court circular

ZURICH MUNICIPAL

Winter 2017

THE LATEST JUDGMENTS AND WHAT THEY MEAN TO YOU

Happy New Year and welcome to the Winter 2017 edition 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/.

On behalf of all the team here at Zurich Municipal, I would like to extend compliments of the season to all our readers. 2018 is shaping up to be an interesting year for all organisations. In May 2018, the General Data Protection Rules (GDPR) will come into force, bringing with it vast changes to the way data protection is regulated. The UK will be moving into the critical second year of Brexit negotiations, which will undoubtedly bring ongoing challenges to our clients, many of whom will be trying to implement changes with ever-decreasing budgets.

We hope that our long-running and highly respected Court Circular publication assists you in keeping up to date with the latest cases so that you can adjust your practices, policies and procedures accordingly.

In this issue, the subject of 'out-of-time' claims and the court's discretion under section 33 of the Limitation Act 1980 is dealt with in three recent cases. In two of the cases, *Chief Constable of Greater Manchester v Robert Carroll* and *Estate of Mohammed Mossa v Barbara Wise*, the out-of-time claim could proceed, which is rare. The main thread of reasoning was that the defendant would experience no prejudice to their case if the out-of-time claim was allowed to advance. This is in contrast to the decision in *Olawale v XOP Supply Chain UK Ltd* which followed the more traditional path trodden by the courts for out-of-time claims.

In the area of Employer Liability, we examine a case involving liability after a TUPE transfer (*Darrell Baker*) and discuss the potential consequences of an almost catastrophic data breach if it occurred under the GDPR (*Wm Morrisons Supermarket*).

In Housing, we look into the definition of 'work equipment' and 'workplace' for the purposes of liability under the Provision and Use of Work Equipment Regulations 1998, and the Workplace (Health, Safety and Welfare) Regulations 1992 (*Johnson*).

The section on Police considers a wide variety of cases, including an award for a long-running racial discrimination claim (*Durante*), and the granting of anonymity for police officers accused of assaulting one of the country's most notorious terrorists (*Adebolajo*).

Two failed claims involving potholes feature in the Highways section this month. Each case demonstrates the importance of risk assessment and documenting all checks made to a highway in case they need to be used as evidence to defend a claim.

We also include a case on defamation, in which the volunteer editor of a newspaper was found liable for defamation (*Sooben*), and a case involving a cost order when there is late acceptance of a Part 36 offer in the Civil Procedure section (*Optical Express Ltd*).

In Motor, we outline a case involving liability under the Animals Act 1971 (*Williams*), whether an earthmover can be classed as a motor vehicle (*Charli Lewington*) and the effect of exaggerating a personal injury on the amount of damages received (*Fletcher*).

There are details of two health and safety prosecutions, both involving local bodies and several negligence cases, including the landmark Court of Appeal decision allowing a cohabitee to claim under the Fatal Accidents Act 1976 (*Smith*).

And finally, we wrap-up with a case of contributory negligence (*Casson*).

We hope you find this edition useful and informative. If you have any suggestions on how we can improve this publication, please do not hesitate to let us know.

Richard Shanks

Contents

EMPLOYERS' LIABILITY

INJURED EMPLOYEE ENTITLED TO CLAIM DAMAGES FROM HIS NEW EMPLOYER FOLLOWING A TUPE TRANSFER DESPITE BREACH BEING CAUSED BY PREVIOUS EMPLOYER

Darrell Baker (A Protected Party By His Litigation Friend Kerry Baker) v (1) British Gas Services (Commercial) Ltd and (2) J & L Electrics (Lye) Ltd, 18.09.2017, Queen's Bench Division, **18.09.2017, Queen's Bench Division.**

The first defendant (DI) employed C. They supplied electrical repairs and maintenance to commercial firms. In July 2012, C was fixing some lights at height and suffered a serious electric shock. As a result, he was thrown to the floor and suffered a cardiac arrest. In addition, he suffered a serious brain injury from striking the floor.

It was no dispute that the electric shock was caused by a previous miswired junction box which was connected to the casing of the lamp.

C argued that the miswiring occurred during the original fitting of the electrical circuits and lighting at the premises in 2004. The second defendant (D2) relied on evidence supplied by the electricians who supplied and inspected the original electrics. They maintained the junction box was not miswired and no fault has been found during testing.

