court circular

ZURICH MUNICIPAL

Summer 2017

THE LATEST JUDGMENTS AND WHAT THEY MEAN TO YOU

Welcome to the Summer 2017 issue of Court Circular.

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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 selection of recent judgments in Employers' Liability claims. These include a finding of fundamental dishonesty and a ruling rejecting an allegation that surveillance amounted to harassment under the Equality Act 2010 (*Richardson and Peninsula Business Service Ltd*, p.3).

In other EL cases the Employment Appeal Tribunal reiterates, in discrimination claims, a tribunal may draw inferences from circumstances considered as a whole, to decide whether there has been unlawful discrimination (*Talbot*, p.4). There is also an example of damages awarded for the loss sustained from the stigma of having sued a former employer (*Small*, p.5).

Moving to different areas – on the general subject of Insurance, we include a claim focusing on the importance of accurately drafted exclusion clauses in insurance policies (*Leeds Beckett University*, p.5).

We then feature two claims concerning the Police Service. These revisit the questions of the duty of care owed to informants, and of an arrest deemed lawful despite being based on an erroneous civil court order (*R (X)* and *Ahmed*, p.6).

There are a number of claims concerning Highway Authorities, involving evidence of a breach of duty, absence of visible evidence of a defect, and the s.58 defence (P.7). These are followed by three Motor claims, including two Court of Appeal rulings. These concern credit hire and nil excess premiums (*McBride*, p.8) and claiming against unnamed defendants (*Cameron*, p.9).

We also include a negligence claim reminiscent of *Poppleton*, where the claimant fell from a bouldering wall at a leisure centre (*Maylin*, p.9) and a Housing claim regarding injury from an allegedly defective garden path (*Watson*, p.10).

Two Health and Safety Executive prosecutions concern a fine imposed after a tractor injured a member of the public, and a failed appeal against a corporate manslaughter fine (*Nottinghamshire County Council* and *London Borough of Havering*, P.10).

A defamation claim warns of the potential consequences of publishing unsubstantiated allegations of serious criminal involvement, while also providing an example of the court's power to award damages far exceeding the amount claimed (*Harrath*, p.11).

We also include a contempt of court application in which the claimant is imprisoned for pursuing a staged road traffic accident claim. Finally we summarise a selection of recent damages awards, including for an injury involving a spiraliser. We hope you will find this edition useful and informative.

Richard Shanks

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EMPLOYERS' LIABILITY

ZURICH claim

ALLEGED INJURY AT WORK – CONFLICTING EVIDENCE – FUNDAMENTAL DISHONESTY

Richardson v Stockton on Tees Borough Council, **12.01.17, Northampton County Court**

The claimant, C, was employed by the defendant, D, as a labourer. While removing cabling in a block of flats, C said plasterboards stacked against a wall fell and injured him. C claimed damages from D, alleging the incident was caused by D's negligence and breaches of various statutory workplace regulations.

D denied liability, contending it had complied with all the relevant workplace regulations C alleged had been breached. These included an allegation that C had not been properly trained for the task, which D denied.

D primarily disputed the occurrence of the alleged accident. C had given differing accounts of how it had occurred, how his injuries developed, and regarding the medical treatment he received.

D also referred to C's failure to report the alleged accident to D. C continued to work for a number of hours until the end of his shift after allegedly sustaining the injury, without giving any indication of having suffered it.

D also questioned how C spent his time off work while allegedly injured. D disputed C's expert medical report by a general practitioner, stating an orthopaedic surgeon would be appropriate.

At trial, C attempted to explain the mechanism of the accident but the judge held C's evidence to be "hopeless". The judge found D's witness evidence "impressive". The claim was dismissed. The judge also agreed to make a finding against C of fundamental dishonesty.

COMMENT

This claim highlights the importance of defendants' claims handlers being alert to inconsistent accounts of how an incident allegedly occurred and inconsistencies in evidence supporting the claim.

It also illustrates some of the many potentially questionable elements surrounding a claim suspected to have been dishonestly made. These include why an accident was not reported, how the claimant continued working on the day of the alleged incident despite allegedly being seriously injured, and how a seriously injured claimant's time was spent while on sick leave. These types of disputed factors or areas C has not explained convincingly may cast sufficient doubt on the legitimacy of a claim for a court to agree to make a finding of fundamental dishonesty.

EMPLOYERS' LIABILITY

HARASSMENT – PROVING DISABILITY UNDER THE EQUALITY ACT – SURVEILLANCE

Peninsula Business Service Ltd v Baker, **01.03.17, Employment Appeal Tribunal**

The appellant company, R, was the respondent in employment tribunal (the ET) proceedings brought against it by the claimant, C. C, a lawyer, had been employed by R to give legal advice and representation at tribunals.

C had worked for R for a few years before informing R he was dyslexic and had an arthritic condition. He showed R the covering letter accompanying a psychologist's report stating C was dyslexic. He said he needed reasonable adjustments to take account of his disability. R indicated it would consider the matter.

R referred C to an occupational health doctor who recommended C needed reasonable adjustments and would probably be regarded as disabled.

R later suspected C was carrying out private work, or not carrying out his work during the time he was being paid by R. In relation to its suspicions, R arranged for surveillance of C. C was told about the surveillance at a disciplinary hearing.

C brought a claim in the ET alleging the surveillance amounted to harassment. Basing his claim on various breaches of the Equality Act 2010 (the Act), C alleged the surveillance, and subsequently being informed of it for disciplinary purposes, constituted unwanted conduct relating to his disability. He claimed the conduct violated his dignity and/or created an intimidating, hostile, degrading, humiliating or offensive environment for him. C argued he was not required to demonstrate he was actually disabled to establish harassment under the Act. He had said he was disabled and made requests for reasonable adjustments.

The ET held the surveillance itself was not harassment because C did not initially know about it, but telling him of it in a disciplinary hearing did amount to harassment under s.26(1) of the Act because the decision to arrange surveillance was made on C's claim to being disabled. Further, the ET held C had been victimised under s.27 of the Act because the surveillance had been arranged after C claimed to be disabled and had requested reasonable adjustments, which were protected acts.

R appealed, arguing that for C to succeed in his harassment claim, C actually had to demonstrate he had a disability rather than merely claim he was disabled. Further, the ET had misinterpreted the Act in finding C had been victimised.

The Employment Appeal Tribunal (EAT) held the ET had erred in ruling C could allege harassment under the Act based on a disability he had only claimed to have but had not actually proven. Disability is defined under s.6 of the Act and a person only claiming to be disabled was not protected from the conduct set out under s.26(1).

