court circular

ZURICH MUNICIPAL

Spring 2017

THE LATEST JUDGMENTS AND WHAT THEY MEAN TO YOU

Welcome to the Spring 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 variety of judgments made in claims concerning Occupiers' Liability. The first three of these provide robust examples of the courts applying the recent Court of Appeal guidance in *Dean and Chapter of Rochester Cathedral v Debell*, in which the Court emphasised that the key question is a visitor's reasonable safety.

Other claims in the area of Occupiers' Liability include a postal worker's slip, a visitor's fall off the end of a harbour slipway, and two claims arising from a child's accident at school (pages 3-5).

We also feature rulings in a variety of claims alleging breaches of duty by Highway Authorities. These include an allegation of failure to remove surface debris from the highway, and the Court of Appeal rules that Highway Authorities must operate a system that is capable of responding, out of normal working hours, to reports of serious defects. There is also a judgment confirming the status of verges and the extent of the duty to maintain them (pages 5-6).

We next focus on Employers' Liability, featuring a claim that revisits the question of an employer's vicarious liability for the wrongful actions of its employee. There is also a judgment reiterating the requirement of control in the context of the Provision and Use of Work Equipment Regulations (page 7).

We also include a ruling concerning our Police Service customers, reiterating the two-stage test for finding reasonable grounds for making an arrest (page 8).

With regard to the seemingly increasingly prevalent subject of suspected fraud and how defendants address this, the High Court has cautioned of the importance of committal applications being supported with evidence, to the criminal standard of beyond reasonable doubt, that fraud has been committed. A judge's finding of probable fraud in a civil claim is insufficient (page 8).

In the area of Motor, we have included two judgments concerning a claimant struck by an oncoming vehicle. One concerns an experienced cyclist and the other, a pedestrian. Both impose liability for contributory negligence (page 9).

We also include a number of rulings concerning Civil Procedure. These focus on applications for a finding of fundamental dishonesty, costs in pre-action disclosure applications, limitation and a claimant's delay, and disclosing surveillance evidence.

We conclude this issue with three damages awards, two of which concerned mesothelioma.

Richard Shanks

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OCCUPIERS' LIABILITY

ZURICH claim

RISK OF INJURY TO BE REASONABLY FORESEEABLE

Brown v Maidstone Borough Council, **16.11.16, Maidstone County Court**

On a dry afternoon, the claimant, C, had parked her car in the Park and Ride facility situated on land leased by the defendant, D. C was injured after tripping on an uneven section of the surface of the car park. She claimed damages from D, alleging her injuries were caused by D's negligence and breach of duty, under the Occupiers' Liability Act 1957, to ensure the car park was reasonably safe for visitors.

D denied liability, contending that at the site of C's accident tree roots had caused the surface of the car park to be slightly raised. There was no lip, rocking or movement, or other defect meeting D's intervention criteria. The area was inspected annually and checked daily. In response to a report of C's accident, the area was inspected but no relevant hazard or defect was found. In the five years before C's accident, 1.25 million people had visited the car park, with only one relevant incident reported to D.

The judge considered the recent Court of Appeal decision, *Dean and Chapter of Rochester Cathedral v Debell* (*Court Circular*, Winter 2016) in which the Court reiterated that, among other things, an occupier's duty is to make premises reasonably safe, not to guarantee safety.

The judge held there was no obvious danger creating a tripping hazard. The uneven surface did not constitute a real source of danger which a reasonable person would have considered as needing remedial action. The claim was dismissed.

COMMENT

This county court ruling follows the guidance in the Court of Appeal decision, *Dean and Chapter of Rochester Cathedral v Debell*, above. As the Court held, an occupier is not required to ensure its premises are in pristine condition or to guarantee visitors' safety. An allegation that an occupier has breached its duty to make its premises reasonably safe will need to demonstrate that there is a reasonably foreseeable risk of injury, posed by a real source of danger, which a reasonable person would regard as requiring remedial action.

OCCUPIERS' LIABILITY

ZURICH claim

TRIP OVER METAL LOOP BARRIER – REASONABLE SAFETY

Beraet v Orbit South Housing Association Ltd, **16.11.16, Canterbury County Court**

The claimant, C, was a school teacher. While supervising a group of children, he tripped over a metal loop barrier, 39cms high, fixed to the pavement. C suffered injuries for which he claimed damages from the defendant occupier of the area, D, alleging negligence and breach of duty under the Occupiers' Liability Act 1957 (the Act).

C alleged that the barrier was situated far below a person's normal line of vision. He alleged that the barrier posed a foreseeable risk to pedestrians, there was nothing to warn pedestrians of its presence, and that the metal loops, with no colour contrasting them with their surroundings, should have been painted in a conspicuous colour.

D denied liability.

The judge noted that the barriers have since been replaced with tall, wooden posts, but held this was irrelevant. The judge, having referred to the recent Court of Appeal decision, *Dean and Chapter of Rochester Cathedral v Debell* (*Court Circular*, Winter 2016), said the key question is whether C was reasonably safe when walking on D's land. The barriers had been in situ for at least 28 years without any known similar incident.

The judge held that C's accident was caused by his failure to concentrate on where he was walking. The barrier was not itself dangerous and C was reasonably safe, in terms of the Act. There were four metal loop barriers in a row and they were sufficiently visible to pedestrians. The claim was dismissed.

COMMENT

This county court ruling again follows the Court of Appeal's guidance in *Dean and Chapter of Rochester Cathedral v Debell.* The key factor to consider in claims alleging breach of the 1957 Act is whether the visitor was reasonably safe. This will, of course, depend on the particular circumstances of each case, but a long absence of any known or reported similar incident will generally be relevant.

OCCUPIERS' LIABILITY

ZURICH claim

CONFLICTING ACCOUNTS OF ACCIDENT – REASONABLE SAFETY

Jacobs v Symphony Housing Group Ltd, **04.12.16, Liverpool County Court**

The claimant, C, resided as a tenant of the defendant, D, in a flat in a block accessed from outside by communal steps. C said that she slipped on one of those steps and sustained injuries. C's accounts of her accident included that she had slipped because water had pooled in a defect on the step. She claimed damages from D, alleging negligence and breach of duty under s.2 of the Occupiers' Liability Act 1957.

D took issue with C's differing versions of her accident. Apart from slipping in a defect on a step, she said her knee had locked when she picked up her shopping, she had twisted her knee while walking downstairs, and had tripped at a defect between the stairs and the communal hallway. D admitted there was a lip at the edge of the top step of the external communal steps but, as it measured only 5mm, D denied that it posed any risk of injury.