C had been employed by a company prior to 2010 and the business was transferred to D1 in October 2010. C's employment was taken over by D1 as part of a Transfer of Undertakings (Protection of Employment) Regulations (TUPE) transfer.

C claimed D1 was liable, along with D2 for the negligent installation of the junction box.

The trial judge noted significant inconsistencies between the written statements and the oral evidence given by the electricians who performed the original fitting and testing. The work was rapidly carried out and the court could not be confident that the testing on the circuit was done adequately enough to eliminate the existence of a fault from the outset. There was also no substantial evidence that the junction box had been rewired following installation. Therefore, on the balance of probabilities, D2 was liable for C's injuries.

The original employer (D1) of C should have picked up the fault in the circuit when carrying out periodic inspections in 2009 and September 2010. According to experts, these inspections were not carried out diligently enough and, therefore, DI was in breach of its duty to C.

Therefore, pursuant to the TUPE Regulations, D1 was liable, as the transferee, for the D2's breach of duty to C, and hence for C's accident.

D1 had argued that while an employee could recover damages for an injury sustained before the transfer of the business, which was caused by the transferor's breach, transferor liability did not occur where the injury happened after the transfer had completed.

This argument was rejected on the grounds that it was a misunderstanding of the TUPE Regulations to believe they were designed to protect the transferee from unknown liabilities. D1 was liable for C's personal injury because it failed to detect and remedy the defect prior to the accident.

COMMENT

This decision puts transferees of any business on notice that tortious liabilities are transferred under the TUPE Regulations, regardless of whether they were fully accrued or contingent. Therefore, it is imperative that both transferors and transferees are ruthless in their due diligence surrounding the risk assessments of a business subject to a transfer.

EMPLOYERS' LIABILITY

EMPLOYER NOT LIABLE FOR ATTACK BY PUPILS IN SECURE RESIDENTIAL AND EDUCATIONAL HOME

Smith v South Gloucestershire Council, **Bristol County Court**

An employee, C, of the defendant, D, brought a claim following an accident in August 2012. C was a design technology instructor at a secure residential and educational home owned and run by D. The home accommodates young people predominantly on remand or convicted of serious criminal offences and, as such, their behaviour is often unpredictable and violent.

Due to the nature of the unit and the traits of the residents, all doors are constantly locked and are accessed by staff using electronic key fobs. In addition, all staff are given personal alarm systems, personal radios, and CCTV monitors the premises at all times. C had only taken up his post a few weeks prior to the accident and, following a period of induction and training, had taught in his own right for approximately four weeks.

The accident occurred when C was conducting a tutor group session for four pupils. Part of this involved providing feedback to pupils on points which they had gained or lost through good or bad behaviour. During the session, there was a disagreement between the pupils, which resulted in a table being upturned and striking C's hand.

C argued D was liable for the injury because: 1) He should not have been required to conduct the session after expressing reservations about it; 2) He had not been trained on the points system, and thus should not have been asked to conduct a tutor group where the points system was discussed; 3) He should not have been asked to conduct a group involving the four particular boys, as there had been some mild disturbance between them the previous night; and 4) He should only have been asked to conduct the group with additional precautionary measures, such as within a room closer to the control room.

It was noted that no CCTV footage of the incident was available, as C had not complained about the way the incident was handled at the time, and thus footage was erased after 28 days.

The court failed to find D liable. Reasons for the decision included; 1) C could not present an accurate account of the incident which led to his injury; 2) evidence showed C had received training and he had not expressed any reservation about conducting the tutor session. In addition, the disturbance the night before was nothing out of the ordinary. It was also found that C was familiar with the boys who were present in the tutor session.

Although some parts of the risk assessment were criticised, they did not have a causative effect on the incident in question.

COMMENT

This is a heartening decision for organisations who provide valuable services such as the Insured in this case. Employees will always be at risk working alongside volatile service users, but as this case shows, there may not always be a legal liability if an unfortunate incident does occur.

EMPLOYERS' LIABILITY

EMPLOYER VICARIOUSLY LIABLE FOR ACTIONS OF EMPLOYEE WHO DISCLOSED PERSONAL DATA

Various Claimants v Wm Morrisons Supermarket PLC, **01.12.2017, Queen's Bench**

This case, brought via a group action, raises the question of whether an employer is liable, directly or vicariously, for the criminal actions of a rogue employee, X, in releasing the personal data of colleagues on the internet. Liability under the Data Protection Act 1998, via an action for breach of confidence, or in an action for misuse of private information were considered by the court.