The EAT held the ET had failed to consider, among other things, R was required by the ACAS code to disclose its surveillance of C to him in disciplinary proceedings. The EAT held it could not be reasonable, under S.26(4)(c), for R's surveillance to be regarded as having the effect described under s.26(1)(B) (violation of dignity, etc.).

The EAT held the ET did not find C's manager knew, when arranging surveillance, about C's emails and conversation about his alleged disability or that the decision to arrange surveillance was based on those communications by C. The manager had not arranged surveillance on the grounds of any protected act.

The appeal was allowed.

COMMENT

This successful appeal illustrates an employer would not necessarily be committing acts of harassment or victimisation when arranging surveillance of an employee suspected to be seriously breaching its terms of engagement. There was no finding that the surveillance was instigated on the manager's knowledge of the employee's claim to being disabled. Further, a claim of harassment based on a disability under the 2010 Act needs to be supported by evidence of the disability, not merely an assertion of it. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

DAMAGES LIMITED AFTER SURVEILLANCE PROVES RECOVERY

Karapetianas v Kent and Sussex Loft Conversions Ltd, **25.04.17, High Court**

In March 2012, as the claimant, C, was working for the defendant, D, in a loft, he fell through the loft to the floor below. It transpired that, unbeknown to C, two supporting joists had been removed. C consequently sustained injuries including a fractured pelvis, for which he claimed damages from D. C was aged 43 at the time.

A dispute ensued between the parties concerning the extent to which C had recovered from the pelvic fracture. D carried out surveillance of C on a number of occasions, primarily between March and August 2014. When C was examined by medical experts before and after this main period of surveillance, he appeared severely disabled. The surveillance footage showed, however, C moving about and carrying items without much difficulty, walking only with a slight limp. He did not use a walking stick or a crutch in the footage, and he drove his car.

Relying on the Supreme Court decision in *Summers v Fairclough Homes* (*Court Circular*, September 2012), D contended C had dishonestly fabricated the severity of his injuries to the extent that the claim should be struck out.

At trial, C said he had been recovering by 2014 but his condition then deteriorated. A pain specialist suggested C might be suffering from chronic pain syndrome. A neurologist said C might have a psychological condition, such as being depressed, because his deterioration and current condition could not be explained by the physical function of his nervous system.

The court held C had largely recovered by mid-2014. The court rejected C's argument of having good and bad days, because the surveillance footage showed him functioning well from mid-2014. The period of surveillance covered too many days when he was moving about without difficulty.

Although there was no psychological report, the court accepted C might have a residual psychological condition. The court said C appeared distressed by his condition and doubted he was fabricating this. The court held C was entitled to damages from D up to May 2014, after which he was capable of light manual work.

C was awarded damages totalling just under £151,000, including general damages of £29,000.

COMMENT

This ruling illustrates it will only be in very rare cases that a claim will be struck out under the ruling in *Summers*, above. While the court refused to strike out this claim, the ruling highlights the potential value of surveillance evidence which casts doubt on medical evidence as to a claimant's alleged ongoing symptoms. Such evidence may, as here, convince the court of the true extent of a claimant's recovery. While the evidence might be insufficient to satisfy the high burden of proof in *Summers*, it may still potentially assist in limiting the duration of the injury liable to be compensated, and therefore the extent of a defendant's outlay. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

UNLAWFUL DISCRIMINATION – SEX DISCRIMINATION – DRAWING INFERENCES

Talbot v Costain Oil, Gas and Process Ltd and others, **14.03.17, Employment Appeal Tribunal**

The claimant, C, was engaged through an agency by the respondent, R, as a mechanical engineer at Sellafield Nuclear Power Station. C, who had started her career in 1981, was an experienced engineer and had worked at Sellafield previously. After 12 weeks of working for R, C was informed her contract was immediately terminated due to "Business HR changes". She was escorted off the site. Her agency had not been informed this was to happen.

C brought proceedings in the employment tribunal (ET) claiming damages for sex discrimination, harassment and wrongful termination of her contract. Her allegations included breaches of s.13 and s.26 of the Equality Act 2010 (the Act). C alleged a hostile atmosphere developed in which her colleagues openly criticised her personality, told her she was arrogant and aggressive and she did not know what she was doing. Her manager, M, told her she should be "gentler, kinder, and generally nicer".

At the ET, C's claim was dismissed after the ET held she had not proven the facts or, where she had proven them, her treatment had not been because of or related to her sex. The ET also held C's contract was terminated after M was dissatisfied with her work and because of colleagues' complaints.

C appealed, contending the ET had taken a fragmented approach to the evidence and had applied the burden of proof wrongly.

The Employment Appeal Tribunal (EAT) said if unlawful discrimination has taken place, there is rarely direct evidence of it but an ET will usually be able to infer it from the relevant circumstances. These will include the conduct of the person/s against whom the allegations are made, their reliability and possible motives, and the ET's assessment of the parties and their witnesses when giving evidence. The ET should consider the overall picture from the evidence, as well as factors indicating discrimination, when deciding any inference to be drawn from any unfavourable treatment.

If the question of burden of proof had to be considered, s.136 of the Act indicated it is for the alleged discriminator to prove there had not been discrimination.

The EAT held the ET had failed to consider the overall picture and form views about the witnesses. It had also failed to consider what inferences may be drawn from the absence of corroborating documentary evidence. The EAT held the ET had erred in dismissing C's claim despite having found she had proven many of her allegations.

With regard to C's harassment claim, the EAT held the ET had erred in finding, given the resilient nature of C's character, there was no harassment. The EAT said harassment could not be excused simply because the victim is able "to deal with it".

The appeal was allowed and the claim was remitted to a fresh tribunal for re-hearing.

COMMENT

This EAT ruling confirms how an employment tribunal should assess whether there has been unlawful discrimination under the Equality Act. The difficulties for a tribunal stem from having to make findings about a person's state of mind and the reasons for the conduct complained of. When deciding any particular question of fact, the overall picture created by the evidence should be considered. Inferences may then be drawn from considering the circumstances as a whole, including – as here – the absence of corroborating documentary evidence where supporting documents would be expected to have been relied on at the hearing. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

DAMAGES FOR STIGMA OF HAVING SUED FORMER EMPLOYER – *CHAGGER*

Small v Shrewsbury & Telford Hospitals NHS Trust, **27.04.17, Court of Appeal**

The appellant, C, had been employed by the respondent, R, as a project manager on a short term contract. C contended he would have been offered permanent employment until his retirement, scheduled for 2022. C was dismissed after he asked R to notify former occupiers of its premises of the possibility of having been exposed to asbestos.