The judge held that C had not proven, on balance, how her alleged accident occurred. C was "an intelligent and articulate person" but had given several conflicting versions of her accident. C did not have language or speech difficulties.

Further, the lip on the top step measured only 5mm, which did not amount to an actionable defect. The judge focused on a visitor's reasonable safety, referring to the Court of Appeal decision, *Dean and Chapter of Rochester Cathedral v Debell* (*Court Circular*, Winter 2016). The claim was dismissed.

COMMENT

This claim again illustrates the importance of scrutinising the alleged circumstances of an accident at different stages of the claim, and cross-checking them to establish or eliminate any apparent conflicts and taking account of a claimant's intelligence and their communication skills.

Further, as in *Brown v Maidstone Borough Council* above, this ruling reiterates that an occupier is only required to ensure their premises are reasonably safe and do not pose a real risk of injury from a real source of danger.

OCCUPIERS' LIABILITY

ZURICH claim

POSTAL WORKER'S TRIP – CONFLICTING EVIDENCE

Muca v Newcastle City Council, **22.11.16, Newcastle County Court**

The claimant, C, a postal worker, was delivering mail in a block of flats owned by the defendant, D. C said the corridor floor was wet and a person was using a cleaning machine. C walked through the wet area, reached a flight of stairs but allegedly slipped and fell on a wet step, sustaining injuries.

C claimed damages from D for injuries, alleging breach of duty, under the Occupiers' Liability Act 1957, to take reasonable care to ensure D's visitors to the block were reasonably safe.

D denied liability. D noted that the floor appeared to C to be wet, presenting an obvious hazard to him. D contended that if it were held primarily liable, C's contributory negligence contributed to the accident by his proceeding despite knowing the floor was wet, and failing to hold the handrail.

D also disputed how C's alleged fall occurred. He told his employer he had descended 10 steps before falling, but pleaded that he had fallen two steps from the top.

At trial, the judge noted conflicts in C's evidence, including the Management Accident Report Form stating that C tripped outdoors in dry weather.

The judge said that the walkways, being in part open, are likely to become wet but D is not automatically liable if an accident occurs simply because they are wet. The judge held that there was no defect with the corridors, the stairs or the handrail. C is trained to walk in varied conditions and his working practices were safe.

Further, C had conceded that he was not certain he slipped because his shoes were wet. There was no certainty as to what caused him to fall. The claim was dismissed.

COMMENT

This provides a good example of the importance of examining the circumstances of an alleged accident. Cross-referencing accident report forms, all witness statements, and medical records recording how an accident occurred, assists with ascertaining any conflict in the mechanics of an alleged accident

OCCUPIERS' LIABILITY

ZURICH claim

FALL OFF STEEP EDGE OF BOAT SLIPWAY – OBVIOUS RISK

Bennett v Wyre Borough Council, **02.12.16, Preston County Court**

The claimant, C, and her husband were launching their boat off a slipway into an estuary in Lancashire. As C stood in approximately 18 inches/45cms of water, uncoupling the boat from their car, she fell approximately three feet/one metre off the end of the slipway.

C sustained injuries for which she claimed damages from the defendant, D, who was responsible for the slipway. She alleged D had breached its duty as occupier to ensure the slipway was reasonably safe for its users.

D denied liability, stating that there were sufficient warning signs and the slipway had been in situ since at least 1899. D argued that the opaque water presented obvious risks, including soft mud and quicksand, of which C would or should have been aware. D also questioned the time C allegedly attempted to launch the boat, as the tide would have been too low to provide adequately deep water.

D also argued contributory negligence. C failed to heed the warning signs or investigate the design of the slipway beforehand (website information was available).

The judge found discrepancies in the pleadings and evidence regarding the alleged time of the launch. The judge held that adequate warnings were in place. A further sign now warns of the drop, concealed when the tide is in, but this made no difference to C's claim as she admitted that it would not have prevented her from launching the boat.

The judge held that D had not breached its duty and C had not proven, on balance, that the accident had occurred as alleged. Had D been held primarily liable, C would have been held liable for 50% contributory negligence for failing to take "exceptional" care in the circumstances. The claim was dismissed.

COMMENT

This judgment illustrates the varied circumstances in which an occupier may face allegations that its premises, or an amenity, were not reasonably safe. It also demonstrates that certain factors may be more relevant in some claims than in others – here, for example, the question of time and the tide.

OCCUPIERS' LIABILITY

ZURICH claim

CHILDREN'S SCHOOL PLAYGROUNDS – SUPERVISION

Cooper (a child, by her litigation friend, T Marks) v Northumberland County Council, **01.12.16, Newcastle County Court**

The claimant, C, was a five year old student at a school for which the defendant, D, was responsible. C was climbing on fixed turning or "rolling" bars, when she fell, sustaining an injury.

C claimed damages from D, alleging her injury was caused by D's negligence and/or breach of duty under the Occupiers' Liability Act 1957. C's allegations included failure to operate a system to supervise the children using the bars, failure to provide adequate instruction in how to use them, and failure to warn of the danger of attempting to walk on the bars.

D denied liability. Its defence included that C had received proper instruction in how to use the bars, C had admitted trying to stand on them despite instructions not to and the children were adequately supervised. Further, the bars were not defective; they were regularly inspected and had been in situ for many years without any similar incidents.

There were no adult witnesses, and precisely how C fell was unknown. The court held that, given the weekly instructions in how to use the playground equipment, C would have known how to use the rolling bars but C had knowingly used them incorrectly.

The court held that the level of supervision was adequate – three staff supervising fewer than 90 children in the same age group. The standard of the playground equipment was also adequate. The claim was dismissed.

COMMENT

This ruling highlights the question of school playground equipment and the supervision of children using it. It focuses on the importance of being able to produce evidence that the equipment had been inspected appropriately, it was properly maintained, appropriate risk assessments had taken place, it was appropriate to the age group of the children using it and children had been sufficiently instructed in how to use it. Further, this claim emphasises the importance of being able to demonstrate adequate levels of supervision. As the court stated, it is not "practical to assume that every child can be monitored at every second regardless of the supervision system in place".

OCCUPIERS' LIABILITY

ZURICH claim

SCHOOL DOOR CLOSING ON CHILD'S HAND – FORESEEABILITY

O'Leary (a child, by her litigation friend B O'Leary) v Oxfordshire County Council, **13.01.17, Oxford County Court**

The claimant, C, and her brother attended a primary school for which the defendant, D, was responsible. C had paused at the doorway to her classroom when her brother shut the door, trapping C's middle finger in the hinge. C, aged five, sustained injuries to her finger for which her mother, on her behalf, claimed damages from D. She alleged negligence and breach of duty under the Occupiers' Liability Act 1957. Her allegations included that D should have carried out risk assessments of the school's doors and that doors posing a risk of injury should be fitted with protective devices.