On 12th January 2014, X posted the personal details of 99,998 of the defendant company's, D's, employees on a file-sharing website. The details included names, addresses, sex, dates of birth, phone numbers, national insurance numbers, bank sort codes, bank account numbers and the salary details. Three months later, a disc containing the details which had been uploaded was received by three news outlets, who did not publish them but instead informed D.

Within a few hours of being informed, D had managed to have the website containing the information taken down and the police were alerted. It was quickly established that the data which had been compromised was only accessible to a few employees. The data was held in a supposedly secure internal environment created by proprietary software known as "PeopleSoft" and, following forensic investigations, it was revealed it had been copied during the afternoon of 14th November 2013 by an employee who was arrested three days later. However, this employee had been framed and X was subsequently arrested and charged with an offence under the Computer Misuse Act 1990, both of fraud and under Section 55 of the Data Protection Act 1998. He is currently serving an eight-year sentence.

D was found vicariously liable for X's actions. While the disclosure had taken place outside working hours and from X's personal computer, if the approach in *Mohamud v Wm Morrison Supermarkets Plc* was adopted, there was a sufficient linking between the position in which X had been employed and his unlawful conduct, to hold D liable.

COMMENT

This case is important for all organisations and local bodies, not simply for the discussion of liability under the Data Protection Act 1998, but what would occur in a similar type of case after the General Data Protection Regulations (GDPR) come into force in May 2018. The penalty for a compliance breach is substantial – between €10-20 million, or 2-4% of global turnover – whichever is greater (although not every infringement will be penalised with a fine). Should a similar type of breach occur under the GDPR, an organisation would have to report it to the ICO, not less than 72 hours after becoming aware of it. Therefore, undertaking data-flow mapping and appointing a Data Protection Officer to manage the security, sharing, access and storage of data is critical. The full case can be read here[1].

EMPLOYERS' LIABILITY

A THREE-YEAR LIMITATION PERIOD WAS UPHELD IN RESPECT OF A PERSONAL INJURY CLAIM BROUGHT BY AN EMPLOYEE

Olawale v XOP Supply Chain UK Ltd (2017), **02.11.2017, Queen's Bench Division**

The appellant A was appealing against a judge's decision to apply section 33 of the Limitation Act 1980, which had resulted in his claim against his employer D being struck out.

D ran a haulage company. In April 2011, A was repairing a pallet and suffered a back injury due to a faulty bench. He was given alternative duties. On 7th August 2011, he was asked to do work he considered unsafe and refused. The next day he was suspended from work. He told the court that he had been forced into his car, which exacerbated his back injury.

A took a grievance against D; however, following an internal investigation, he was dismissed. A brought a claim against D regarding the back injury caused by the faulty bench. D admitted liability for the breach but contested causation and damages.

Expert evidence was sought regarding A's physical and psychological injuries regarding the incident on 8th August 2011. In April 2015, he applied to amend his particulars of claim to include the 8th August event. A's solicitors then applied to adjourn the hearing of that application, which did not take place until the three-year time limit for personal injury claims had expired. Permission to amend the claim was subsequently refused.

In April 2016, A brought a claim for personal injury relating to the incident on 8th August 2011. The judge accepted D's argument it would be prejudiced by such a late claim would be prejudice to its case, partly because the employees who had been with the company at the time had left and could not be contacted. Therefore, the claim was disallowed under the Limitation Act 1980, section 33.

A appealed on the grounds the judge at first instance had erred in; a) ruling the delay in proceedings would not cause forensic prejudice to D, as there were written records and statements regarding the incident that occurred on 8th August 2011, and b) stating that separating the injuries caused by both incidents would cause too much difficulty for the trial judge, as in fact, the difficulty would be increased by refusing to allow the second claim to proceed.

The judge held that A had no excuse for not pleading the 8th August occurrence in the first claim. In addition, A's legal advisors had chosen to adjourn the amendment hearing rather than seek an early hearing, despite the fact the second claim was pleaded eight months out of time.