C, as a litigant in person, brought a claim against R in the employment tribunal (ET), alleging unfair dismissal.

C's claim included a schedule of loss of future earnings to 2022. He said he was unable to gain employment since his dismissal because, as a short-term contractor, a reference from the previous employer was required when applying for future contracts. Having sued R, R would not provide him with a reference. He had applied for over 600 posts but was not successful due to the stigma of having sued R.

The ET held C would not have been offered permanent employment; his replacement, X, had also been engaged on a short-term contract. The ET held C had been unfairly dismissed but it restricted damages for future loss of earnings to the end of X's contract term. C was also awarded damages for injury to feelings and aggravated damages.

C, with legal representation, appealed to the Employment Appeal Tribunal (EAT). He argued the ET should have considered the Court of Appeal decision in *Abbey National plc v Chagger* (2009). In that ruling, the Court held an employer could be liable for the losses of a dismissed employee resulting from having been unlawfully stigmatised by future employers who refused to employ him due to his having taken legal action against the employer.

C argued he had suffered losses beyond the end of X's contract term through his disadvantage on the labour market due to the stigma of having sued R. The EAT rejected this argument, saying C had not expressly made a claim under *Chagger* and it had not been sufficiently obvious to the ET that *Chagger* should have been considered.

C appealed to the Court of Appeal. The Court held the ET should have given due consideration to C's witness statement clearly setting out his future losses and the reason for them, i.e. the stigma of having sued R resulting in his inability to be offered future contracts. The ET itself had accepted C's dismissal was fatal to his future career.

The Court upheld the ET's awards but ordered the matter be referred back to the ET for the claim under *Chagger* to be considered. The appeal was therefore allowed.

COMMENT

This Court of Appeal ruling cautions employers against providing a dismissed employee with grounds likely to support a claim, under the ruling in *Chagger,* for future losses resulting from the stigma of having been dismissed. The Court emphasised that an ET will not necessarily always be obliged to consider a *Chagger* claim where such loss has not been intimated. Here, though, not only had the ET accepted C's dismissal was career-ending for him, but C had clearly set out his future losses and the reasons for them, despite not specifically basing that element of his claim on the applicable case law.

INSURANCE

PROPERTY DAMAGE – ACCIDENTAL DAMAGE NOT CAUSE OF LOSS – EXCLUSION CLAUSES

Leeds Beckett University v Travelers Insurance Co Ltd, **11.04.17, High Court**

Between 1993 and 1996 the claimant, C, carried out substantial refurbishment and development works on the site of a former brewery. The works included constructing new accommodation blocks. One of the buildings had been built on a slope adjacent to a canal.

15 years later, large cracks appeared in the internal walls and ceilings of the building. Investigations established a section of concrete blockwork below ground level had "turned into mush" providing no structural support. This had apparently been caused by flowing water.

The buildings were insured with the defendant, D. Under the policy C made a claim for accidental damage to the insured property. D rejected the claim, essentially asserting the damage was not accidental. A few months later the building was demolished.

C brought proceedings against D for a declaration that D was liable to meet C's claim under the policy. The claim had a potential value in excess of £10 million.

D denied liability on several grounds, including the damage was not accidental. D relied on its policy exclusions which included gradual deterioration, damage caused by defective design or materials, and contamination. D relied on evidence of a water course running down to the canal, possible mine workings deep below the ground adjacent to the footprint of the building, sub-surface water flow across the site, warnings at the time of construction about the possibility of sulphate attack, and the presence of springs in and around the footprint of the building at the time of construction.

The court noted the building had been constructed across an old watercourse. The flowing water came from that watercourse and from springs under or around the footprint of the building. The water had caused the sulphate attack to the concrete blockwork, reducing it to mush.

The court held the design of the groundwater drainage was defective for failing to address the potential damage to the blockwork which had been constantly exposed to running water. This risk should have been addressed at the outset. The court held the damage was not accidental but inevitable.

The court further held that, in any event, D's exclusion for gradual deterioration applied. The damage was caused by an inherent weakness or an inherent characteristic of the building. The damage occurred gradually over at least ten years.

Further, the court held D's exclusion relating to defective design also applied. C had failed adequately to design drainage for the groundwater. This resulted in the "known and predictable problems" of groundwater on the site not being properly addressed. The design was not fit for its purpose.

Finally, regarding contamination, the court held while there had probably been some contamination of the property from old mine workings, this had not caused any relevant damage. The contamination exclusion did not therefore apply.

The claim was dismissed.

COMMENT

This ruling provides a salutary if not cautionary example of the fundamental importance of intended construction work taking sufficient account of the physical history and suitability of the proposed site. Relevant potential risk factors should be strategically approached and dealt with at the outset. From an insurer's point of view, this ruling demonstrates the critical importance of policies containing properly and comprehensively drafted policy terms, particularly exclusion clauses. The full judgment may be accessed here.

POLICE

DUTY OF CARE OWED TO INFORMERS

R (application of X) v Chief Constable of Y Constabulary, **26.04.17, High Court**

The applicant, X, had been a confidential police informer for the defendant, D, for 14 years. One of the terms of the arrangement was that the informer would not disclose his role.

In 2016 a person called out in public, to a relative of X, that X was a "supergrass". X's home was subsequently burgled and the walls were painted with words accusing him of being a supergrass. X claimed the burglars clearly knew he had been a police informer.

X applied for judicial review of D's assessment of the risk to him and his family through his former position as a police informer.

X alleged D compelled him to lie to the police who were investigating the burglary, about his position as a former informer. The investigation did not lead to the perpetrators being identified.

D contended the burglary was not the result of any disclosure by D of information about X's role. There were no further incidents of similar accusations against X for over a year.

The court held there was a strong public interest in the duty of care owed by D to its informants. There is a duty to protect their safety, as reflected in the Court of Appeal decision, *An Informer v A Chief Constable*, (*Court Circular*, July 2012).

While D's response to the burglary may not have been perfect, it was adequate. Its investigation did not find X's role as former informant had been disclosed by D and there was no evidence D had failed to give appropriate advice to X and his family.

The court said the criminal community had learned some time before the burglary of X's role as an informant. D's investigation concluded X's role had, in fact, become known through his own disclosure.

The court said judicial review was a remedy of last resort and would not be available if the relief sought was academic. It was not appropriate in this case. D had conducted an appropriate risk assessment regarding X's role and the risk had been assessed as low.

D was also aware of its continuing duty to monitor and re-assess the situation, and of the possibility X could claim damages should D breach its duty of care to him.