D denied liability, contending that the door was a "normal door", posing no particular risk of injury.

The judge considered relevant case law, including *Smart v Gwent County Council* (1991, Court of Appeal) and *Ashford v Somerset County Council* (22.11.2010, Yeovil County Court). The judge said that a door is an everyday object. Parents do not risk assess their doors at home or put finger guards on them. Parents must ensure their children negotiate doors safely.

The judge said that C had moved between classrooms many times without injury. At age five, C would have known not to put her fingers in door hinges. A risk assessment of the school doors would not have identified any particular risk of injury. The judge noted that, protectors have since been fitted to the school doors, but this did not constitute evidence of any breach of duty by D. The claim was dismissed.

COMMENT

This ruling reiterates that not every foreseeable risk of injury to children must be guarded against. A child's home is unlikely to be risk assessed for hazards such as trapping fingers in doors, drawers, cupboard doors, windows, and standard car doors. Parents should teach children about such risks, but a person of any age may catch their fingers in a door hinge.

HIGHWAYS

ZURICH claim

ALLEGED TRIP IN POTHOLE – INCONSISTENT AND UNVERIFIABLE EVIDENCE

Power v Wirral Metropolitan Borough Council, **16.10.16, Birkenhead County Court**

The claimant, C, said he tripped and fell due to a pothole in the road, sustaining injuries for which he claimed damages from the defendant highway authority, D.

C alleged negligence and breach of duty under the Highways Act 1980 (the Act). His allegations included failure to repair the defect despite inspecting it five weeks earlier. His claim included £8,000 loss of earnings for an alleged lost opportunity to take up a labouring job.

D denied liability. It argued that the inspection C referred to was carried out competently, with no relevant defect found. D relied on its statutory defence under s.58 of the Act, contending it operated a suitable inspection system. Alternatively, D argued that, if held primarily liable, C's injuries were caused by his own negligent failure to take reasonable care.

The court held that C's account of how his accident occurred was inconsistent and not credible. D had tried unsuccessfully to contact the person who had allegedly offered C a labouring job, but he did not attend trial. The court therefore rejected the job offer allegation.

D asked the court to make a finding of fundamental dishonesty against C. C's counsel argued that, while the loss of earnings claim may have cast doubt on C's credibility, D had not proven that C had been fundamentally dishonest. The court rejected D's application but held that C had not proven, on balance, that the accident had occurred as alleged or that there was any actionable defect. The claim was dismissed.

COMMENT

This highlights a number of issues, including the need for highway authorities to be able to demonstrate the operation of a compliant inspection and repair system, and the importance of credible witness evidence, including that of claimants themselves. It also emphasises the importance of verifying loss of earnings claims, particularly concerning casual jobs or lost opportunities to take up job offers due to the injury. The inability to contact the alleged prospective employer is likely to cast doubt on that part of a claim.

HIGHWAYS

ZURICH claim

TRIP ON FALLEN STONE – NO DUTY TO REMOVE SURFACE DEBRIS

Rimmer v Calderdale Metropolitan Borough Council, **10.01.17, Bradford County Court**

The claimant, C, was walking along a rural lane in Halifax, bordered by dry stone walls. C tripped over a large stone, sustaining injuries for which he claimed damages from the defendant highway authority, D. C alleged negligence and breach of duty under s.41 of the Highways Act 1980 (the Act). He said the stone, concealed by leaves, had probably fallen from the stone wall. He alleged that D had failed to repair the wall despite knowing it needed repairing.

D denied liability, particularly denying that stones on the highway rendered it unsafe or amounted to a breach of D's s.41 duty. It further relied on its statutory defence under s.58 of the Act, arguing it operated a suitable inspection system for the area.

The court accepted that D operated a suitable inspection system for the area. Further, D's duty is to maintain the fabric of the highway, not to remove surface debris. The principles applying to this duty are summarised by the High Court in *Rollinson v Dudley MBC* (*Court Circular*, January 2016).

With regard to D's common duty of care, D's inspector had responded to reports of damage to the wall, but had not found anything to remove from the highway. Further, C had not proven, on balance, that he had fallen over a stone as alleged. The claim was dismissed.

COMMENT

This county court ruling reiterates that the duty of a highway authority, under s.41 of the Highways Act 1980, is to maintain the fabric of a highway in a state of repair; it does not extend to removing loose, transient debris from the surface. Generally, the question of whether a highway authority has breached its s.41 duty by a highway being out of "repair" will broadly depend on the nature of the defect or material. A court will assess whether the material is permanent or transient, whether it constitutes damage to the highway or its surface, and whether it could be regarded as forming part of the fabric of the highway.

HIGHWAYS

ZURICH claim

DUTY TO RESPOND TO OUT OF HOURS REPORTS OF SERIOUS DEFECT

Crawley v Barnsley Metropolitan Borough Council, **02.02.17, Court of Appeal**

One Friday in January 2012, a member of the public notified the defendant highway authority, D, of the presence of potholes along a minor road. The operator forwarded the report to D's highway inspectors but no other action was taken that day.

The following evening, the claimant, C, was jogging along the road when he tripped in a pothole, sustaining injuries.

On Monday morning, D's highway inspector noted the message on his computer reporting the potholes. He promptly went to inspect the site and ordered the defect to be repaired within 24 hours. It was duly repaired the next day.

C claimed damages from D, alleging his injuries were caused by D's failure to comply with its duty, under s.41 of the Highways Act 1980 (the Act) to repair the highway.

D denied liability, arguing that it operated a suitable repair and maintenance system and that, if the court found an actionable defect had caused C's accident, D was entitled to rely on its statutory defence under s.58 of the Act.

The initial trial judge accepted D's defence, dismissing the claim, but C successfully appealed.

D appealed further to the Court of Appeal. The key question was whether D's system of waiting until Monday, before addressing a potentially serious defect in a road that was reported to D on the previous Friday afternoon, complied with its duty under the Act.

The Court of Appeal, by a majority, held that a report of a defect in the road on a Friday afternoon may present a real risk that the pothole was a Category 1 defect under the Department of Transport's Code issued to highway authorities as guidance for addressing statutory duties.

The Court noted D's inspector had categorised this pothole as requiring immediate attention.

The Court further held D was not entitled to rely on the s.58 defence. This was because D's system suffered from the inherent flaw that reports of potentially serious defects would not be addressed by D's staff out of normal hours, unless a report was made by a member of the emergency services. If the system was due to a lack of resources, the Court held that this did not justify D failing to comply with its duty to operate a reasonable maintenance system.