The written statements and records held by D were used in the internal investigation and were not necessarily suitable for defending a personal injury claim. In addition, the second claim was not clear enough for D to understand exactly what negligence had given rise to the breach of duty. The trial judge had been entitled to decide that the time lapse would prejudice the employer, in that the claim was not formulated to enable it to obtain evidence to meet the negligence allegations; and had not alerted D to the need for evidence of what effects the assault had had on A.

It was also held that an inquiry into causation did not mean that a fair trial required allowing an out-of-time claim on the intervening event. The judge had not erred in observing the difficulties a trial judge would face; they would arise whether or not the second claim was permitted to proceed. This was because, as A conceded, there was difficulty in attributing specific injuries to the incident which occurred on 8th August, and he was charged with the burden of detangling the elements of his claim.

COMMENT

Time limits under the Limitation Act 1980 are seldom waived. This case illustrates why personal injury claims against employers often require detailed expert and medical evidence to be sought and witnesses to be interviewed. The passing of time can dilute the opportunities for an employer to build a defence, thereby denying them a fair trial.

HIGHWAYS

NO EVIDENCE FOUND OF A LARGE POTHOLE THAT THE CLAIMANT ARGUED HAD CAUSED HIS FALL

Hanson v Cobra Traffic Management Limited & City of York Council, **07.07.2017, Bradford County Court**

On 30th May 2013, the claimant, C, was at work, controlling traffic flow whilst road works were taking place at the junction of Poppleton Road and Acomb Road, York. The court heard how whilst the road was having existing tarmac taken up, another workman should have been following behind and filling in any large potholes that appeared. C was carrying out his duties, putting out signage when he fell because of an unfilled pothole. He suffered an injury to his ankle.

C argued that both defendants breached their statutory duty in that:

- They failed to inspect, examine, repair, or maintain the area of work for defects or hazards which could cause someone to slip or fall
- Permitted the work area to be or remain defective
- Failed to backfill or ensure the work area was safe
- Failed to put up signs, notices, or barriers warning C of the position of the mud or stopping him from walking near it
- Required or suffered C to be in the said area when it was dangerous for him to be there
- Exposed C to a foreseeable risk of injury
- Failed to take adequate care for the safety of C
- The second defendant breached its duty under the Highways Act 1980, section 41 by failing to ensure C was safe whilst crossing the road
- The defective section of the carriageway constituted a nuisance which was permitted by the 1st and 2nd defendant

The claim against both defendants was dismissed. No evidence was produced to show there was a large pothole present that caused C to fall. C was witnessed rushing about and falling, but no pothole was seen. Any large potholes would have been recorded and mentioned. The court deemed C was wearing heavy boots and carrying large, bulky items, and was simply not paying attention. Despite the court criticising the 1st defendant for not ensuring C filled out an accident report, there was no evidence that an inadequate risk assessment caused the accident and the 1st defendant's duty of care had not been discharged.

COMMENT

This illustrates that the court will want to see adequate evidence that a breach of duty occurred. Here, no witnesses came forward to verify that there were dangerous potholes in place. In addition, the risk assessment had been adequate. Therefore, there was no proof that there was an actionable defect in the work area.

HIGHWAYS

CLAIMANT COULD NOT BE SURE SHE FELL INTO A POTHOLE – SECTION 58 DEFENCE ESTABLISHED

Gregory v Darlington Borough Council, **25.05.2017, Middleborough County Court**

The claimant, C, claimed damages from the defendant, D, after alleging she had fallen into a pothole.

C alleged D had, (a) failed to maintain the highway in a reasonable state of repair contrary to S41 of the Highways Act 1980, (b) failed to institute a proper system of inspection of the highway, (c) caused or allowed the highway to become or be in a dangerous state of disrepair, and (d) failed to warn pedestrians of the danger posed by the defective road surface and the road surface in general.

The court found that C could not be certain that she fell in the pothole as alleged and that D had a valid section 58 defence. Section 58 of the Highways Act 1980 allows a council or highways agency to defend claims on the basis that they had taken reasonable measures to ensure that problems such as potholes are found and dealt with swiftly.

COMMENT

To rely on a section 58 defence, all local bodies and highway authorities should have a process in place to ensure highways are inspected regularly and potholes repaired. To enable this to be relied on in the event of a claim being brought, detailed records of inspections and repairs must be kept.