The court held D had not breached its duty of care to X and the application was refused.

COMMENT

In refusing to grant this application for judicial review, the High Court said the court's role was not to manage the police or the conduct of its investigations. The police are under a duty of care to protect the safety and wellbeing of its informants and their families, and a continuing duty to monitor the situation and reassess the risk to them. Here, D had complied with this duty and was not responsible for the informant's own breach of the terms of the arrangement in disclosing his role.

POLICE

LAWFULNESS OF ARREST BASED ON ERRONEOUS CIVIL COURT ORDER

Ahmed v Crown Prosecution Service, **04.5.17, High Court**

A county court had granted a local authority an injunction, under s.153A(3) of the Housing Act 1996 (the Act), preventing the appellant, C, from congregating in groups of two or more in the local authority's area. The injunction included a power of arrest under s.155 of the Act. A police officer, P, served the injunction on C.

Some weeks later, P was on duty in the area with a fellow officer and both were in uniform. P saw C with two other men. On approaching them, C pushed P and walked away. P arrested C for breaching the injunction but C then assaulted P.

C was convicted of assaulting a police officer in the execution of her duty.

C appealed by way of case stated, against the conviction. The point of law on which he based his appeal was that the arrest and conviction were legally invalid because they were based on law repealed by s.1 and s.4 of the Anti-Social Behaviour, Crime and Policing Act 2014.

The CPS disputed C's argument, contending the essential question was whether, at the time of the arrest, P had a genuine and reasonable belief in her legal authority to arrest C.

The court considered the concept of acting in the execution of duty. In *Rice v Connolly* (1966, High Court), Lord Parker said while there is no exhaustive definition of the powers and obligations of the police, it was clear in his judgment that "it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury".

The court said when an officer acts in line with a civil court injunction, which includes a power of arrest, the officer would be acting under her duty if her actions were in accordance with the injunction. The key question was whether P was acting under her duty when the power to arrest was erroneous.

The court held, when P genuinely and reasonably believed she was authorised by the civil court's order giving a power to arrest C for breaching the injunction, and P genuinely and reasonably believed C had breached the injunction, P was acting in the execution of her duty.

Otherwise, this could lead to police officers having to check the validity of every court order.

The court said it would be unfortunate if a police officer would be held not to have been acting in the execution of duty if the court order on which they were acting had been made in error.

The court held P had been acting in the execution of her duty and C's appeal was dismissed.

COMMENT

This High Court ruling confirms a court is likely to uphold the lawfulness of an arrest where it is made by an officer in accordance with a civil court order, and the officer genuinely and reasonably believed there was a power to arrest the suspect despite the power having been issued by the court in error. The High Court revisited the concept of an officer acting in the execution of duty, acknowledging that there is no exhaustive definition of police powers and obligations.

HIGHWAYS

ZURICH claim

INSUFFICIENT EVIDENCE OF BREACH OF DUTY

Kirsopp v Northumberland County Council, **26.01.17, Northampton County Court**

The claimant, C, was walking across a road in Hexham when she said she fell in a pothole. She sustained injuries for which she claimed damages from the defendant highway authority, D.

C alleged D had breached its duty, under s.41 of the Highways Act 1980 (the Act), to repair and maintain the highway. C's allegations included failing to operate a suitable inspection system and to act on complaints about the area previously made to D.

D denied liability and disputed there was an actionable defect in the area at the date of C's alleged accident. No relevant complaints had been received in the 12 months preceding C's accident. D further relied on s.58 of the Act, arguing if the court found C had tripped in a dangerous defect, D operated a suitable inspection and repair system. The area was inspected every six months, and an inspection had been carried out three and a half months before C's alleged accident, when no actionable defects were recorded measuring more than D's intervention level of 40mm.

D alternatively argued that if the court found C had sustained injuries as alleged, they were wholly or at least in part caused by C's negligent failure to take reasonable care.

The judge accepted C had fallen as claimed, but held the fact of her falling is not proof she fell over a dangerous defect. The judge referred to well-known case law, including *Mills v Barnsley MBC* (1992, Court of Appeal), ruling D is not under a duty to maintain the highway in perfect condition.

C's photographic evidence showed no defect in the area more than 20mm. D is not required to repair defects not posing a real source of danger to the public. In any event, the court held D operated a suitable maintenance and repair system. The claim was dismissed.

COMMENT

This county court decision reiterates the factors a court will take into account when deciding liability for an injury relating to a defect on the highway. Key factors in this ruling were D's operation of a reasonable inspection system, the reasonableness of D's intervention criteria, the photographic evidence showing the defect's depth measured only half of D's intervention level, and the absence of relevant complaints in the year preceding the accident.

HIGHWAYS

ZURICH claim

NO VISIBLE EVIDENCE OF DEFECTIVE, ROCKING PAVING STONE – S.58 DEFENCE

Dunbavin v Wirral Metropolitan Borough Council, **19.01.17, Birkenhead County Court**

On a light evening the claimant, C, was walking on a footpath when she tripped and fell on a rocking paving stone. She sustained injuries for which she sought damages from the defendant highway authority, D. C alleged her accident was caused by D's failure, under s.41 of the Highways Act 1980 (the Act) to repair the highway.

C accepted the flagstone in question did not look defective and the surrounding flagstones were in good condition. She said the defect only became apparent when stood upon.

D denied liability but relied on s.58 of the Act, arguing that if the court found C had tripped over a dangerous defect, D operated a sufficient inspection and repair system. The system provided for annual walked inspections and the area was inspected eight months before C's accident when no relevant actionable defects were noted. D contended there was no visible sign of the flagstone in question being defective.

The court accepted C had fallen as alleged and the defect was both actionable and a danger to pedestrians, but a highways inspector could not be expected to step on every paving slab during an inspection. The duty was to carry out an inspection reasonably. The claim was dismissed.

COMMENT

This ruling focuses on the small but important point that highways inspectors, carrying out walked inspections, are not under a duty to walk on every paving stone to check the condition of each one. The duty is to carry out the inspection with reasonable care and skill, and at intervals appropriate for the area.

HIGHWAYS

ZURICH claim

DEFECT IN FOOTPATH NOT PRESENT AT PRE-ACCIDENT INSPECTION

Duggan v Wirral Metropolitan Borough Council, **13.01.17, Birkenhead County Court**

On a December night the claimant, C, was walking on a footpath when she tripped and fell in a depression in the path. She sustained injuries for which she sought damages from the defendant highway authority, D. C alleged the depression, measuring a depth of approximately 1⅝ inches/41mm, was caused by D's failure, under s.41 of the Highways Act 1980 (the Act) to repair the highway.

