric injury is indivisible.

Another proposition states the damages award should take account of any pre-existing vulnerability or relevant psychiatric condition. The Court in *Dickins* said this proposition enables a fair outcome.

Here, C had only developed a diagnosable psychiatric illness after M's comment at the meeting in 2006. The Court reiterated the principle that R had to take its victim – C – as it found her.

R had not raised the question of whether C would have suffered a similar condition through some other trigger, and the Court did not therefore apply the guidance regarding damages being assessed against a background of a pre-existing vulnerability. The appeal was dismissed.

COMMENT

This Court of Appeal judgment reviews the potential extent of an employer's liability for an employee's psychiatric injury sustained in the course of employment. The propositions in *Hatton v Sutherland* remain the key guidance in these claims. Further, the circumstances of this claim caution employers to ensure they have appropriate systems in place to be able to take serious and effective measures to comply with their relevant duties to manage and address employees' complaints of discrimination, bullying, harassment, and workplace stress. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

TERMINATION OF EMPLOYMENT – COPYING CONFIDENTIAL INFORMATION

WE Cox Claims Group Ltd v Spencer, 11.07.17, High Court

The respondent, D, was the managing director of the appellant, C. C alleged D had emailed his assistant requesting a list of C's business contacts. D was told to leave the premises and that disciplinary action would be taken against him. D resigned the following week.

C asked D if he had used, copied or disclosed the list to any third parties. C asked D to undertake to deliver up all copies of the list and to cease using it. D denied taking a copy of the list or any other confidential information except in the course of his employment. He said he had not contacted anyone on the list and had deleted it without disclosing it to any third party. D said he had been endeavouring to develop the business and had intended to check the list for who should be contacted for that purpose. He admitted he had copied the list to his home computer and had made a secondary list.

C found emails implying D was intending to join another company. C applied to the court for an order for the delivery up of any computers, documents and equipment containing C's confidential information, to be examined by an independent expert. D agreed in principle but the court was asked to determine the extent of the examination. C argued the expert should be permitted to inspect two devices for any further copying of confidential information.

The court held there was a triable issue regarding whether D had copied C's confidential information to assist himself after leaving C's employment. C had discovered extremely damaging emails. The court accepted that copying the list might have been a coincidence but this was a question to be decided at trial, as was C's allegation that when D copied the list he knew he had done so in breach of contract.

The court noted D had not initially admitted to having copied the list, although he did so later. The court accepted there was a real possibility D had copied it to make use of the obviously confidential information. The application was granted.

COMMENT

This alerts both employers and employees to the potential perils of wrongly attempting to copy an employer's confidential information at the time employment is, or is likely to be, terminated. The full outcome of this matter will only be known after the trial.

We have previously reported this type of situation when it has reached the courts, although it is a relatively infrequent occurrence. Readers might recall *Brandeaux v Chadwick (Court Circular, March 2011)*, in which the court ordered "delivery up" of the employer's confidential information, and we suggested employers review their policies warning employees of the possible consequences of this type of wrongful action. More recently, in *Kaplan Financial Ltd v Locke* (*Court Circular,* July 2013) the employee was ordered to pay a six-figure costs bill after the court held the employer had been entitled to take urgent injunctive steps to protect itself from the employee's dishonesty.

EMPLOYERS' LIABILITY

IMPRISONMENT FOR BREACHING INJUNCTION PROHIBITING DISCLOSURE OF EMPLOYER'S CONFIDENTIAL INFORMATION

OCS Group v Dadi and others, **06.07.17, High Court**

The claimant, C, was contracted to provide cleaning and other services to the airline industry, including to British Airways. C lost its contract to a competitor company, D4, the fourth defendant in these proceedings.

The first defendant, D1, and the fifth defendant, D5, were employed by C but were transferred to the employment of D4 under the Transfer of Undertakings Regulations.

C alleged D1 and D5 conspired to transmit C's confidential business information to their personal email accounts. C obtained an injunction against D1 prohibiting him from disclosing C's confidential information, ordering him to preserve all the information he had transmitted and to provide details of any disclosures he had made about it to any third parties. He was also prohibited from disclosing to anyone the fact of the injunctive Order having been made. The Order carried a penal notice, warning D1 that, if he breached the Order, he could be imprisoned, fined, or have his assets seized.

D1 accepted he had breached the Order by deleting much of the information from his email account and by telling D5 and others about the Order after it was served on him. He took this action within 48 hours of the Order being served on him. He said he had made a grave error of judgement in acting as he had, for which he said he was sorry. He said he had co-operated with C's solicitors by providing his computer and access to his email account. He pleaded for the court's mercy not to imprison him, giving family reasons as to why imprisonment would have a catastrophic effect on his and his family's lives.

The court noted relevant case law regarding terms of imprisonment for contempt of court, and that a person imprisoned for this reason is entitled to unconditional release after having served half of the sentence.

While taking account of D1's admission, co-operation and apology, the court said D1 intentionally transferred large amounts of C's confidential information but tried to conceal this by encryption and double deletion. The court said D1 was a "sophisticated user of this kind of technology". The court said D1's copying and deletion of the material had put C to considerable expense in trying to retrieve and analyse various computers and memory sticks.

The court sentenced D1 to six weeks' imprisonment.

COMMENT

This prison sentence for contempt of court demonstrates the potential for even more serious consequences, than in *WE Cox*, above, where an employee misuses an employer's confidential, commercially sensitive, information. The court noted D1 had not committed just one act of contempt, perhaps in a panic, but four acts over two days. The court said prison was a punishment of last resort but a short prison sentence would reflect the court's disapproval and should deter others from breaching court orders. The court said the justice system "will not work if people think that they can ignore court orders and destroy evidence".

This ruling also illustrates that an employer, who discovers an employee has misused the employer's confidential information, may be justified in taking urgent steps to protect its position. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

VICARIOUS LIABILITY FOR SEXUAL ASSAULTS OF MEDICAL EXAMINER

Various Claimants v Barclays Bank plc, **26.07.17, High Court**

The claimants, C, were 126 applicants for employment with the defendant bank, D, or were already employed by D. D required each claimant to be medically examined at the home of a doctor, B, appointed by D. C alleged that during the examinations B sexually assaulted them. These assaults are alleged to have taken place several years ago. B died in 2009. In 2013 a police investigation concluded B would have been prosecuted in relation to 48 victims, had he not died.