HIGHWAYS

CLAIM FOR SLIPPING ON ICE FAILED

Harrison v East Riding of Yorkshire Council, **Kingston Upon Hull County Court**

The claimant, C, alleged that she was walking along a road when she came across water emerging from a drain and running alongside the road. Some of the water had frozen on the surface of the carriageway and C slipped on the ice. C contended that the ice had formed because of a defective gully.

C claimed against the defendant, D, on the grounds of negligence, occupier's liability, breach of the Highways Act 1980, section 41(1) and section 41(1)(A).

D argued that the allegations under the Occupiers Liability Act 1957 were legally misconceived as the claimant was not a visitor but was exercising a public right of way at the time of the incident.

C stated that the gully was blocked or defective and contended that the local authority was aware of the surcharging water on the road prior to the accident. D had received complaints from members of the public and C therefore argued that D should have acted to prevent ice formation in this area given the potentially enhanced risk of ice forming.

The court heard that there had been serious and widespread flooding in the area at the time of C's accident. D stated any surface water that was present and may have turned to ice was there because of the challenging and unprecedented weather conditions.

D stated the locus of C's accident was the subject of an appropriate and regular system of maintenance and inspection and the gullies/drains were cleansed on a regular, annual basis. The defendant also operated a reactive system to complaints and enquiries it received.

A system by which roads on the network were gritted/treated to prevent the formation of ice was operated by D; however, it argued it was impossible to grit/treat every road and areas were prioritised according to need. The law does not require the defendant to keep the highway always clear of ice.

The court found D not liable on all counts. The allegations pursuant to the Occupiers Liability Act 1980 were irrelevant given the accident occurred on the highway. The judge found that, although the gully was surcharging, there was no defect with the gully and thereby the section 41(1) claim failed.

In terms of the section 41(1)(A) claim, the area where the accident occurred was a minor road which was not in D's gritting scheme and, whilst the court accepted that something could have been done to reduce the risk of an accident, it found that it was not reasonably practicable.

COMMENT

The key issue arising from this case is that a local authority is not automatically in breach of section 41(1)(A) of the Highways Act 1980 if they have failed to respond to a complaint relating to the potential risk of ice forming on the highway.

Highway authorities are only under a duty to ensure safe passage along the highway so far as is reasonably practicable. Although, it should be noted that each case will be decided on its own facts.

HOUSING

DEFINING 'WORK EQUIPMENT' AND 'WORKPLACE' IN THE CONTEXT OF DOMESTIC HOUSING

Jonhson v University of Bristol, **17.10.2017 Court of Appeal**

The claimant, C, had been employed by the defendant, D, as a carpenter and joiner. D asked him to repair part of a kitchen unit in a student flat. Whilst engaging in the work, C opened the door of a cupboard which collapsed, causing utensils to fall out. C's right hand was cut, and he suffered consequential problems. He claimed damages from D, alleging breach of the Provision and Use of Work Equipment Regulations 1998, and the Workplace (Health, Safety and Welfare) Regulations 1992.

At first instance, the court considered whether (i) the cause of C's injury, namely the kitchen unit, was "work equipment" within the meaning of reg.2(1) of the 1998 Regulations; (ii) if so, was it was being "used" at work within reg.3(2); (iii) had the accident occurred in a "workplace" within reg.2(1) of the 1992 regulations. The judge found that the kitchen unit had not been provided for a work purpose, as it was simply used for storage, and that being repaired did not make it work equipment. Therefore, reg.2(1), and consequently reg.3(2), of the 1998 regulations were not engaged. It was also held the flat could not amount to a workplace within reg.2(1) of the 1992 regulations because it was domestic property. The claim was therefore dismissed.

The Court of Appeal agreed with the trial judge. Although D provided the accommodation as part of its function, the kitchen unit was not supplied to its workforce, nor could it be described as equipment that D's workforce had to use during the course of employment.

The court concluded that, as it was installed in private student accommodation, the kitchen unit was not used in the course of work.

COMMENT

Deciding whether the kitchen in the student flat amounted to "domestic premises", and thereby could not be called a workplace for the purposes of reg.2(1) of the 1992 regulations, was a matter to be decided upon by the trial judge. The Court of Appeal stated it could only interfere with the trial judge's decision if he erred in law or was mistaken on the facts of the case. There were no grounds for the Court of Appeal to find the trial judge in error on his reasoning or conclusion.