D denied liability but relied on s.58 of the Act, arguing that if the court found C had tripped over a dangerous defect, D operated a sufficient inspection and repair system. D stated the area in question was inspected by a suitably trained inspector at the recommended frequency, including four months before C's accident, when the defect identified by C was not present. D contended that the defect was most likely to have resulted from vehicles – including refuse vehicles – overriding the footpath.

D alternatively argued that if the court found C had sustained injuries as alleged, they were wholly or at least in part caused by C's own negligence in failing to take reasonable care for where she was walking.

The court accepted C had fallen as alleged and the defect in question created a reasonably foreseeable risk of injury to pedestrians. The judge referred to D's inspection four months before C's accident, when some defects were noted for repair but not the defect in question. The court accepted if the defect identified by C had been present during that inspection D's inspector would have noted it for repair.

The court held there had been no dangerous or actionable defect when D carried out its scheduled inspection and D was entitled to rely on its s.58 defence. The claim was dismissed.

COMMENT

This ruling provides a good example of the importance of a highway authority being able to produce evidence of the operation of a reasonable inspection and repair system. While C was injured due to a significant and dangerous defect, D's thorough evidence satisfied the judge as to D's entitlement to rely on its statutory defence.

MOTOR

CREDIT HIRE – NIL EXCESS PREMIUMS – RECOVERABILITY OF CHARGES

McBride v UK Insurance Ltd; Clayton v EUI Ltd (T/A Admiral Insurance), **15.03.17, Court of Appeal**

These two appeals concerned similar issues and were heard together.

In *McBride v UK Insurance Ltd*, the claimant, C, used his car extensively, including for business. His vehicle, a Jaguar XJ Supersport V8, was an executive saloon in the P10 insurance group. His car was damaged in an accident caused by a driver insured by the defendant, D1.

While C's car was being repaired he hired an equivalent car from AEL at a daily rate of £409, discounted from £649. The agreement also made additional charges including a further daily charge of £10 for collision damage waiver (CDW), which effectively reduced its standard £2,500 excess to nil. The car was hired for 77 days at a total cost of £40,215, including VAT.

At the initial trial, the judge held it was reasonable for C to have hired the car for 74 of the 77 days. The judge considered the House of Lords guidance in *Dimond v Lovell* (2000) and the Court of Appeal's guidance in *Stevens v Equity Syndicate Management* (2015). In *Stevens*, the Court of Appeal said the lowest reasonable rate by a mainstream supplier would be a reasonable approximation of the basic hire rate. Following that guidance, the judge here held a reasonable daily rate quoted by a mainstream supplier was £270 including VAT. For 74 days' hire the judge allowed C a total of £19,980.

C appealed. His grounds concerned the test in *Stevens* as to "the lowest reasonable rate quoted by a mainstream supplier", or the lack of evidence that the companies who quoted £225 plus VAT were mainstream suppliers, or the judge's failure to make a reasonable adjustment to the £225 rate to allow for the cost of the CDW waiver.

The Court held that the companies who had provided quotes could be regarded as mainstream suppliers.

The Court further held credit hire companies should not be entitled to recover the full credit hire rate simply because comparable basic hire rates did not include a nil excess. The Court held it would be reasonable for a claimant to opt for a nil excess agreement, and the court would then assess what the claimant could recover for the cost of purchasing it.

In C's case, the only feasible nil excess cover was that which AEL had provided. C was therefore awarded the additional £10 plus VAT daily charge for the CDW.

In *Clayton v EUI Ltd*, the claimant, C2, owned a 1973 Ford Mustang. A driver insured by the defendant, D2, negligently drove into it. While the car was being repaired C2 hired cars from AEL at a daily charge of £355. Additional charges were made, including for reducing the excess to nil. The total hire charges were £24,823.

At the initial trial, administrative errors resulted in C2 not relying on any basic hire rate evidence supporting his hire charges claim. The judge awarded C2 £13,131. C2 unsuccessfully appealed to the circuit judge.

C2 appealed further to the Court of Appeal. His grounds included the circuit judge having accepted the trial judge's "guess" as to a reasonable rate, and that D2 had failed to prove the hire charges were unreasonable.

The Court of Appeal held the trial judge had been entitled to calculate C2's award as he had, using a seven-day rate with a 15% uplift. With regard to the charges made for the nil excess cover, the trial judge only had basic hire rates from mainstream companies which did not provide for nil excess. The trial judge had therefore been entitled to add 10% to the daily rate he had allowed. C2's appeal was dismissed.

COMMENT

These two Court of Appeal rulings reiterate how the court should approach credit hire claims and the additional charges for nil excess cover. The Court confirmed *Stevens*, above, remains good law concerning the approximate calculation of an allowable basic hire rate. Full credit hire rates including nil excess cover will not necessarily be recoverable simply because comparable basic hire rates from mainstream companies do not provide nil excess cover. The full judgment may be accessed here.

MOTOR

CYCLIST 100% RESPONSIBLE FOR COLLISION WITH CAR

Elson v Stilgoe, **30.03.17, Court of Appeal**

In January 2011 the claimant, C, and his friend, F, were cycling along a 'B' road in Warwickshire. The defendant, D, was driving his car in the opposite direction. C said he and F were cycling single file, with F in front. As C tried to avoid a puddle and overtook a stationary line of traffic, he collided with D's car.

C sustained injuries for which he claimed damages from D, alleging negligence. His allegations included that D had failed to notice C was trying to avoid a puddle and had encroached into D's lane.

D denied liability and disputed C's version of the accident. D said C encroached into the path of his car at a late stage, at which point C and F were cycling next to each other. D alternatively argued C was substantially responsible for the accident through contributory negligence.

At the initial trial, the judge dismissed the claim, preferring D's evidence as to C and F cycling next to each other. The judge said C had veered into D's side of the road when he would have seen D approaching and he should have waited for D to pass before riding around the puddle. The judge said that, had he found D primarily liable, he would have found C 35-40% liable for contributory negligence.

C appealed. The Court of Appeal held the trial judge was entitled to find F's evidence was unreliable. The trial judge had found D had been driving properly and he did not have to take account of the possibility of C suddenly veering into his path without good reason. The trial judge was entitled to find C's actions were the sole cause of the accident.

The Court held the trial judge had considered all the evidence and his decision had properly been based on it. The appeal was dismissed.