C claimed damages from D, alleging it was vicariously liable for the assaults. The court addressed vicarious liability as a preliminary issue.

C alleged D owed them a duty of care to ensure the requisite medical examination was carried out by a suitable doctor with sufficient safeguards to protect C against sexual assault. C relied on the Supreme Court judgment in *Various Claimants v Catholic Child Welfare Society and others* (*Court Circular*, January 2013), arguing B was carrying out work for D at least "akin to employment".

D denied vicarious liability, saying B was an independent contractor, not an employee of D, and that the examinations were not part of D's business.

The High Court referred to relevant case law, including *Various Claimants*, above, and *Cox v Ministry of Justice* (*Court Circular*, April 2016). The court considered the reality of the relationship between B and D, focusing in particular on the control mechanism and the purpose of the organisation.

Vicarious liability is assessed according to the two-stage test established in *Various Claimants*, above. First, the court considers whether there was a relationship of employment, or one "akin to employment". Second, consideration is given to whether there is a sufficiently close connection between the wrongful act and the role for which the alleged wrongdoer is engaged.

The court said B's activity was part of D's business activity because the medical assessment enabled D to be satisfied its prospective employees were fit for D's work. The court also considered whether D had created the risk of B committing the wrongful acts. C were examined by B at his home. B required them – some, only young girls – to remove their clothing to their underwear and allow chest measurements to be taken. D had created the risk of the wrongful acts being committed.

Regarding the control element, the court held D could direct what B did, not how he did it. D had significant control of the terms of the examination, issuing B with questions to ask C and stating the physical examinations to be carried out. Further, C were told to attend B for the requisite examination. The court was satisfied these factors met the stage one criteria for D and B to have had a relationship "akin to employment".

Regarding stage two, the court considered whether B's assaults were sufficiently closely connected with his employment. B assaulted C while carrying out duties on behalf of D at a time and place required by D. The assaults were inextricably linked with his work, satisfying stage two of the test.

The court held D vicariously liable for any assaults C might prove B carried out.

COMMENT

This ruling reiterates the two-stage test to be applied when assessing whether an employer may be vicariously liable for the wrongful acts of an employee or quasi-employee. The first stage is to establish whether an employment relationship, or a relationship "akin to employment", existed between the employer and the alleged wrongdoer at the time the wrongful act was committed. The second stage is to establish whether the wrongful act was sufficiently closely connected with the wrongdoer's role. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

APPORTIONING LIABILITY FOR MESOTHELIOMA IN SMOKER

Blackmore (Executrix of the Estate of C L Hollow, Deceased) v Department for Communities and Local Government, **27.07.17, Court of Appeal**

Readers might recall the county court judgment in this case featured in our January 2015 edition of *Court Circular.* The claimant, on behalf of the estate of the deceased, H, claimed damages from the defendant, D, alleging H's exposure to asbestos during his employment caused the disease that resulted in his death. H, born in 1936, was employed for 20 years by the defendant, D, at Devonport Dockyard.

C alleged that, approximately 20% of his working time was in environments in which he was exposed to asbestos dust. C had smoked since the age of 14. He smoked 20 cigarettes daily until 2005 when he reduced to 12 daily. In 2010 H died from lung cancer. The post mortem examination found he had asbestosis.

D conceded primary liability but argued C's smoking should be regarded as contributory negligence.

The parties' medical experts agreed H died from the combined harmful effects of smoking and exposure to asbestos fibres.

The trial judge noted H smoked many years before commencing employment with D, and before smoking was known to be harmful to health. The trial judge held D primarily liable but also held H 30% liable in contributory negligence.

D appealed the amount of the contributory negligence, contending that 30% was less than half of C's contribution, through his smoking, to the risk of developing lung cancer.

The Court of Appeal considered s.1 of the Law Reform (Contributory Negligence) Act 1945 (the Act). The Court held that, with regard to apportioning responsibility under the Act, causative potency and blameworthiness had to be taken into account. A distinction should not generally be made between an employee who contributes to their injury by their conduct relating to work and one who does so by conduct unrelated to their work.

With regard to calculating the apportionment of liability, the Court held the trial judge had not erred in his decision. The Court held the trial judge correctly rejected D's argument that the apportionment should be made based on the proportions by which both the asbestos exposure and smoking increased the risk of contracting lung cancer. The trial judge had been entitled to hold D largely to blame for exposing H to asbestos fibres when the dangers of doing so were known at the time and governed by statutory duty. The trial judge was right to take into account that, although H had continued to smoke after the dangers of smoking were made public, there was some medical uncertainty in H's earlier years of smoking.

The appeal was dismissed.

COMMENT

This Court of Appeal judgment confirms the extent to which smoking will be held as contributory negligence where a person who was wrongly exposed to asbestos fibres, but who also smokes, has developed asbestosis and lung cancer. The apportionment will not necessarily be according to the proportion of the increased risk of contracting lung cancer caused by asbestos and by smoking. The court will take account of any duty the defendant breached at the time, the state of knowledge of the risks of asbestos exposure, as well as the state of knowledge at the time of the risk of tobacco smoking. The full judgment may be accessed here.

HOUSING

TENANT'S DEVELOPMENT OF MESOTHELIOMA – FAILURE TO PROVE CAUSATION

Lugay (PR of the Estate of F Lugay, Deceased) v London Borough of Hammersmith and Fulham, **19.07.17, High Court**

The claimant, C, is the widow of the deceased, L, who died of a heart attack in July 2012, aged 73. The parties' medical experts agreed his death was accelerated by four years due to malignant mesothelioma, with which L had been diagnosed in 2011.

L, born in the Dominican Republic, moved to the UK when he was young. For many years L resided as a tenant of the defendant, D, in a flat. C married L in 2008 and continues to reside in the flat.