POLICE

DAMAGES AWARDED FOR RACIAL DISCRIMINATION IN LONG-RUNNING CASE

Durant v Chief Constable of Avon and Somerset, **14.11.2017, Court of Appeal**

Readers might recall this case in our Autumn 2017 edition and in our November 2014 edition of Court Circular.

The claimant, C, had been awarded £14,000 compensation after proving she had been a victim of racial discrimination by police after being arrested and detained on suspicion of being involved in a fracas in the city centre. C had been forbidden to go to the toilet for a significant time during her detention and, as a result, urinated on the floor of a holding cell in front of four male officers.

The award of damages included an uplift to take into account the long process of complaints and litigation which had to be endured by C.

C appealed against a decision concerning the amount of compensation awarded for her complaints of race discrimination against the defendant, D.

At first instance, the court dismissed several parts of C's claim but found two incidents where D had committed racially discriminatory conduct. The first was where D had focused on arresting C, who was of mixed-race, before later arresting the two white suspects. The second was when D handcuffed C's hands behind her back before putting her in the police van. This led to compensation of £4,950 to be awarded to C for injury to her feelings.

On appeal to the Court of Appeal, a third finding of racial discrimination was found. This involved D delaying in allowing C to go to the toilet, resulting in her urinating on the floor of the cell in front of male officers. This incident caused her significant humiliation. The finding of the third instance of racially discriminatory conduct meant the question of compensation had to be reconsidered.

The court held that all three incidents of racial discrimination should be considered together, and one overall figure of compensation should be awarded. This was because all three incidents occurred within a few hours of each other and related to the same arrest.

The court then went on to consider where the case fell in terms of the Vento guidelines. These guidelines, split into three bands, govern how the court should award damages for injury to feelings in discrimination cases. The level of the band will depend on the seriousness of the discrimination.

It was held that the discrimination arose due to unconscious racial bias and was not accompanied by goading or offensive comments. Therefore, the discrimination was serious, but it fell within the lower end of the middle band.

The figure of £14,000 was arrived at using the latest figures for the Vento bands, as set out in the Presidential Guidance issued on 4th September 2017: "*Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879*". This was despite the fact C had made her claim before September 2017. The court held that following the new guidance was the best way of achieving the appropriate amount of interest and uplift on the award owed, due to the long road C had to travel towards vindication.

Aggravated and exemplary damages were not awarded as there was no proof of an ill-intentioned motive for the police officers' conduct.

COMMENT

The award for damages provides an example of how the new Presidential Guidance for making awards will work in practice. It also reiterates that aggravated and penal damages will not be awarded lightly and claimants will have to show there have been aggravating factors or outrageous behaviour to make a successful claim.

POLICE

ANONYMITY ORDER GRANTED FOR PRISON OFFICERS ACCUSED OF ASSAULTING TERRORIST

Adebolajo v Ministry of Justice & Anor, **31.10.2017, Queens' Bench**

The claimant C, is an Islamic extremist who is serving a life sentence for the murder of Fusilier Lee Rigby in 2013. He brought a claim against several prison officers, alleging they had assaulted him while he was being held in custody.

The incident occurred in July 2014, when C claimed his front teeth were knocked out while he was being restrained by five prison officers during an incident at Belmarsh prison.

The defendant prison officers D applied to the court to be anonymised in the personal injury action.

There was evidence that C, who gloried in his actions, was charismatic and had developed many associations in prison. Many people looked up to him.

In 2016, the police had produced a report on anonymity, considering that C was devoted to terrorism and wanted to further the cause of *Daesh*. Given the amount of media coverage given to C, the defendants were fully within their rights to fear for their safety if their identities were exposed. It was claimed that a threat had been made to the life of one of the defendants; however, it could not be corroborated that the threat was linked to C.

Evidence showed all the defendants were suffering from stress, and three were taking anti-depressants.

The court granted the application for anonymity. It held the legal basis to grant anonymity was found both at common law and under the European Convention on Human Rights (ECHR).

Under the ECHR, an anonymity order was required where there was a risk which came under Art.2 or Art.3, namely, there was a risk to life or a risk of serious injury. The threshold was high (the threat must be real and immediate for an anonymity order to be granted). An anonymity order could be made at common law if the applicant was (a) fearful for their personal safety, and (b) it was in the public interest because refusing to grant the order would prevent the applicant from doing their job.