The Court held that, while it might be reasonable to have a reduced number of staff operating at the weekend or out of hours, there had to be a means of actively responding to reports from members of the public of serious defects in the highway.

The appeal was dismissed.

COMMENT

This ruling confirms that highway authorities must operate systems that can address reports received, out of normal working hours, of serious, dangerous defects in a highway. The system may be operated by a reduced number of staff, but it will need to be capable of arranging for serious defects to be dealt with out of normal hours. It will not be sufficient to operate systems that respond only on the next normal working day. The Court emphasised that a lack of resources will not justify a failure to respond to reports, received out of normal working hours, about dangerous defects. The full judgment may be accessed here.

HIGHWAYS

ZURICH claim

PEDESTRIAN'S COLLISION WITH ROAD SIGN – STATUS OF VERGES

Knights v Northumberland County Council, **22.09.16, Newcastle County Court**

One dark evening in January 2014, the claimant, C, was walking his dogs along a grass verge at the side of an unlit lane, when he collided with a road sign. He sustained a laceration to his forehead for which he claimed damages from the defendant highway authority, D, alleging negligence and breach of duty under the Highways Act 1980.

The road sign displayed a silhouette of an adult and child, warning motorists of pedestrians in the road ahead. C alleged it stood five feet/150cms from the ground and it was not marked or lit to warn C of it.

C further alleged the highway was in a dangerous condition due to the sign constituting a trap, the height of the sign should have been adjusted to prevent it from amounting to a nuisance on the highway, the sign posed a foreseeable risk of injury to pedestrians, and D had failed to follow its own guidance in its Traffic Signs manual.

D denied liability but admitted the sign was sited at the height alleged. D had not received any report of any similar incidents in at least the preceding 12 months, and the sign had been in situ for many years.

The judge noted that C is familiar with the lane and knew of the presence and location of the sign. He usually wore a head-mounted torch but had not done so on the evening in question.

The judge said that as D had sited the sign in the verge, the verge forms part of the highway. However, a verge is not akin to a footpath, and D was not under a duty to maintain it as such.

The judge noted that another sign, sited on the verge approaching the end of the village, is lower than the sign in question and would present a similar danger to pedestrians. The judge held the verge was not intended for pedestrians, nor could D have expected pedestrians to walk along it. D was not, therefore, under a duty to fit the sign at a higher level.

The judge dismissed the claim but said that, had he been required to address contributory negligence, he would have held C 60% to blame. C was negligent in failing to wear his head torch, and being familiar with the route and the presence of the sign, yet walking straight into it.

The judge would have awarded C £12,000 (on a full liability basis) for the residual scar to his forehead.

COMMENT

This county court ruling briefly considers the circumstances under which a verge may form part of a public highway maintainable by a highway authority under its s.41 duty. The judge said that, where the highway authority has sited "road ware" on the verge, such as bollards and road signs, the verge will form part of the highway. However, generally, unless there is clear evidence indicating a verge is used as a footpath, a verge will not be subject to the same standard of maintenance as a public footpath. Each case will have its own particular features.

EMPLOYERS' LIABILITY

VICARIOUS LIABILITY FOR ASSAULT OF EMPLOYEE

Bellman (a Protected Party by his litigation friend N Bellman) v Northampton Recruitment Ltd, **01.12.16, High Court**

C was employed by the defendant company, D. One of D's directors was M. C and M were very longstanding friends. In December 2011, they attended an office Christmas party at a golf club. After the party, the group spontaneously decided to go to a hotel for drinks. C and M were drinking in the hotel lobby, discussing a work-related subject. During their discussion, M punched C once then a second time. C fell, striking his head on the marble floor. He suffered a fractured skull and other head and brain injuries.

Subsequent criminal charges against M were discontinued but C's complaint as to this was upheld.

A claim for damages for personal injury was made on C's behalf against D, alleging it was vicariously liable for M's actions. The claim was not pursued against M as it was considered he would be unable to satisfy any resulting judgment.

D denied liability, arguing the assaults were not actions taken in the course of, or within the scope of, M's employment. M stated that he had acted in self-defence.

The court examined the development of the principle of vicarious liability, spanning more than 300 years, from the Court of King's Bench decision in *Turberville v Stampe* (1697) to the Supreme Court judgment in *Mohamud v Wm Morrison Supermarkets plc* (*Court Circular*, April 2016).

In *Turberville*, Chief Justice Holt said, "if my servant doth anything prejudicial to another it shall bind me when he may be presumed that he acts by my authority being about my business".

In *Mohamud*, the Supreme Court said that, put simply, the two key issues are: first, what was the nature of the job, and second, whether there was a sufficient connection between the employee's specific role and the wrongful conduct, so that it would justify holding the employer liable for it under the principle of social justice, originating in *Turberville*. The Court recognised each case will differ in its circumstances.

The court held that M's assault on C was committed after the work social event, not during it. The office party at the golf club had ended. Deciding to have drinks at the hotel could not be regarded as a seamless extension of the Christmas party. At the hotel, the group had discussed social topics for a considerable time and some members had gone to bed before C and M, in the small hours of the next morning, had engaged in a "drunken discussion" about work, which triggered the assault.

The court held that there was an insufficient connection between M's role and his assault against C to justify holding D liable for C's injuries, under the principle of social justice dating back to *Turberville*.

While sympathising with C, the court dismissed the claim.

COMMENT

The High Court has, in this judgment, conducted a fine analysis of the historical development of the principle of vicarious liability, dating back to 1697. The court summarised the factors that need to be established before an employer can justly be held liable for a wrongful act of its employee. This ruling provides a clear and helpful review of the principle, its historical development, and its requisite criteria, emphasising the importance of an employee's role and the connection between that role and the wrongful act. The full judgment may be accessed here.

EMPLOYERS' LIABILITY

PRISONER'S INJURY WORKING DURING DAY RELEASE – PUWER

Casson v (1) Hudson and (2) Parochial Church Council of St Wilfred's Church Mereside, **03.03.17, Court of Appeal**

The appellant, C, was a prisoner at HMP Kirkham, Lancashire. During a period of resettlement day release, C was working at a church hall in Shrewsbury as a general handyman, supervised by a community worker, L.

While standing near the top of a 15-rung ladder, cleaning a wall he was going to paint, C fell to the floor, sustaining serious injuries.

C claimed damages from the defendants, R1 and R2, who owned the ladder, alleging his injuries were caused by their breach of duty under the Provision and Use of Work Equipment Regulations 1998 (PUWER). He alleged that the defendants owed him duties as an employee.

C's original claim included negligence and other statutory breaches of workplace regulations.

The respondents denied liability. L gave evidence that she had instructed C not to use any ladders, and C accepted she had told him this.