C claimed damages from D on behalf of herself and L's estate, alleging L's mesothelioma was caused by D's negligence. C alleged the flat, in a block, was constructed of materials containing asbestos and that L had been negligently exposed to asbestos fibres during his tenancy. C alleged the installation of central heating in the 1980s disturbed the asbestos in the block of flats. L continued to live in the flat during the installation. L also carried out regular maintenance and re-decoration work to his flat, including sanding and painting the ceilings.

D accepted it owed L a duty to take reasonable care to ensure L was not exposed to a foreseeable risk of asbestos-related injury in connection with his tenancy. D denied breaching its duty to L.

The court heard medical evidence that, while L had suffered from significant heart failure for some time, this was stable until the development of mesothelioma caused serious deterioration to his health.

The court considered the evidence, concluding L had not been exposed to asbestos dust in the block of flats beyond background levels. The court also considered what was or should have been D's knowledge of the risk of asbestos at the time. The court held D knew the building had been constructed using materials containing asbestos. D was under a duty to ensure its tenants were protected from exposure to asbestos if works involving the disturbance of asbestos were carried out in the building.

With regard to the maintenance and decoration work L had regularly carried out, the court held D was not under a duty to remove all asbestos in the flats. D had complied with its duty to warn tenants of the risk of carrying out works involving a disturbance to asbestos materials. The duty did not extend to warning against cleaning and decoration works as these did not involve the requisite abrasive action which disturbed the textured coating on the ceilings. Any disturbance to the edges of the ceiling would have been minimal.

The claim was dismissed.

COMMENT

This High Court ruling concerns slightly unusual circumstances of alleged mesothelioma in the sphere of landlord and tenant. We usually feature such claims in the area of Employers' Liability. This claim highlights the state of knowledge of the risks of asbestos at the time and a landlord's duty in connection with those risks, including a duty to warn tenants against carrying out particular types of work that would disturb asbestos within the construction materials in the building.

This judgment also emphasises the importance of the question of causation. A claimant must prove on the balance of probabilities that a defendant's breach of the duty owed caused or materially contributed to the loss and injury for which damages are claimed. The full judgment may be accessed here.

HOUSING

LACK OF STAIRCASE HANDRAIL NOT "RELEVANT DEFECT"– EXTENT OF DUTY TO REPAIR

Dodd (Widow and Executrix of the Estate of P Dodd, deceased) v Raebarn Estates Ltd and others, **21.06.17, Court of Appeal**

Readers may recall the High Court ruling in this claim, featured in our April 2016 edition. The claimant, C, claimed damages against the defendant freeholder of the property, D, on behalf of herself and the estate of her husband, H.

While on honeymoon, C and H were guests of one of the defendants who had leased a flat from a freeholder. The building comprised three storeys. A replacement staircase with deep stairs and no handrail gave access between the ground and first floors. H fell down the stairs, suffered a major brain injury, remained in a coma, and died two years later.

D was the freeholder of the property. C alleged D had breached its duty under s.4 of the Defective Premises Act 1974 (the DPA) to take reasonable care to ensure the premises were reasonably safe so that persons using the premises would not be at risk of injury due to a "relevant defect" at the premises.

The term "relevant defect" is defined in s.4(3) of the DPA. It broadly refers to a defect in the state of the premises, resulting from a landlord's act or omission amounting to a failure to comply with the landlord's obligation to maintain or repair the premises. The experts agreed that when the alterations were made, the steep stairs and absence of a handrail would have breached what were, at the time, the relevant building regulations.

The High Court held the absence of a handrail did not amount to a "relevant defect". The court said the duty under s.4(3) is to repair demised premises, not to make them safe.

C appealed. The key question for the Court of Appeal was whether the absence of a handrail on the steep stairs constituted a "relevant defect" under s.4(3). The Court confirmed that the duty under s.4 of the DPA was a duty to repair, not to make safe. The steep stairs with no handrail may have created a hazard but the stairs were not in a state of disrepair.

The Court considered relevant case law, including the High Court decision in *Hannon v Hillingdon Homes Ltd* (*Court Circular*, September 2012). In that case, the court held that a handrail removed from a staircase amounted to disrepair under the DPA.

The Court here said the judge in *Hannon* appeared to have based his decision on a test of functionality, which is not the correct test. If part of a building does not function adequately, it cannot be said to be in a state of disrepair. While expressing profound sympathy for C, the appeal was unanimously dismissed.

COMMENT

This notable Court of Appeal ruling reiterates the extent of a landlord's duty to repair, under s.4 of the DPA. The duty does not extend to, or encompass, a duty "to make safe". It remains a duty to ensure "relevant defects" are repaired. This decision is significant for all landlords, providing reassurance as to the scope of their s.4 duty. The ruling also questions the correctness of the High Court judgment in *Hannon v Hillingdon Homes Ltd*, above. The full judgment may be accessed here.

HIGHWAYS

PEDESTRIAN'S FALL FROM FOOTPATH INTO BROOK

Singh v City of Cardiff Council, **23.06.17, High Court**

One night in December 2011 the claimant, C, was walking on a footpath that led to a footbridge over a brook. Somehow, C went into the brook, remaining there during the night until he was found in the morning with serious injuries.

C claimed damages from the defendant, D, alleging his injuries were caused by D's various breaches of duty. C alleged negligence and breach of duty under s.41 of the Highways Act 1980 (the 1980 Act) to maintain the footpath, and under s.2 of the Occupiers' Liability Act 1957 (the 1957 Act) to ensure D's visitors were reasonably safe in the area.

D denied liability.

The footbridge, two metres above the brook, had guard rails along it. Housing estates are situated at each side of the footbridge and it is used frequently by members of the public. C's expert witness said the footbridge was used hundreds of times daily by pedestrians.

C lived in a property on the other side of the footbridge from the path he was walking on. He had previously walked across the footbridge, without any difficulty, many times during the day and night, in all types of weather. When he was recovered from the brook, his blood alcohol level showed a reading of two and a half times the legal limit for driving.

After considering evidence as to the mechanics of the accident, the court found C had lost his balance when standing on ground at the side of the footpath and fell on his back, sliding down into the brook. The court held C had voluntarily stepped off the footpath on to ground next to, but not part of, the highway. His fall was not caused by tripping on any defect in the highway. D had not breached its duty to C under the 1980 Act.