COMMENT

This is an uncommon finding that a cyclist was entirely to blame for his collision with a car. This appeal also fleetingly (at paragraph 21 of the judgment) highlights an important factor in witness evidence. While C relied heavily on his independent witnesses, some of that evidence contained an opinion as to fault. Independent witness statements should avoid carrying opinions, including regarding fault. That is the court's role. Witness statements should be restricted to statements of fact. The full judgment may be accessed here.

MOTOR

ROAD TRAFFIC ACCIDENT – IDENTIFICATION OF DRIVER RESPONSIBLE – S.151 ROAD TRAFFIC ACT 1988

Cameron v (1) Hussain and (2) Liverpool Victoria Insurance Company Ltd, **23.05.17, Court of Appeal**

In 2013 the claimant, C, was driving her car in Leeds when it was struck by a Nissan Micra, which also struck another vehicle but did not stop. A taxi driver noted the Micra's registration number. C and her passengers sustained minor personal injuries but her car was written off.

The first defendant, D1, was identified by police as the registered keeper of the Micra. The Micra was the subject of a motor insurance policy with the second defendant, D2. D1 was not the named insured and he was not insured to drive the Micra. The named insured was found to be a fictitious person and D2 contended the policy had been fraudulently obtained.

C, believing D1 was the driver at the time of the incident, claimed damages from him for her injuries and loss. She also alleged D2 was obliged, under s.151 of the Road Traffic Act 1988 (the Act), to satisfy any unsatisfied judgment she obtained against D1.

D2 denied liability and successfully applied for summary judgment against C, arguing D1 was not insured to drive the Micra, and C was unable to identify the driver of it at the time of the incident.

C applied for permission to substitute the name of D1 for "The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on 26th May 2013." Her application was refused, her first appeal failed after the judge held D2 would be unable to trace the driver to attempt to recoup its losses, and C could make a claim to the Motor Insurers' Bureau (MIB) under its Untraced Drivers Agreement.

C appealed to the Court of Appeal. She contended judgments could be made against unnamed parties and she was entitled to proceed against an unknown person by s.151 of the Act. She said a claim to the MIB would provide a less adequate remedy than a court award.

In a majority decision, the Court held an insurer's liability under s.151 of the Act did not depend on whether the driver in an incident could be named. The insurer is liable to meet third party liabilities, irrespective of whether the driver could be named. This type of situation would not open the floodgates to fraudulent claims.

The Court held a judgment could be obtained against an unnamed defendant where the claimant gives an appropriate description.

The Court further held C was not prevented from pursuing an unnamed defendant and D2 on the ground of having a remedy available through the MIB. It would not be unjust to D2 to permit C to proceed against an unnamed driver. The appeal was allowed.

COMMENT

This Court of Appeal ruling confirms a claimant may proceed against an unnamed defendant but, in motor insurance claims, the unnamed defendant must be identified by reference to a specific vehicle, driven at a particular time and place. The Court said where a valid insurance policy can be established, a claimant who cannot identify the driver in a road traffic accident is not obliged to pursue a consequential claim against the MIB. The Court said the MIB may be regarded as providing an "inferior" remedy than a court award for damages for reasons including only limited legal costs are recoverable and the MIB itself investigates claims and decides the amount of compensation.

One judge dissented, saying the differences with the MIB scheme are no basis for allowing C to proceed under s.151. The judge said there is also greater potential for fraud if such claims were allowed to proceed without an MIB investigation. The full judgment may be accessed here.

NEGLIGENCE

SPORTS – NO DUTY TO WARN OF OBVIOUS DANGER

Maylin v Dacorum Sports Trust (Trading as XC Sportspace), **09.03.17, High Court**

The claimant, C, went with a friend, F, to a climbing centre occupied and operated by the defendant, D. The two friends intended to use the bouldering wall, which C had not previously tried. F had completed the beginners' course and was regarded as "rope competent". C signed a disclaimer warning of the risk of injury or death, and she indicated on the form that she understood those risks and had no questions before starting.

After a short period of rope climbing F climbed the easiest route on the bouldering wall. On C's third attempt her foot slipped and she fell, fracturing a disc in her back.

C claimed damages from D, alleging her injury resulted from D's negligence in failing to draw her attention to the risks involved, and failing to provide basic safety information.

D denied liability, saying C's attention had been clearly drawn to the risks. Additional notices warning of the risks, in spite of the matting, were posted near the climbing walls. D further relied on the Court of Appeal judgment in *Poppleton v Portsmouth Youth Activities Committee* (*Court Circular*, July 2008), a similar case to this, in which the Court ruled the defendant does not owe a duty to climbers to warn, train or supervise them undertaking an inherently and obviously risky activity.

At trial, the court focused on whether D was under a duty to provide a safety induction or to supervise C and warn her of the risk of injury despite both the disclaimer she had signed and the warning notices.

C conceded the risk of falling from the wall was plainly obvious but she said she believed the matting would break her fall.

The court held it was plainly obvious no amount of matting would protect a person from serious injury after an awkward fall, and the possibility of such a fall is an obvious and inherent risk in bouldering.

The court held D was not under a duty to warn C further than it had, or provide her with training or supervision. C had had the risk of injury plainly drawn to her attention. The claim was dismissed.

COMMENT

Revisiting the well-known Court of Appeal judgment in *Poppleton*, above, which also concerned injury from falling from a bouldering wall, the High Court reiterated an operator of sports facilities is not under a duty to warn, train or supervise users where the risk of injury from using a particular facility is plainly inherent and obvious, as in climbing walls. If there were a duty to warn of the risk, D here had ensured clear warning notices were posted near the walls and C had signed a disclaimer acknowledging the risk of injury. The full judgment may be accessed here.

HOUSING

DEFECT IN GARDEN PATH – LANDLORD'S REASONABLE RESPONSE

Watson v North Tyneside Council, **31.01.17, Newcastle County Court**

The claimant, C, was a tenant of the defendant, D, residing in a house with a garden featuring a concrete path. C alleged the path had developed numerous cracks along its edge where it joined the concrete perimeter of the garden. C alleged she tripped and fell on the defective edge, sustaining injuries for which she claimed damages from D.

C alleged her injuries were caused by D's breaches of duty under s.11 and s.12 of the Landlord and Tenant Act 1985, s.4 of the Defective Premises Act 1972 (the DPA), breach of an implied or express duty under the tenancy agreement, or by D's negligence. She alleged she had repeatedly complained to D about the defects in the path.

D denied liability. D contended the path did not amount to an actionable defect. Further, D said it had responded to C's complaints about the path, including having coincidentally arranged a meeting at the property a week after C's accident, when maintenance works to the garden were agreed. D also said C's medical records indicated she had tripped over in her flip flops, and the alleged defect did not appear to be at the area of the path where C said she fell.