C alleged that R1 had told him that the prison authorities had suggested to R1 that C could undertake some painting at the hall. C said R1 told him to paint the hall, and showed him the ladders, indicating he could use them. R1 disputed C's account, arguing C was undertaking the painting work on his own initiative.

At the initial trial the judge dismissed the claim, rejecting C's evidence that he had been told to paint the hall or that he had been shown the ladders. The judge also held that C was not an employee of the respondents.

C appealed, limiting his appeal to an allegation under PUWER, that the trial judge had wrongly applied regulation 3(3)(b). This regulation addresses work undertaken outside the context of employment, and concerns the question of who has control of the person carrying out the work, the equipment, and how it is used.

The Court noted the trial judge had held that the respondents had not assumed any control over what work C carried out or how he carried it out. Further, the Court noted that the trial judge had found the prison governors, or L, or C himself, had control over his work.

The Court held that the respondents did not have control over C's work, nor did they supervise him or manage his work equipment.

The Court held that C had not been instructed to carry out any painting, nor had he been permitted to use the ladders. On the contrary, C had been expressly forbidden from using a ladder.

The appeal was dismissed.

COMMENT

This reiterates the requirements of the 'control' element for PUWER to be engaged. While it is not necessary for a worker to be an employee, the worker must be carrying out their task, and using any equipment, under the requisite degree of control by the person or organisation which is alleged to owe duties under PUWER. The full judgment may be accessed here.

POLICE

REASONABLE GROUNDS FOR ARREST – TWO-STAGE TEST

Kandamwala v Cambridgeshire Constabulary, **25.01.17, Court of Appeal**

In August 2009 the claimant, C, called the police on 999, saying that he had been assaulted by a woman, X. Officers from the defendant's police force, D, attended the scene. X admitted hitting C but said she had done so because C had sexually assaulted her daughter. C was arrested on suspicion of sexual assault but was later released and no further action was taken against him.

C claimed damages against D, alleging, among other things, false imprisonment and false arrest. He withdrew allegations of race discrimination and wrongful interference with his human rights.

D disputed all C's allegations. D argued that, under s. 24(5) of the Police and Criminal Evidence Act 1984 (PACE), D's officers had the power of summary arrest if they had reasonable grounds for believing that it was necessary to arrest a person for any of the reasons listed under that section. Code G of the Act emphasised that the use of the power of arrest had to be fully justified to satisfy the "necessity" criteria. Further, the arresting officers had to consider whether there were less intrusive means of meeting the necessary objectives before exercising their power of arrest.

The claim was initially dismissed after the judge held that C had been properly and reasonably arrested. C, acting in person, appealed. He contended that the judge had erred in her decision that the arrest was justified, had failed to consider his other allegations, and he had not had a fair trial.

The Court held that the trial judge had incorrectly referred to a section in PACE but she had correctly followed the Court of Appeal's guidance in *Hayes v Chief Constable of Merseyside*, (*Court Circular*, September 2011), in which the Court set out a two-stage test for arrest. To decide whether an arrest is necessary, the Court should examine (a) whether the arresting officer subjectively believed that the arrest was necessary, and (b) whether that officer's belief was objectively reasonable.

The Court held that in this case, there was evidence to support the officer's belief that the arrest was necessary, including that C had been verbally aggressive before he was arrested, and an independent witness supported X's account of C's assault on her daughter.

The Court referred to C's other allegations, of race discrimination and breach of his human rights, that he had withdrawn. The Court said that, in any event, C's race discrimination allegation had only been raised in evidence and not as a separate claim. Further, it was time-barred because C had raised this complaint under the Equality Act 2010 rather than the Race Relations Act 1976.

The Court also dismissed C's claim that he had not had a fair trial. The trial had been allocated two days but had lasted only two hours. The trial judge had read the skeleton arguments and, having considered them, did not require oral evidence. The Court held that C could have questioned the relevant officers but he had confirmed that he had no more evidence. There was no justification for finding that C had not had a fair trial.

The appeal was dismissed.

COMMENT

This Court of Appeal ruling revisits the test for whether an arrest is necessary, set out in *Hayes*, above. It also highlights that, while a trial judge might erroneously refer to a section in a statute, this type of error will not necessarily lead to an appeal succeeding on such a technicality, if the correct test in law has been applied, as it was here.

FRAUD

SUSPECTED STAGED RTA – REQUIREMENTS FOR SUCCESSFUL COMMITTAL APPLICATION

AXA Corporate Solution Services Ltd v Khan and Another, **27.02.17, High Court**

The respondents, R1 and R2, had made claims for damages for personal injury following a collision between two vehicles.

R1 was driving and R2, R1's niece, was allegedly seated beside her. Two men, who had initially said they were sitting in the back seats, abandoned their claim.

The collision occurred after a vehicle in front of R1 suddenly turned; R1 braked and the vehicle behind R1 collided with R1's car. The driver of that vehicle, X, said that R2 had not been in the car with R1. Other evidence cast doubt on R2's presence in the car and there were inconsistencies with the medical evidence. The judge held that the collision had been staged and the claims were fraudulent.

Eighteen months later, the applicant insurer, C, applied for permission to bring committal proceedings against R1 and R2. C's key grounds supporting its application were that the vehicle in front of R1 was a decoy vehicle, R1 had braked excessively for the purpose of causing a collision so that she and R2 could bring personal injury claims, and that R2 was not present in the car at the time i.e. she was a phantom passenger.

The court held that, in an application for permission to bring committal proceedings such as here, the court had to consider whether an applicant had a strong prima facie case. The court would take account of the question of proportionality, the public interest, and the overriding objective set out in Part 1 of the Civil Procedure Rules 1998, that cases will be dealt with justly and at proportionate cost.

The court held that a significant factor was C's delay in making this application. Further, while the judge had found fraud, he was adjudicating civil matters where findings are made on the balance of probabilities. An applicant had to demonstrate it had a strong case and committal proceedings had to be in the public interest otherwise applications would be made every time a judge had found a witness dishonest.

Here, the evidence of the alleged staged accident was circumstantial and there was no evidence of conspiracy. There was insufficient evidence for a court to find, to the criminal standard of proof of beyond reasonable doubt, that the collision had been staged. Here a minor collision had occurred and there was conflicting evidence as to its cause and regarding whether R2 had been a passenger. But this did not amount to a prima facie case of dishonesty.

The court further held that C's delay had to be taken into account and this was a decisive factor in the court considering the overriding objective of dealing with cases fairly. The application was refused.