The court further held that pedestrians who leave the path should know there is a brook nearby and should take appropriate care. The court held D had also not breached its duty under the 1957 Act.

Regarding negligence, the court held D had not created any danger or hazard by constructing the path or the bridge. The path was intended as a means by which pedestrians could access and cross the bridge over the brook. D had not breached any duty it might have owed when constructing the footpath and not putting fencing at the side of it to prevent pedestrians walking on to the adjacent land. The footpath did not create the hazard or cause C's injury.

The court dismissed C's claim but said that, had it found D primarily liable, it would have found C 70% liable for contributory negligence, given his blood alcohol level.

COMMENT

This claim alleged multiple breaches of duty, requiring the court to focus on some of the duties owed under common law, Occupiers' Liability, and liability under the Highways Act 1980. Unlike the circumstances in *Yetkin v London Borough of Newham (Court Circular,* September 2010) in which the Highway Authority was held to have created the danger resulting in the accident, D in this case was held not negligent as it had not created any danger posed by the path and the nearby brook.

Under its duty as occupier, D had not failed to ensure pedestrians were reasonably safe as it was obvious care should be taken in the area. Under the Highways Act, C had not tripped on any defect in the path. The full judgment may be accessed here.

HIGHWAYS

ZURICH claim

FALL FROM UNFENCED HIGHWAY – WHETHER RAILING DESIGN CREATED DANGER

Robinson v (1) North Yorkshire County Council and (2) Richmondshire County Council, **30.01.17, Newcastle County Court**

In March 2012 the claimant, C, with a group of friends, went by coach to Doncaster Races and in the evening, to a 'stag' party for C's brother.

At the end of the evening C was trying to locate the bus taking the group home. He walked along a pedestrian route on top of a retaining wall dividing two highways. The two defendants, D1 and D2, were each responsible for one: D1 for the upper, D2 for the lower.

The path on which C walked was situated approximately two and a half metres above the other. A railing stretching along part of the top path ended but the footpath continued without a barrier to the lower highway. Approximately two metres from the end of the railing, another footpath led from the top path to steps giving pedestrian access between the top and lower highways. As C walked past the railing along the top path he fell to the lower highway, sustaining life-changing spinal injuries.

When taken to hospital C was found to have a blood alcohol level just under four times the legal limit for driving.

C claimed damages from the defendants, alleging his injuries were caused by their negligence and/or breach of duty under the Highways Act 1980.

C's allegations against D1 included that it had created a trap when it fitted the railing in 2001, because the railing did not run the entire length of the wall, but ended. He said he was unaware of the steep drop between the highways. He further alleged there would have been only a modest cost in extending the railing a little further, and that a suitable risk assessment would have identified the risk of danger. C also alleged the area was not lit.

C's allegations against D2 included failing to co-operate with D1 when the railing was fitted or afterwards, to enable a fence to be fitted along the highway. C said the steps were used infrequently and there was no need to keep them open for pedestrian access.

The defendants denied liability. They contended they were not under a duty to guard against a foreseeable risk of injury from a pedestrian falling off the wall, because the risk was so obvious. There had not been any previous similar accidents. Further, evidence was given of a street light approximately five metres from the wall which would have lit the area sufficiently for C to have been able to see and avoid the drop to the road below.

The court held C's accident resulted from the extent of his blood alcohol level. The court said C was holding on to the railing to support himself as he walked along the upper road but, due to his intoxication, had not seen the drop to the highway below after the railing ended, despite a street light illuminating the area.

The court referred to relevant case law regarding highway authorities' duties, including the House of Lords decision *Gorringe v Calderdale MBC* (*Court Circular,* May 2004) and *Yetkin v London Borough of Newham* (*Court Circular*, September 2010). It also considered well-known occupiers' liability case law, including *Tomlinson v Congleton Borough Council* (House of Lords, 31 July 2003) and the more recent *Edwards v Sutton LB* (*Court Circular*, Winter 2016).

The court dismissed the claim against D1, ruling it had not created a trap or any other danger when fitting the railing. The difference in levels of the highways created an obvious risk of danger, clearly visible at any time of day or night.

The court also dismissed the claim against D2, ruling D2 was neither the occupier of, nor the highway authority for, the land from which C fell. D2 was not obliged to suggest D1 fits a fence along the upper highway or to put a barrier across the steps.

The claim was dismissed but the judge said that, had primary liability been established, C would have been held 85% liable for his contributory negligence due to the extent of his intoxication.

COMMENT

This ruling provides a useful review of the circumstances in which a highway authority may be liable in negligence for creating a danger on the highway. A similar allegation was made in the claim in Singh on p.3. The court here was referred to relevant case law including *Yetkin v London Borough of Newham,* but the railing design was clearly not the cause of the accident. This judgment also provides a significant example of the potentially catastrophic consequences of a claimant voluntarily becoming severely intoxicated. Further, it demonstrates that, even if the danger in question poses a risk of serious injury, a person remains under a duty to take reasonable care for their own safety – particularly when the risk of serious injury is so obvious.

HIGHWAYS

ZURICH claim

INADEQUATE EVIDENCE OF ALLEGED DEFECT

Bingham v Hull City Council, **04.04.17, Hull County Court**

The claimant, C, was walking alongside his friend, F, on a tarmacadam footpath, followed by C's partner and F's wife, on their way to Craven Park Stadium in Hull. C turned to speak to his partner but, as he did so, he said he fell on a raised and defective section of the path, sustaining injury.

C claimed damages from the defendant Highway Authority, D, alleging his injuries were caused by D's negligence and breach of duty under the s.41 of the Highways Act 1980. C's allegations included that D knew or should have known the footpath was the main route to the stadium, used by many pedestrians, but D caused or permitted it to be dangerous. He also alleged failure to maintain a safe surface on the path, failure to repair the defect before C's accident, failure to operate a suitable inspection system which would have identified the defect, and failure to provide signs near it to warn pedestrians.

D denied liability. It provided evidence that the area had been regularly inspected. An inspection had been carried out approximately eight weeks before the accident, when no relevant defects were found.

On a further inspection approximately ten weeks after the accident, again no relevant defects were found. Also, D had not received any complaints about the area before C's accident.