The court considered the evidence and held the defect did not amount to a dangerous defect under the DPA. The claim was dismissed.

COMMENT

This ruling illustrates a social landlord demonstrating it had responded reasonably to a tenant's reports of a defect. This emphasises the importance of retaining adequate records of such complaints and the remedial action taken or the reasons why steps were not taken at a particular time.

HEALTH AND SAFETY PROSECUTIONS

COUNCIL TRACTOR COLLISION WITH MEMBER OF PUBLIC

Nottinghamshire County Council, **19.04.17 Nottingham Crown Court**

In 2015 operatives of the defendant Council, D, were working in a country park, using a tractor with a grab attachment to collect branches which would be taken elsewhere and burned. At the same time, a 71 year old disabled man, X, was on a guided walk in the park. The tractor collided with X, causing him multiple injuries.

An investigation by the Health and Safety Executive (HSE) found D had failed to implement a safe system of work in failing to segregate vehicle movements from the public. The HSE said the operatives had not been adequately trained to operate the mounted grab attachment and provide a banksman (an operative trained to direct the movement of a vehicle around a site).

In addition, the HSE found the tractor was unsuitable for transporting these types of materials across relatively long distances. Further, the work was inadequately planned and supervised, risking the safety of D's employees and members of the public.

D was prosecuted under s.2(1) and s.3(1) of the Health and Safety at Work etc. Act 1974. S.2(1) requires employers to conduct their undertaking in a way to ensure, so far as is reasonably practicable, the health, safety and welfare of their employees at work. S.3(1) requires employers to conduct their undertaking in a way to ensure, so far as is reasonably practicable, that persons not in their employment, but who might be affected by it, are not exposed to risks to their health and safety.

D pleaded guilty. It was fined £1 million and ordered to pay costs of £10,269.

COMMENT

This incident and the resulting substantial fine could, said the HSE, have been avoided had D properly planned the work and instigated straightforward measures to control how it was undertaken. This prosecution reiterates the importance of works to be carried out in public being properly planned and risk assessed, with operatives being sufficiently trained, particularly where new machinery is intended to be used. The HSE press release may be accessed here.

FAILED APPEAL AGAINST CORPORATE MANSLAUGHTER FINE

London Borough of Havering, **09.03.17, Court of Appeal (Criminal Division)**

In March 2015 an employee, E, of the defendant council, D, was part of a team tasked with checking the drainage capacity of a pipe. Before work began the area had to be cleared of trees and bushes. E was provided with a Stihl petrol-powered disc-cutting tool but E did not know it was not intended for cutting wood. The manufacturer's user manual expressly warned against using it to cut wood due to the risk of potentially fatal injury. E began cutting branches but the blade lodged in the wood. As E tried to pull the tool free the blade severely lacerated his leg.

D was prosecuted by the Health & Safety Executive (HSE) for failure to provide E with the correct equipment and clothing, in breach of Regulations 4(2) and 4(3) of the Provision and Use of Work Equipment Regulations 1998. The HSE also alleged D failed both to carry out a risk assessment and to provide a safe system of work.

D pleaded guilty and was fined £500,000 plus costs. In reaching this figure the judge first set the starting point for the fine at £1.3m. Taking mitigating factors into account, including D's co-operation with the investigation, the sentence was reduced to a fine of £750,000. The judge further allowed a one third reduction for D's early guilty plea, resulting in a fine of £500,000.

D appealed, arguing the fine was manifestly excessive. D contended the court had failed to take account of the Sentencing Council guideline that a fine against a public sector organisation should normally be substantially reduced to lessen the likely impact on the provision of public services. D argued the discount should have been 50%.

The Court of Appeal held there was no authority supporting D's argument for such a discount. The Court upheld the fine of £500,000 and the appeal was dismissed.

COMMENT

This fine, upheld by the Court of Appeal, was imposed under the Sentencing Council guideline, introduced in February 2016, concerning health and safety offences resulting in death or serious injury. Given the guideline takes account of turnover, including public sector organisations' annual revenue budget, when setting fines, such organisations are now likely to fall into the category of "large" organisations, potentially subject to substantial fines. The proposed fine may possibly be significantly reduced if the public sector body submits detailed evidence of how a large fine would impact the provision of public services.

DEFAMATION

SEVERITY OF LIBEL JUSTIFYING AWARD EXCEEDING AMOUNT CLAIMED

Harrath v (1)Stand for Peace Ltd and (2)Westrop, **30.03.17, High Court**

The claimant, C, is the founder of the Islam Channel, a television channel. The first defendant, D1, operates a website and the second defendant, D2, is a director of D1. In 2014 the website posted an article alleging "extremist links" to a forthcoming fund raising event. The article referred to the Islam Channel and claimed C was a "convicted terrorist".

C claimed damages in libel from the defendants and judgment was granted in C's favour in 2016. In this hearing the High Court assessed damages.

The court held there was no evidence supporting the allegation of terrorism. The court held C entitled to damages for injury to his reputation, for embarrassment and hurt feelings, and to vindicate his reputation.

The court referred to the importance of awards for libel being proportionate, with an upper notional limit of £300,000. The court said few if any allegations could be more serious than one of terrorism, which implies a person is prepared to take part in or encourage indiscriminate murder.

The court noted D2's defence included truth of the allegation. Further, D2's advisers' letters stated C's complaint was "ludicrous" and "doomed to fail", and that his proceedings were an abuse of process. The article remained on D1's website for many months despite C's complaints.

The court referred to recent relevant case law, including the Court of Appeal's guidance for quantifying damages in defamation, in *Cairns v Modi* (2013) and *Cruddas v Calvert* (2015).

The court noted C had limited his claim to £10,000. The court referred to CPR rule 16.3(7) which states, "The statement of value in the claim form does not limit the power of the court to give judgment for the amount which it finds the claimant is entitled to."

The court awarded C £140,000. The judge said this figure should ensure a reasonable onlooker would be in no doubt as to C's entitlement to a convincing vindication.

COMMENT

Having invoked CPR rule 16.3(7) to award a sum effectively 14 times greater than C had claimed, this libel award cautions against publishing allegations potentially causing serious damage to a person's reputation. As the court said, "…it is unwise to mount a defence of truth, where the charge is one such as terrorism, unless there is solid evidence available". In making the award the court also took account of the defendants' letters in their response to C's complaint, saying they were "unnecessarily combative, dismissive and aggressive", constituting aggravating factors. The full judgment may be accessed here.