COMMENT

The refusal of this application for permission to bring committal proceedings cautions defendants as to the importance of making such applications reasonably promptly. Further, applications should only be made where the evidence is likely to be regarded by the court as supporting the allegation of fraud beyond reasonable doubt. Supporting such an allegation only to the civil standard of the balance of probabilities is insufficient. As the court here said, a finding of fraud by a trial judge in a related personal injury claim is not a "green light" for the bringing of committal applications.

MOTOR

MOTORIST'S COLLISION WITH PEDESTRIAN – APPORTIONING LIABILITY

Woolridge v George, **23.01.17, High Court**

One night, the claimant, C, had left a pub and was crossing a road when he was struck by a car driven by the defendant, D. C, aged 35 at the time, sustained severe brain injuries for which he claimed damages from D.

C alleged his injuries were caused by D negligently failing to heed C's presence in the road and failing to drive as a reasonably careful driver.

D said she was driving at 20mph, had not been distracted, but had not seen C in her path. She argued contributory negligence. An eyewitness said that C walked across the road in front of D's car.

The court found that C had been present in the road for at least six seconds before walking in front of D's car, which would have been 20 metres from him. The area was well lit and C, despite wearing dark clothing, would have been visible in the darkness due to his arms being bare. The court held that D should have seen C when he was at least six metres from her car and should have taken evasive action.

With regard to contributory negligence, the court referred to relevant case law, including the Supreme Court decision in *Jackson v Murray* (*Court Circular*, May 2015). The question was whether C risked his own safety. The court held D primarily liable for negligently failing to avoid C, but C, possibly misjudging the speed and proximity of D's car, was held 30% liable for contributory negligence.

COMMENT

This demonstrates the importance of examining in detail the circumstances of a vehicle and pedestrian collision. It reiterates that a claimant's intoxication alone is not a reason for which a court will find contributory negligence, but it may influence a claimant's ability to assess potential dangers when crossing a road. The court reiterated that a motorist will usually bear the greater share of blame for colliding with a pedestrian, but each case will be assessed on its own facts.

MOTOR

MOTORIST'S COLLISION WITH CYCLIST – APPORTIONING LIABILITY

Rickson v Bhakhar, **20.02.17, High Court**

One clear, dry summer morning the claimant, C, was taking part in a cycling club time trial. He was cycling on the A27, a busy dual carriageway. The defendant, D, was driving his Ford Transit van in the opposite direction. On reaching a designated turning point, D turned across the carriageway towards a road leading off the A27. C swerved to try to avoid the van but collided with it, sustaining life-changing injuries.

D was convicted of driving without due care and attention.

C claimed damages from D for his injuries, alleging negligence. D admitted primary liability but alleged that C's negligence contributed to the accident. D said visibility was good and C would have had a sufficiently advanced view of the junction ahead to heed any vehicles turning across his path.

The court held that D would have been driving at approximately 10mph at the time of the collision. A reasonable cyclist, keeping a proper lookout, could have avoided the collision. C, an experienced cyclist, was familiar with the A27 and aware of the junction in question. The court accepted the possibility that C had been checking his cycle clock or the position of his competitors and therefore failed to notice D pulling across the road.

The court held that, had C braked to avoid the van, this would have more effectively avoided the collision than swerving, as C had done. The court held D primarily liable but C, failing to heed and respond properly to D's presence, was held 20% liable for contributory negligence.

COMMENT

This finding of 20% contributory negligence illustrates the significance of a cyclist's failure to exercise due care, particularly in circumstances where a high degree of care and attention could be reasonably expected. Where, as here, an accident unfortunately results in catastrophic injuries, the question of contributory negligence should be investigated, having the potential to reduce a defendant's outlay significantly, even where an apportionment is small. The full judgment may be accessed here.

MOTOR

EVIDENCE INADEQUATELY ASSESSED AT TRIAL – APPEAL COURT REMITTING FOR RETRIAL

Noble v (1) Wilkinson and (2) Advantage Insurance Co Ltd, **16.12.16, Halifax County Court**

The claimant, C, alleged that he was driving his pick-up truck on a narrow road in West Yorkshire, to assist a motorist whose vehicle had broken down. C said that the first defendant, D1, collided with C's truck, causing C injuries and loss for which he claimed damages from D1 and D1's insurer, the second defendant, D2.

D1 did not attend trial but his witness statement conflicted with C's account. D2 alleged that C was pursuing the claim fraudulently. The trial judge did not give any weight to D1's statement because D1 did not attend trial. The judge held in C's favour, and D2 appealed.

The judge hearing the appeal held that D1's statement was admissible in his absence, as hearsay evidence. The appeal judge said an "unusual feature" was that C had no record of the person or vehicle he was intending to assist. The court questioned many other aspects of C's evidence.

The appeal judge held that the trial judge had failed to state whether adverse inferences may be drawn from the numerous inadequacies and conflicts in C's evidence. The evidence had to be balanced but the trial judge had not done this. The appeal was allowed and the matter was remitted for a re-trial before a different judge.

COMMENT

As well as providing an example of a justified appeal, this demonstrates some characteristics indicating that fraud should be suspected.

Here the court mentioned the differing accounts as to the time of the alleged accident, the possibility of collusion, the failure to report injuries to a GP where this would be expected, failure of witnesses to attend trial where they may reasonably be expected to attend, and any suspicious circumstances behind a claimant's relationship with a person at the relevant claims management company. Inconsistencies in evidence while the litigation proceeds, and the absence of evidence where it may be expected, are usually indicators that further scrutiny is required.

NEGLIGENCE

TREES – REASONABLENESS OF 3-YEAR INSPECTION CYCLE

Cavanagh v (1) Witley Parish Council and (2) Shepherd (T/A Shepherd Tree Surgeons and Forestry Contractors, **14.02.17, High Court**

In January 2012 the claimant, C, was driving a single decker bus on an A road through Surrey when a 20-metre high lime tree fell across the road on to the bus, also striking a residential property on the opposite side of the road.

C sustained severe personal injuries for which he claimed damages from the defendants. The first defendant, D1, was responsible for arranging the inspection and maintenance of the trees in the area, and the second defendant, D2, was the tree surgery organisation that carried out the inspections on behalf of D1.

The parties accepted that the tree failed due to severe and extensive root decay, extending to the base of the trunk. High winds were a contributory factor.

C's allegations included that D1 should have arranged for the trees to be inspected every 18 months or two years at most, rather than every three years, as was its policy. He also alleged D1 had negligently engaged D2 to carry out the inspections when D2 was not adequately qualified to do so. The only question for the court in this hearing was that of liability.

The defendants denied liability. D1 argued it was reasonable to operate a system of inspecting the trees every three years.