At trial, the judge was not satisfied the accident occurred as alleged. The judge also held that the alleged defect on which C claimed he fell did not constitute an actionable defect. The claim was dismissed.

COMMENT

This illustrates the importance of evidence to rebut allegations of a dangerous defect in the highway. Here, the court found C's oral evidence did not adequately support his account of the accident, there was no witness evidence to support his claim, and D's evidence of a properly operated inspection system satisfied the court there was no actionable defect in the area.

NEGLIGENCE

INJURIES FROM FIRE – FAILURE TO PROVE NEGLIGENCE

PT Civil Engineering v Davies, **30.06.17, High Court**

The appellant company, D, is the defendant to a claim brought against it by the respondent, C.

C was a self-employed ground worker. C, carrying two passengers, was driving a van owned by D. During the journey a fire broke out in the van and the three occupants jumped from it to safety while it was still moving.

C sustained injuries for which he claimed damages from D, alleging his injuries were caused by D's negligence to maintain the vehicle adequately or at all.

D denied liability. C succeeded at the initial trial after the judge found the van had been poorly maintained and that many complaints had been made to D about it.

D appealed, arguing the trial judge had accepted the parties' experts' agreement that the fire started in the driver's seat cushion and the seat back, neither of which was connected to the question of maintenance. There was no electrical wiring or mechanical feature in the area of the driver's seat.

The High Court held that the mere fact of defects having been present in the van was not evidence of the fire having been caused by those defects. The court also noted the trial judge had accepted expert evidence stating there was no link between the condition of the van, including any defects, and the fire.

The cause of the fire had not been established, which the court said was unusual, but it is for C to prove D's negligence.

The court held the trial judge had been wrong to conclude the fire was caused by D's negligence. There was no evidence indicating this. The facts indicated there was no causal connection between the fire and any failure by D to maintain the van.

The court held that C had not proven, on the balance of probabilities, that his injuries were caused by D's negligence.

The appeal was allowed

COMMENT

This judgment demonstrates the need for a claimant to prove, on balance, their injuries and loss were caused by the defendant's alleged breach of duty. Even where a breach of duty may be established, as here, the claimant is still bound to demonstrate a causal link between the breach and the loss sustained. The High Court held the claimant here had failed to prove such a link and the initial trial judge was wrong in law to have inferred it. The full judgment may be accessed here.

POLICE

ALLEGED RACE DISCRIMINATION IN ARREST

Durrant v Chief Constable of Avon and Somerset, **17.08.17, Court of Appeal**

Readers might recall the High Court decision in this claim featured in our November 2014 edition of *Court Circular.*

The claimant, C, and two of her friends had been arrested in Bristol in 2009, by officers from the defendant police force, D, on suspicion of assaulting taxi marshals. C is of mixed race. C alleged her friends were treated more favourably than her due to her race.

C was subsequently acquitted and claimed damages from D. Her allegations included false imprisonment, race discrimination, assault, misfeasance, and breach of art.3 of the European Convention on Human Rights, due to an alleged delay, despite four requests, in allowing her to use a toilet. She said the delay caused her to urinate on the cell floor in the presence of male officers and male detainees, and that this amounted to humiliating treatment.

D denied liability, contending the arrest was lawful, only reasonable force was used, and its medical officer had not found C had sustained any injury during her arrest or detention.

The High Court noted one of C's friends was permitted to wait in a consulting room rather than a cell, but rejected this was racially motivated against C.

The High Court also held there was no evidence of racist language or behaviour towards her by D's officers during her arrest and detention. It said the delay in allowing C to use a toilet was "lamentable" but not racially motivated and had not breached her art.3 rights. C's claim largely failed except for some aspects of her treatment on arrest, for which she was awarded £4,950.

C appealed. The Court of Appeal said the relevant law at the time regarding the race discrimination claim was s.57ZA of the Race Relations Act 1976 (the 1976 Act). Under this section the court should first assess whether C had made out a prima facie case of different treatment on the grounds of her race and, second, whether D had adequately explained C's treatment was due to some other reason.

The Court noted C had been a litigant in person at the trial and had not referred to s.57ZA of the 1976 Act. The judge had not referred to it in the judgment and there was nothing to indicate he had considered it.

Regarding the delayed use of the toilet, the Court held C had made out a case of different treatment due to her race – she had been targeted for arrest before her friend, and rear-handcuffed. The onus was on D to demonstrate no racially-motivated grounds for this treatment. There was no evidence explaining the delay in allowing C to use the toilet despite her four requests to do so. The Court held C had made out her case of race discrimination under a correct application of s.57ZA.

The appeal was allowed in respect of the delay in permitting C to use the toilet. The Court held this was evidence of unconscious racial stereotyping by D's officers.

The Court also gave C permission to appeal the amount of damages, and gave directions for the parties to make submissions as to them.

COMMENT

This partly successful appeal focuses on the question of unconscious racial stereotyping by police when considering arresting an individual, on their arrest, and during any subsequent detention. The claim fell within the 1976 Race Relations Act because it preceded the Equality Act 2010, which now governs the law as to race discrimination. The full judgment may be accessed here.

POLICE

DAMAGES FOR WRONGFUL ARREST

(1) Stewart and (2) Chergui v The Commissioner of Police of the Metropolis, **28.04.17, High Court**

The first claimant, C1 is the mother of the second claimant, C2. C2 alleged that, in June 2010, officers of the defendant's police force, D, pulled him off his bicycle, forced him into a police car and drove him home, suspecting he had stolen the bicycle. At home, C1, who was pregnant, alleged one of the two officers, O, grabbed C2 by his throat and pushed him towards the front door. She also alleged O pushed her in her abdomen and, shortly after, made physical contact with her abdomen twice more before both officers left. C1 said no mention was made of cannabis at that time.

D's version was that C2 and his friend, on their bicycles, noticed the police officers and threw a small packet away, after which they arrested C2 and took him home. C2 was a minor at the time and the officers decided it would be more efficient to explain to C1 why C2 was being arrested rather than awaiting an appropriate adult at the police station. D denied O made contact with C1's abdomen.