CIVIL PROCEDURE

PRISON SENTENCE FOR FALSE MOTOR ACCIDENT CLAIM

EUI Ltd v Sultan, **12.04.17, High Court**

The respondent, C, had claimed damages against the appellant insurer, D, alleging he had sustained injuries and consequential financial loss in a road traffic accident. D had insured the driver of the other vehicle allegedly involved.

D believed the claim was fraudulent, deriving from an accident that had not occurred as alleged, if at all.

At trial, an engineer's expert evidence concluded the damage to the vehicles was inconsistent with the circumstances of the alleged accident. The trial judge dismissed the claim, finding it had been brought fraudulently. D subsequently issued committal proceedings and C admitted his contempt of court.

The committal hearing proceeded in the High Court which noted the expert evidence indicated the accident had been staged. The court held C would have known the claim and the witness statements were untrue. The court was satisfied C was in serious contempt of court. The court held C had supported his claim with false medical and financial evidence, and there was evidence of collusion and planning of the accident.

The court took account of C being a 40-year old father of two, his admission of contempt, having no previous convictions, good character references, and that he cared for his elderly parents. He had not acted alone but had taken a central, key role in the fraud. C was sentenced to nine months' imprisonment.

COMMENT

The court reiterated that insurance fraud, from acts such as staged road traffic accidents, lead to increased insurance premiums for honest members of the public. This immediate and significant custodial sentence was imposed to deter others and to reflect the seriousness of the offence. This ruling demonstrates an insurer being justified in taking such action in cases of suspected fraud which is not, as the court said, a victimless crime.

DAMAGES

MESOTHELIOMA

Davey v 00017518 (formerly Shaw-Saville & Albion Co Ltd), **30.03.17, High Court**

The claimant, C, brought this claim on behalf of the widow and the estate of a deceased man, E, who had worked for the defendant, D, between 1948 and 1971. E's job related to ship repairs. At the age of 86 E was diagnosed with mesothelioma. He died three and a half years later. Before the diagnosis E had been healthy and active.

C alleged D negligently, or in breach of its statutory duty, exposed E to asbestos when it knew or ought to have known of the risks to E's health. Liability was not disputed.

E suffered breathlessness and a large pleural effusion to his left lung. He was treated with pleural biopsies and a talc pleurodesis. An intercostal drain was inserted into his chest. He suffered a persistent cough, swollen ankles, severe chest pain and significant weight loss.

For the final 18 months, E was unable to go out alone and he eventually suffered severe disability and pain. His prognosis caused him considerable anxiety. His life expectancy was reduced by 4.4 years.

C was awarded a total of £150,977. This included general damages of £90,000 for pain, suffering and loss of amenity. This was slightly below the top bracket of £95,700, and took into account that E died at home having been nursed mainly by his family.

The court also awarded future dependency costs of £2,980. Special damages included past gratuitous care and support (£11,090), past income dependency costs (£18,893), past service dependency costs (£9,523), bereavement award (£12,980), funeral costs, and miscellaneous expenses.

DAMAGES

FINGER – LACERATION ON SPIRALISER

Kearney v UP Global Sourcing (UK) Ltd, **24.02.17, Oldham County Court**

The claimant, C, was opening a package containing a spiraliser, delivered by the defendant, D, when the blade of the device cut her ring finger on her non-dominant hand. The cut measured 5mm by 3mm. Further, a piece of flesh at the side of her nail was sliced off. C, a nurse, was aged 34 at the time.

C claimed damages from D for her injury, alleging negligence and other allegations under product liability law.

Her hobbies of swimming and using the gym were affected for three weeks after the accident, by which time the wound had healed.

Eight months later, C's finger remained sensitive to touch and ached in cold water. A plastic surgeon believed the sensations would resolve within three years of the accident. There was some scarring and loss of tissue due to the deep laceration.

The judge relied on the Judicial College Guidelines section on Minor Hand Injuries, 7(1)(h) to assess damages. C was awarded general damages of £3,000 for pain, suffering and loss of amenity and £250 for the scarring. C also received £350 for past care costs, £30 for past travel, and £17 for past medication.

LACERATION TO EYE, FRACTURED ELBOW

Berington v McNeish, **20.02.17, Settlement**

The claimant, C, when aged 32, was knocked off her bicycle by a van driven by the defendant, D. C sustained numerous injuries, including a laceration to the area of her left eye, a fractured left elbow and soft tissue injuries to her right index finger and lower back. C claimed damages from D, alleging negligence. Liability was admitted.

The eye injury was glued but a faint, permanent scar remained measuring two centimetres. The elbow injury was treated with open reduction internal fixation, and K-wires were inserted (to hold the broken bone in the correct position).

C was absent from work for five weeks and a further four weeks after the fixings were removed from her elbow, leaving scarring. C required assistance at home for eight weeks. She continued cycling but ceased playing squash for fear of injuring her elbow again. 18 months after the accident, C had largely recovered but suffered a permanent 3-5% loss of function in her elbow.

C accepted £23,800 in settlement. The sum included £21,000 as general damages for pain, suffering and loss of amenity. The remainder comprised special damages for past care costs (£1,500), bicycle damage (£600), cycling clothing (£600), travel and medication.

BURNS, SPINAL FRACTURE, LACERATION TO LIVER

S v Acromas Insurance Company Ltd, **10.02.17, Settlement**

The claimant, C, was walking along a footpath when a car collided with her. The driver was insured with the defendant, D. C, aged eight at the time, was pushed through a fence and trapped under the vehicle until freed by emergency services. C sustained multiple injuries including a serious burn to her thigh, a fractured spine at L1, laceration to her liver, and post-traumatic stress disorder. C claimed damages from D, alleging negligence of its insured. Liability was admitted.

The burn to C's thigh was treated with a skin graft but both this and the donor site became infected. These areas required dressings for three months but scars remained, measuring 14cms by 7cms. C later became anxious about further surgery to improve the scars' appearance.

Due to C's spinal fracture she was immobile for two weeks then in a back brace for eight weeks. She was in hospital for three and a half weeks, then used a wheelchair for three weeks. The laceration to C's liver healed after three weeks.

C suffered disturbed sleep and required help for two months with personal hygiene tasks. She was absent from school for six weeks, unable to swim for two months, and unable to take part in other sports for six months, after which she experienced occasional back pain

Three years after the accident, C's mood and sleep had improved but she was nervous near cars. The orthopaedic prognosis was that C's residual symptoms would significantly improve within the next two years. C's scarring was permanent but would be improved with future treatment. An award totalling £90,000 was approved. It comprised general damages of £55,000 for pain, suffering and loss of amenity and special damages of £35,000.

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