D2 initially admitted to having inspected the tree in question in 2009 but later claimed that he had not. D1 disputed this, referring to D2's report he provided to D1 following his inspection in 2009, in which he stated that "no works" were required to the tree.

The court held that the tree in question, situated near a very busy road, was in a more high-risk position than a smaller, younger tree leaning away from the road. It required regular inspection. It was obvious that if it failed it would cause severe damage at least to the property on the opposite side of the road (as did occur), even if no vehicles or pedestrians were in its path as it fell. It was in a high-risk category zone and was "part-way" to being a "high-risk category tree". As with all trees, it could contract a disease at any time. There could be latent rotting to the roots that might not be visible. The court held that a three-year gap between inspections was inadequate for this tree.

The court noted that when D1 invited tenders for the 2009 survey, this particular tree was singled out for an individual report. The court said that this indicates that D1 recognised the need for particular care regarding this tree.

The court held D1 liable for failing to operate an appropriate inspection cycle for the tree. A three-year inspection cycle was not reasonable; the tree should have been inspected at least every two years. Had this been done, the disease would have been identified and D1 would have arranged for it to be felled or otherwise made safe, so that the accident would not have occurred. The court dismissed the other allegations against D1.

With regard to D2, the court held that he had inspected the tree in 2009, but had dishonestly claimed that he had not. The court held that, on balance, his inspection was carried out negligently. Nonetheless, his negligence did not cause the tree to fail, and the claim against D2 was dismissed. The claim therefore succeeded in part against D1.

COMMENT

This emphasises the importance of local authorities operating suitable systems for inspecting and attending to trees for which they are responsible, taking account of the age and size of trees relative to their location. The court noted D1 had recently instigated a zoning policy, enabling inspections to be arranged to more appropriate timescales, as well as more economically. This ruling also illustrates the importance of ensuring that tree surgeons, contracted by local authorities, are suitably qualified and experienced.

CIVIL PROCEDURE

STANDARD COSTS AFTER UNSUCCESSFUL FUNDAMENTAL DISHONESTY ALLEGATION

Ryan v Prescott-Thomas Ltd, **05.12.16, High Court**

The claimant, C, had been employed by the defendant, D. C alleged that he had sustained a serious injury when lifting a 25kg sack of potatoes in the course of his work. C claimed damages from D, alleging his injury was caused by D's negligence and various breaches of statutory duty.

D denied the accident occurred as alleged, but accepted that, if the court found that it did, D had breached its duty to C.

There were numerous other disputed aspects of the claim, including regarding the nature of the work C was employed to do, the length of his employment with D, the training and supervision he had received, what C did after the alleged accident and how the alleged accident was recorded in the various medical records.

The court criticised D for providing much of its disclosure one week before trial, but accepted this was an honest but careless mistake. The court said that no adverse inferences should be drawn from it regarding the credibility of D's evidence.

The court considered all the evidence and concluded that C had probably sustained an injury to his back at work, but not as he had alleged. The claim was dismissed.

D asked the court to find that C had pursued his claim with fundamental dishonesty and that costs should be ordered against him on the indemnity basis.

The court held that, while the accident had not occurred as alleged, an accident had occurred, though it had been less serious than C had claimed.

The court considered the Supreme Court decision in *Summers v Fairclough Homes Ltd* (*Court Circular*, September 2012) in which the claim was struck out for dishonesty. The court here said that the *Summers* claim differed from this by being entirely fabricated. The court said there is a difference between a concocted claim and an exaggerated one.

D had accepted that C had suffered an injury at work; it was the circumstances of it that were disputed. The court held that it was appropriate to order costs to be paid on the standard, not the indemnity, basis.

COMMENT

This High Court judgment illustrates some of the circumstances under which an application for a finding of fundamental dishonesty will not succeed. While D accepted C had suffered an injury at work, it was how he had sustained it, and the extent of it, that were disputed. While the court emphasised that there is a considerable difference between a fabricated and an exaggerated claim, each case will be decided on its own facts. Further, a defendant should ensure it cannot be criticised for its own conduct during the litigation if an indemnity costs order is sought. The full judgment can be accessed here.

CIVIL PROCEDURE

DISCLOSURE OF SURVEILLANCE EVIDENCE

Hicks v (1)PRs of Rostas (deceased) and (2) Motor Insurers' Bureau, **17.03.17, High Court**

The claimant, C, sustained serious injuries in a road traffic accident involving the first defendant, D1. C claimed damages from D1 for his injuries but as D1 was uninsured, C joined the second defendant, D2, into the proceedings. C's claim included substantial future loss of earnings for his alleged continuing disabilities and psychological problems.

The court ordered the experts to produce joint reports and for a trial date to be fixed. In June 2016, approximately ten months before trial, D2 served surveillance evidence which it argued showed C had exaggerated his disabilities. In February 2017 D2 served further surveillance evidence.

Five weeks before trial, D2 applied for permission to rely on this evidence. C objected, contending he had been ambushed by D2's late disclosure. He also argued D2 had failed to serve the evidence in a timely manner and had breached its duty of continuing disclosure, under CPR rule 31.11.

The High Court held D2 should have disclosed its surveillance evidence sooner but C had not been ambushed. The June 2016 footage suggested C was less disabled than he had claimed. The experts would have difficulty giving evidence without reference to the footage they had seen and C could be overcompensated if D2 were prohibited from relying on the surveillance. The court allowed D2 to rely on the June 2016 footage.

The court held that C could rely on the more recently disclosed footage if it assisted his claim. In the circumstances, the trial date had to be vacated but this was necessary in the interests of justice. D2's application therefore partially succeeded.

COMMENT

This highlights the importance of a defendant complying with its duty of continuing disclosure. Where a defendant intends to rely on surveillance evidence, this should be served within a reasonable time relevant to the claim. Here, D's late disclosure and the relatively late application to rely on its evidence, risked D being prohibited from relying on both episodes of surveillance.

CIVIL PROCEDURE

COSTS OF PRE-ACTION DISCLOSURE APPLICATIONS IN PERSONAL INJURY CLAIMS

Sharp v Leeds City Council, **01.02.17, Court of Appeal**

Readers might recall the county court decision in this matter, featured in our January 2016 edition. The claimant, C, tripped on a footpath, sustaining personal injury for which she claimed damages from the defendant, D. C's claim initially followed the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (the EL/PL Protocol). She later continued under the Pre-Action Protocol for Personal Injury Claims (the PI Protocol).

When D failed to provide the requisite disclosure under the PI Protocol, C applied for a pre-action disclosure (PAD) order. By the time of the hearing, D had provided disclosure. The court awarded C her costs of the application, of £1,250. D appealed against that costs order. The court reduced C's costs to £305, ruling that costs fell into the EL/PL Protocol fixed costs regime. C appealed.