Even if the fear was merely subjective, an anonymity order could be granted under common law.

The application for an anonymity order was rejected on ECHR grounds as the evidence of risk was largely hypothetical and suggested a potential for harm rather than immediate danger.

The claim succeeded under common law. The applicants were genuinely fearful, and the fact their fear was not objectively substantiated was immaterial. The fact that the officers were suffering from stress, that some of them were taking anti-depressants, and that their family life had been impacted, suggested that they were subject to unnecessary unfairness. The officers should be allowed to give their evidence to a court without fear.

In addition, the court found that granting the anonymity order would not hinder C's claim.

COMMENT

It is inarguable that the role of a prison officer is one which can give rise to highly stressful situations. If a public body is being sued for personal injury and there is a risk to an employee's personal safety, employers need to be confident they can protect the physical and mental health of staff and their families. This decision illustrates the circumstances in which an anonymity order will be granted, and the threshold of evidence required under both ECHR and common law.

POLICE

JUDGE WAS RIGHT TO EXERCISE HIS DISCRETION UNDER THE LIMITATION ACT, SECTION 33 OUT-OF-TIME CLAIM IN NEGLIGENCE AGAINST THE POLICE

Chief Constable of Greater Manchester v Carroll, **01.12.2017 Court of Appeal**

C was a police officer working undercover as a drug-user making test purchases. He became addicted to heroin and subsequently developed a psychiatric illness. C became addicted to heroin in 2009 and spent two years trying to seek help from a local authority project. In February 2012 his GP diagnosed him with anxiety and depression, but C did not mention he was a heroin user. In July 2012 he was suspended from duty because of allegations made against him. He pleaded guilty to misconduct in public office and theft offences that related to his heroin use. He was sent to prison and dismissed from the police force.

C made a claim for negligence in November 2013. The appellant, A, argued that the three-year time limit had expired on 6th May 2012.

The judge in the first instance stated C had not been unreasonable in failing to tell his GP about his heroin addiction, given the high chance he would be dismissed from his job. Furthermore, even if this reasoning was wrong, the judge stated he would have exercised his discretion under section 33 anyway.

D argued that the judge at first instance failed to recognise the prejudice that allowing the claim out of time would cause, especially given that physical and electronic documents were missing. In addition, C had intentionally and unreasonably withheld a crucial part of the diagnostic procedure by failing to inform his GP of his heroin addiction.

The court held it could not be stated for definite that the claimant's delay resulted in real prejudice to D's case. As there was no evidence as to when the documents in question ceased to be available, it could not be said that the documents were lost, had vanished, or were ruined during any period of delay by the claimant in bringing the claim. In some cases, it was up to the police to retain certain documents; therefore, if the police were unsure of the existence of such documents, any prejudice due to delay was speculative at best. Furthermore, there was no evidence that potential witnesses could not be traced or remember certain details of events surrounding the period in question.

It was noted that C had sought advice on making a claim four months after the limitation period expired. The months prior to this had been extremely stressful, given he was charged with criminal offences and dismissed from his position. In addition, the delay in bringing proceedings between from November 2012 to November 2013 had not been C's, as his solicitor and counsel had believed that the limitation period would not expire until November 2013.

COMMENT

The court summarised (at para 42) the considerations which should be taken into account when exercising discretion under s33 of the Act. This judgment also makes clear that if the delay in bringing a claim was not the fault of C, nor was it unreasonable, D would need to show actual prejudice to their case for the claim to be disallowed. The full case can be read here[2].

DEFAMATION

EDITOR OF A NEWSPAPER DEFAMED A SOLICITOR WHEN ACCUSING HIM OF PERJURY

Sooben v Badal, **31.10.2017 Queen's Bench Division**

The editor of a newspaper, D, aimed at the Mauritian community in England and Wales had defamed a Mauritian solicitor, C, when he published an interview in which the interviewee, E, accused C of attempting to get him to commit perjury.

The court held the allegation had been gratuitous and unjustifiable and would not be protected by *Reynolds* privilege. *Reynolds* privilege is a form of qualified privilege that protects the maker of an otherwise defamatory statement from liability if it was in the public interest to do so, and the statement was the product of responsible journalism.