A second allegation of wrongful arrest was made after C2 was arrested by mistake in December 2010. D conceded this arrest was wrongful.

Third and fourth allegations were made that two searches, carried out in 2012 and 2013, were wrongful. The searches had the authority of warrants but C1 alleged D had not carried out proper investigations into the grounds for them. At the second search, C2 was allegedly handcuffed and C1 was made to use the lavatory in the presence of a female officer. After the second search the property was allegedly left in a shambolic condition.

The claimants claimed damages from D in relation to these incidents, alleging trespass, breach of their right to respect for private and family life under art.8 of the European Convention on Human Rights, assault, psychiatric injury of C1, and false imprisonment of C2. They also claimed special damages and aggravated and exemplary damages.

C1's claim totalled just under £43,000 and C2's, just over £26,500.

The case was decided by a jury in a trial, with the High Court subsequently assessing damages. With regard to the bicycle incident, the jury found D's officers had failed to follow the proper procedure. For this procedural failure the court awarded damages of £250.

The court said O's conduct in C1's home was unduly forceful. For pulling C1 off the sofa and acting with unnecessary force the court awarded her £350 for each incident.

With regard to the wrongful arrest of C2, this was conceded and C2 was awarded £1,300. He was awarded a further £500 for being handcuffed in a public place, outside his home, which the jury had found was unnecessary and distressing for him.

Regarding the search warrants, the jury found no proper investigation had been made to justify these and D had failed to give copies of the warrants to C1. C1 was awarded £1,200 each for her art.8 and trespass claims relating to the first search. For the second search, she was awarded £1,500 again for each of the art.8 and trespass claims.

The court awarded C2 £200 for the interference with his belongings in his room during the first search. With regard to the second search, he was awarded £1,200 each for his claims of assault and breach of his art.8 rights. For being handcuffed a second time, he was awarded £350, the court noting the absence of any public humiliation.

The jury did not accept C1's claim for psychiatric injury or special damages. The court refused to award aggravated damages, ruling the awards had already been adjusted upwards to take account of the circumstances of the incidents. The court also refused to award exemplary damages, ruling D's officers had not acted with malice.

COMMENT

This claim illustrates the potential time and costs which may be incurred after instances of alleged wrongful arrest, failure to investigate incidents adequately before obtaining search warrants, and wrongful acts conducted during the execution of those warrants. The damages ultimately awarded were modest and the court commented that, while the issues involved are of great importance both to the parties and the public, the substantial legal costs, including for the three-week High Court jury trial, will be directly or indirectly funded by the public. This highlights the need for correct procedures to be followed, for search warrants to be obtained and executed correctly, and to avoid using unnecessary force. The full judgment may be accessed here.

MOTOR

CAR DRIVER'S COLLISION WITH SCOOTER AT JUNCTION – EVIDENCE

Thornhill v Bagas, **22.06.17, High Court**

Early one afternoon in September 2015 the claimant, C, was riding his scooter westwards on the A13 in east London when he reached a junction with the B108. The defendant, D, was driving his car south on the 'B' road and collided with C at the junction. C sustained serious injuries and loss in the collision for which he claimed damages from D.

Liability was tried as a preliminary issue.

The court heard that when D proceeded across the junction the traffic lights were red against him. The lights had been green in C's favour for approximately 11 seconds at the time C entered the junction. A double decker bus was turning right at the junction to C's offside, heading north on the 'B' road.

D was prosecuted and convicted for careless driving. Following the conviction D admitted primary liability for C's losses but argued C's negligence contributed to the collision.

The court considered CCTV footage and the joint experts' report. The report stated that, due to the location of the bus in the junction, neither C nor D could see one another as they proceeded.

The judge noted D did not give oral evidence at trial and the judge was therefore unable to make any firm findings based on the oral evidence he might have given.

The judge concluded D had clearly driven into the junction unlawfully due to the lights being red against him. He continued to cross the junction when he could not see past the bus whether any vehicles were proceeding. The court said D's criminal actions caused C's grievous injuries. The court held D entirely liable for the accident.

COMMENT

This demonstrates the importance and relevance, particularly in Motor claims, of the outcome of related criminal proceedings. It also illustrates how CCTV footage can be invaluable in assisting the court to decide liability. Other critical evidence would obviously be from witnesses as to facts such as the speed of the vehicles involved, the sequence of events and the traffic light signalling at the time of the incident.

MOTOR

CHILD'S INJURY IN RTA – SIGNIFICANCE OF UNSUITABLE BOOSTER SEAT

ES (by his mother and next friend) v (1) Savage, (2) McCord and (3) WD Irwin & Sons Ltd, and Savage (Third Party), **14.06.17, High Court (NI)**

One morning in August 2014 the plaintiff, P, aged two at the time, was travelling as a nearside passenger in a child booster seat in the rear of a car driven in County Down by her aunt, the first defendant, D1.

The second defendant, D2, was driving a van in the opposite direction.

The third defendant, D3, owned the van and had engaged D2, through an agency, to make deliveries using the van. A high energy frontal collision occurred between the van and the car. P suffered catastrophic spinal injuries causing tetraplegia, and severe abdominal injuries.

P, by her mother, claimed damages against the defendants for her injuries. In this hearing the court was asked to decide liability as a preliminary issue.

At the date of the accident, P weighed 11.6kgs. She was travelling in a Graco booster seat which was accompanied by the manufacturer's notice, affixed to the seat, and a manual, both stipulating the seat was to be used only by children aged 3-12, weighing between 15-36kgs.

D1 was permitted to bring third party proceedings against P's father, TP. She alleged that TP owed a duty of care to P. She alleged that, while TP was not travelling in the car, he had placed P in the booster seat and had stated he was satisfied with how it might restrain her.

TP denied he had placed or secured P into the seat.

D1 also denied liability, contending that her car was on the correct side of the road at the point of impact. D1 alleged that D2 had strayed across to her carriageway after coming around a bend.

D2 denied liability, contending that D1 had drifted to his side of the road and the collision occurred when he tried to take evasive action. He also argued the incorrect booster seat caused or contributed to P's injuries.

The High Court considered the evidence and concluded D1's account was correct. The court held D2 and D3 liable to P.