The Court of Appeal focused on the key question of whether the fixed costs regime applied to PAD applications in claims that had started, but did not continue, under the EL/PL Protocol.

The Court held that a PAD application should be classed as an "interim application" for the purposes of r.45.29H of the Civil Procedure Rules 1998. While the claim itself might not yet have been issued, a PAD application is an interim measure a claimant may take after uploading a Claims Notification Form on to the Portal. Fixed costs therefore applied. The appeal was dismissed.

COMMENT

The Court of Appeal has clarified a small but important point regarding PAD applications. The Court confirmed that the fixed costs regime applicable to the EL/PL Protocol applies to the costs of PAD applications even where a claimant started off under that protocol but was not continuing under it when the PAD application was made. The full judgment may be accessed here.

CIVIL PROCEDURE

LIMITATION – S.33 DISCRETION AND WEIGHING PREJUDICE TO PARTIES

(1) Bowen and (2) The Scout Association v JL, **21.02.17, Court of Appeal**

The respondent, R, alleged that he had been sexually assaulted by a priest, P. R claimed damages for the effects on him of the assaults. His claim proceeded against the first appellant, D1, who was the prevailing Archbishop, and the second appellant, D2, whom R alleged were vicariously liable for P's actions. P pleaded guilty to a number of counts of sexual assault, five of which related to R. P died in 2014.

R alleged he had been assaulted aged between 16 and 31. The judge held that R had delayed between 9 and 23 years in bringing his claim. The judge allowed the claim to proceed and found in R's favour to an extent. R was awarded damages of £20,000.

The appellants appealed. Their grounds of appeal included the finding of vicarious liability of the appellants and the apportionment of liability equally between them. The appellants also relied on the Court of Appeal's 2009 decision in *B v Nugent Care Society*, regarding the court's discretion to waive limitation.

The Court of Appeal noted that in *Nugent*, where a judge is addressing both the question of delay and the substantive issues of the claim, limitation should be addressed first. The court should focus on the effect of the delay on the evidence. R had not adequately explained his delay and it hampered the appellants' ability to show that P had been wrongly convicted. The absence of P and his evidence was highly prejudicial to the appellants.

The Court held that if R was permitted to proceed with his claim, the appellants would be significantly more prejudiced than R would be if he were not permitted to proceed. The appeal was allowed.

COMMENT

The Court of Appeal has revisited the central question, in limitation disputes, of a claimant's delay in commencing proceedings and the effect of that delay on the defence. A claimant must be able to satisfy the court that there were good reasons for the delay, and the court will examine this carefully when deciding whether to exercise its s.33 discretion to allow the claim to proceed beyond the relevant limitation period. The full judgment may be accessed here.

DAMAGES

MULTIPLE ANKLE INJURIES

SS v Heathrow Airport Ltd, **01.09.16, Settlement**

The claimant, C, stepped from a kerb on premises owned by the defendant, D, when she fell due to a defect in the pavement. C sustained multiple injuries to her left ankle, for which she claimed damages from D, who denied liability. C suffered an osteochondral fracture to her talus (the bone at the back of the heel bone, linking the foot to the leg), and ruptured ligaments in her ankle. She was aged 28 at the time.

One year after the accident, C underwent an arthroscopy. Due to the injury, C suffered pain in her ankle, instability, and difficulties with squatting, kneeling and using stairs. There was a 51% chance that her instability would improve and a 20% chance of requiring further surgery to stabilise the ligaments. She was unable to work for some time (duration not stated).

C settled her claim by accepting £40,000. There was no particular breakdown but C's solicitors estimated that the settlement comprised £19,000 as general damages for pain, suffering and loss of amenity, £14,000 for loss of earnings, £4,000 for past care, £1,145 for medical expenses, £1,680 for future medical expenses, and the remainder for past and future travel expenses.

MESOTHELIOMA

Andreou v Booth Horrocks and Sons Ltd, **13.01.17, High Court**

Between 1960 and 1965, the claimant, C, was employed by the defendant, D, as an apprentice to a heating and plumbing engineer. He worked with materials containing asbestos. In 2010, C was diagnosed with emphysema and in 2016, with mesothelioma. C claimed damages from D, alleging that D had negligently exposed him to asbestos during his employment. C was aged 76 at the date of trial. Liability was admitted.

After a thoracotomy and a pleurectomy, C suffered acute renal failure, nausea, vomiting, atrial fibrillation (irregular heartbeat) and subcutaneous emphysema. Due to a pre-existing kidney condition, C could not be treated with chemotherapy. C suffered chest infections, loss of his senses of taste and smell, breathlessness, constant pain and five years' reduced life expectancy. While overweight and a former smoker with chronic renal impairment, C had led an active life, running a hotel and property business with his wife and son.

The parties agreed general damages for pain, suffering and loss of amenity at £90,000, and £20,000 for care. The court rejected C's claim for a lift (costing £84,000) as opposed to a stairlift. He was awarded just over £177,000 for lost years, £5,946 for future loss of income, £1,800 for future aids and equipment, and £200 for future travel and miscellaneous costs. A standard reduction of 50% was made to the living expenses in the lost years claim.

C was awarded special damages of £2,835 for the upkeep of his rental properties and farm, £20,000 for past and future gratuitous care, £3,161 for hotel and travel expenses, £8,700 for aids and equipment, £2,000 for miscellaneous losses and interest of £601.

MESOTHELIOMA

Kearns v Delta Steeplejacks Ltd, **02.02.17, High Court**

The claimant, C, was employed by the defendant, D, for approximately eight years between 1981 and 1991. C worked on structures containing asbestos. In 2007, C was diagnosed with chronic obstructive pulmonary disease (COPD) caused by tobacco smoking. He also developed bilateral asbestos-related pleural plaques and diffuse pleural thickening in his right lung.

C, born in 1953, claimed damages from D for his asbestos-related conditions, alleging negligence and/or breach of the Control of Asbestos at Work Regulations 1987. D admitted having breached these Regulations. Experts agreed that 39% of C's asbestos exposure should be apportioned to D. The parties disputed causation and C's claim for provisional damages.

The court held that the pleural thickening in C's right lung was caused by asbestos exposure, but rejected C's claim regarding his left lung. C had a respiratory disability of 60%, of which 40% was smoking-related. 20% was due to asbestos exposure for which C was awarded general damages, on a provisional basis, of £40,000 plus special damages of £300. On D's 39% apportionment, the award was £15,717.

The court held that damages should be awarded on a provisional basis because relevant risk conditions were present, including a small risk of C developing mesothelioma, and lung cancer caused by asbestos. The full judgment may be accessed here.

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