The court also held P had been placed in the booster seat, but secured negligently, by D1, not by TP. In D1's interview by the police she confirmed she had secured P into the seat.

The court held the question of whether D1's negligence caused or contributed to P's injuries could only be decided after further medical evidence was available. Liability was therefore decided to this extent.

COMMENT

Apart from illustrating the obvious importance of preserving an accident scene for evidence to be gathered as to its cause and the circumstances, this demonstrates the need to ensure children travel in seats suitable for their weight and that they are competently and properly secured. Another relatively recent claim involving the alleged incorrect use of a child seat is *Williams v Estate of D J Williams, Deceased,* (*Court Circular,* July 2013) in which the mother who placed her daughter, the claimant, in the seat was held by the Court of Appeal 25% responsible for failing to follow the manufacturer's clear instructions. The full judgment, including photographs, may be accessed here.

CIVIL PROCEDURE

COSTS POSITION ON LATE ACCEPTANCE OF PART 36 OFFER

Briggs v CEF Holdings Ltd, **13.07.17, Court of Appeal**

The claimant, C, was employed by the defendant, D. In 2010 C injured his foot at work. He claimed damages from D for his injury, issuing proceedings in January 2012. His orthopaedic expert's opinion was uncertain but the prognosis was not favourable to C.

In September 2012 D made a Part 36 offer to settle C's claim for a total of £50,000. C neither accepted nor rejected the offer.

In May 2013 C obtained a stay on his proceedings and underwent surgery to his foot. In April 2014 the stay was lifted and C increased his claim to £248,000. He also served a report from a different orthopaedic expert, E2, which gave only a slightly more positive prognosis. When E2 and D's expert produced a joint report, the prognosis was significantly more positive, with the experts agreeing C could work until retirement age.

The trial date had been fixed but was vacated, on C's application, in early 2015. In June 2015 C accepted D's Part 36 offer made in 2012.

In an attempt to avoid the usual rule that would require C to pay D's costs after the 21 days for acceptance of the offer had expired, C applied for an order that D pays his costs to the end of October 2014. C contended it would be unjust, under CPR Part 36 r.13, for the usual costs rule to apply.

The judge considered Part 36 r.17(5) regarding the matters to be taken into account when a court is considering whether it would be unjust to make the usual costs order. These include the information available to the parties at the time the offer was made. The judge accepted C's argument of not being in a position to accept the offer at the time because his injury had not resolved and the prognosis was not clear.

D appealed to the Court of Appeal. It argued the judge was wrong to conclude the uncertainty at the time as to C's prognosis rendered it unjust to require C to comply with the usual rule to pay D's costs from 21 days after it had made its offer.

The Court said, if an offer cannot be accepted within the 21 days the offeree must demonstrate it would be unjust to apply the costs rule. Uncertainty was part of the risks of litigation.

The Court noted C decided to accept D's 2012 offer after the joint experts' report undermined his case. There was no evidence indicating that applying the usual costs rule would be unjust to C.

The appeal was allowed.

COMMENT

The Court reiterated the "salutary purpose" of Part 36 is to place the costs risk on the offeree. If the offeree accepts a Part 36 offer beyond the 21-day time limit but wishes to avoid the usual Part 36 costs rule, the onus shifts to the offeree to demonstrate why applying the usual rule would be unjust. While a claimant's stay on proceedings might be relevant if it is made soon after they received a Part 36 offer, in this claim the stay was made approximately eight months after C had received the offer.

This judgment also warns claimants of a potential consequence of failing to accept a reasonable offer at an appropriate time, and unnecessarily or unreasonably prolonging their claim despite a prognosis not being absolutely certain. The ruling also emphasises the importance of defendants making realistic offers to settle as soon as possible in order to protect their position as to costs.

CIVIL PROCEDURE

WITHDRAWING ADMISSION OF LIABILITY ON SUBSTANTIAL INCREASE IN CLAIM

Blake v (1) Croasdale and (2) Esure Insurance Ltd, **19.04.17, High Court**

Late one night in September 2013 the claimant, C, was a passenger in a vehicle driven by the first defendant, D1 who drove through a red traffic light. This was witnessed by a patrolling police vehicle which pursued D1. D1 accelerated away on to the wrong side of a road, colliding with an oncoming car. The collision resulted in the death of one of the passengers in the oncoming car and serious brain injury to C.

D1 was convicted of causing death by dangerous driving and is serving a prison sentence. C (by his father as his litigation friend) claimed damages from D1's insurer, D2, who admitted primary liability but said C should bear 25% responsibility for his failure to wear a seat belt and because D1 had consumed illegal drugs.

In December 2015, having considered medical reports on C's condition, D2 offered to settle his claim for £100,000 net of CRU benefits. This was not accepted but, in February 2017, C issued his claim with a schedule quantifying it between £3-5million, at least. This was based on a report D2 had not seen until proceedings were served.

D2's defence included an argument of contributory negligence and one based on the principle, *ex turpi causa* i.e. the claim had arisen from C's illegal conduct. D2 alleged C's injuries were caused in part by his own criminal act through his involvement with D1 in drug-dealing activities. D2 applied to the High Court for permission to withdraw its admission of liability, to enable it to rely on the illegality defence. After proceedings have commenced, a pre-action admission may only be withdrawn with either the parties' consent or the court's permission.

C did not consent to the withdrawal, arguing there was no realistic prospect of the illegality defence succeeding.

The court considered the Practice Direction to r.14 of the Civil Procedure Rules, particularly paragraph 7.2, giving guidance as to the matters the court should consider when deciding whether to allow an admission to be withdrawn. It also considered relevant case law, including the Court of Appeal decision in *Joyce v O'Brien and Tradex Insurance Co Ltd* (*Court Circular*, July 2013).

The court held that, in the circumstances, there were realistic prospects of D2 succeeding at trial. The court permitted D2 to rely on both its illegality defence and its argument as to contributory negligence. The court accepted D2 could not have known, when admitting liability, that the claim would increase to the amount it did. It had started as a claim not exceeding £25,000. The application was granted.

COMMENT

This demonstrates that although a defendant might be aware of a claim arising from a claimant's illegal conduct, a court may permit an admission of liability to be withdrawn where the admission was made at a time when the defendant could not have known the full potential outlay. This ruling revisits the matters a court will take into account, set out in the Practice Direction to CPR 14, and how the court will approach the unique circumstances of each case to ensure an outcome that upholds general justice. The full judgment may be accessed here.

DAMAGES

FIBROMYALGIA

Neilson v Argos Distribution Ltd, **28.04.17, Settlement**

The claimant, C, was employed by the defendant, D. As C was working in D's warehouse, she fell from a dock leveller (an adjustable, mechanised platform) to the floor 60cms below. She sustained injuries to her lower spine and her hand, and developed fibromyalgia, depression, fatigue and cognitive damage. C was aged 38 at the time.

C claimed damages from D for her injuries, alleging the platform was faulty and that D failed to provide her with safe equipment. D admitted 95% liability.

C developed pain throughout her body and, 11 months after the accident, she was diagnosed with fibromyalgia.

C worked for the next two years, treating her mild to moderate pain with neuropathic medication. The pain worsened, C developed depression about her condition, and left her employment.

The prognosis was C's fibromyalgia and depression would be permanent. She suffered chronic pain and fatigue, needed ongoing care and assistance, and her mobility decreased, limiting her independence. She had little if any residual earning capacity.

C's claim was settled on a 95% liability basis against D. C accepted damages totalling £567,829 on a full liability basis, reduced to £539,438 on the agreed 95% liability. This was estimated to comprise, on full liability figures, general damages of £45,000 for pain, suffering and loss of amenity, £250,000 for future loss of earnings, and £207,760 for future care. Special damages comprised, on full liability figures, £22,826 for past loss of earnings, £30,379 for past care, £11,150 for past expenses, and £734 as interest on special damages.

CHEST AND LOWER BACK

Dadd v Viswesvaraiah, **27.04.17, Portsmouth County Court**

In April 2016 the claimant, C, was travelling as a passenger in the front seat of a vehicle which was in a frontal collision with a vehicle driven by the defendant, D. C consequently sustained injuries to her chest and lower back. She was aged 62 at the time.

C claimed damages from D for her injuries. Liability was admitted.

C developed severe pain in her chest and lower back. She also experienced travel anxiety. C consulted her GP about her injuries and treated her pain with co-codamol and painkillers.

C, who worked as a counsellor, was absent from work for one week due to her injuries. For four weeks she had difficulty with ordinary household and personal tasks, as well as disturbed sleep.

C's chest pain resolved six weeks after the accident. Four and a half months after the accident C was found to have a full range of movement in her back. She was expected to recover fully from her symptoms within eight months of the accident.

D had offered to settle C's claim for £2,550. The court awarded C general damages of £3,000 for pain, suffering and loss of amenity. As this was higher than D's offer, C was awarded a further 10% uplift so that her total award was £3,300.

DAMAGES

FRACTURED FEMUR – PSYCHIATRIC INJURY

Oliveira v Aviva, **06.03.17, Settlement**

The claimant, C, was walking with her daughter to school. They were crossing a road at a pedestrian crossing when the light was green in their favour. They had almost reached the other side of the road when a car struck C on her left side. She was thrown into the air and sustained multiple injuries, including a closed fracture of her left femur (thighbone), a soft tissue injury to her left foot, and bruising to the left side of her face, shoulder, chest and arm. She also sustained bruising to her right thigh and she experienced pain in her back.

C claimed damages from the defendant, D, alleging negligence. D admitted liability.

C was treated with injections into her back to relieve the pain. Her left femur was fixed with locking screws. The surgery resulted in C having a 6cm scar over her left hip and two 1.5cm scars over her left thigh. She underwent physiotherapy for six weeks.

After the accident, C also experienced depression and suicidal thoughts for up to 18 months. Her pain interfered with her sleep. She was able to walk for only a few minutes with crutches before feeling exhausted. She needed her husband's assistance with personal hygiene tasks and she was unable to care for her children. She was also unable, for three months, to engage in activities such as shopping and gardening. C lost her job due to being unable to work and her slow recovery.

C's back pain resolved but she would need surgery to remove the locking screws. The prognosis was that she might experience chronic pain.

C wished to return home to Portugal and she decided to settle her claim sooner than advised. She accepted a total of £75,000. There was no particular breakdown but her solicitors estimated the settlement comprised general damages of £29,177 for pain, suffering and loss of amenity, and special damages of £25,327 for loss of earnings and £20,497 for care costs.

NECK FRACTURE AND PTSD

Hancock v DHL, **27.04.17, Bristol County Court**

In March 2012 the claimant, C, a partner in a family haulage business, was driving a lorry which was involved in a frontal collision with a lorry owned by the defendant, D, driven by one of its employees. C suffered serious injuries and the driver of D's lorry died.

C sustained a fracture to his neck at C2 and developed chronic post-traumatic stress disorder (PTSD). C claimed damages from D for his injuries. Liability was admitted but D disputed the amount of C's claim.

After five days in hospital C wore a neck brace for seven months then underwent intense physiotherapy. By the date of the damages assessment C continued to have restricted movement in his neck and perpetual aching, exacerbated by prolonged driving or sitting at a desk.

Although C was able to drive a car, he suffered flashbacks when driving near a lorry. He became very anxious when even sitting in the driving seat of a lorry. Despite several sessions of cognitive behaviour therapy C was unable to return to driving lorries.

Nine months after the accident C returned to work on light duties. However, he became irritable, which adversely affected his family and the business.

The prognosis was that, with further therapy, C's PTSD would partially resolve but he would not be able to resume lorry driving. The residual symptoms in his neck would be permanent.

The court awarded C a total of £121,781. This comprised £21,000 and £15,000 as general damages for pain, suffering and loss of amenity in respect of the neck fracture, and PTSD, respectively.

He was also awarded £80,781 for past and future losses including lost profits, treatment, and past care, travel and miscellaneous expenses.

C had included a claim for loss of congenial employment, which D disputed. C had enjoyed driving and working with lorries for 30 years, but now avoided them. The court awarded him £5,000 under this element, accepting that employment did not have to be vocational to qualify for such an award.

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