The court held the editor could not demonstrate responsible journalism for the purpose of *Reynolds* privilege, having presented the serious allegation in a very one-sided way.

The court awarded damages of £70,000.

COMMENT

Even though D was not a professional journalist (he was a volunteer), the court held he still had a duty to meet the minimum standards of responsible journalism. This is an important point that any organisation that publishes content should take on board. The court also found D had failed to seek from C his views on the article to be published, nor set out C's position from information derived from documents D possessed relating to various proceedings referred to in the interview with E. The key takeaway is anyone publishing content in a public domain should take care to adhere to the basics of responsible journalism to avoid the risk of being found liable for defamation. The full version of this decision can be accessed here[3].

CIVIL PROCEDURE

COURT AFFIRMED GENERAL APPROACH TO COSTS FOLLOWING LATE ACCEPTANCE OF PART 36 OFFER

Optical Express Ltd v Associated Newspapers Ltd, **03.11.2017 Queen's Bench Division**

In January 2015, the claimants, C, issued a claim for general damages for libel and special damages for financial loss caused to their business because of the libel.

In February 2015, C accepted the defendants', D, qualified offer for amends, but refused an offer of £25,000 for special damages, indicating these would be quantified once the loss was fully determined.

In May, D served a defence denying the claimants' entitlement to special damages. In October, it requested C inform them about the value of the claim. The information was not forthcoming until May 2016, when the value was then around £21.5 million.

On 27 May 2016, D made a Part 36 offer comprising of £25,000 in general damages and £100,000 in special damages. The offer was rejected as "wholly derisory" on the 17th June 2016. The matter continued, and nine months later C accepted the offer which had never been withdrawn.

C sought to rely on the normal costs consequences of accepting a Part 36 offer out of time. They sought costs up to 17th June 2017 and accepted that the defendant should recover its costs for the period thereafter.

It was held the Part 36 offer was a genuine attempt to settle and made well in advance of the trial. Any deviation from a standard costs order would be unjust, especially given C's unreasonable delay in quantifying their claim. It was held C could recover costs up to 11th January 2016. D would recover its costs from 12th January until 17th June 2016 on the normal basis and on the indemnity basis thereafter.

COMMENT

The court stated that when making an order for costs where the acceptance of a Part 36 offer was made out of time, under rule 36.13.5 of the Civil Procedure Rules, the court was compelled to make the orders described in rule 36.13(4) (b) unless it was unjust to do so. The test for injustice was laid out in rule 36.17(5) which stated the court must consider all the circumstances of the case, including: (i) the terms of the Part 36 offer; (ii) when the Part 36 offer was made; (iii) the information available to the parties at the time the Part 36 offer was tabled; (iv) the conduct of the parties regarding the giving of further information to allow the Part 36 offer to be evaluated; (v) was the offer made in a genuine attempt to settle the case?

The four principles in *Smith v Trafford Housing Trust (Costs)* were also held to be pertinent to this case, especially the fourth which states the courts do not have unconstrained discretion to depart from the ordinary cost consequences in rule 36.14 and litigants should be aware that showing injustice in order to obtain a different costs order was extremely difficult and should not be undertaken lightly.

CIVIL PROCEDURE

LIE TOLD BY THE DEFENDANT IMPAIRED THE QUALITY OF JUDGMENT

Bishop & Anor v Chhokar, **15.11.2017 Court of Appeal**

The claimant, C, brought a claim against the defendant, D, in respect of an unpaid loan. D had counterclaimed for unpaid rent by C. At first instance, the court dismissed C's claim after finding D's evidence credible. C subsequently launched a second claim against D for damages for conversion of goods. During this trial, D admitted to lying in relation to one of the pleaded issues in the first action. C was awarded judgment in the second claim.

C argued that because of the lie, D's counterclaim in the first action should be dismissed. C stated that had the judge in the first claim known D was lying, he may have reached a different conclusion.

The Court of Appeal ruled that the entire judgment on the first claim was spoiled by fraud and should be set aside. The court also had the power to strike out a claim as an abuse of process if the party bringing the claim was guilty of blatant misconduct such as fraud. However, the court concluded that, in this case, the lie was only one of the reasons the judge at first instance believed D's evidence. Although the decision may have been different if the judge knew of the lie, this was not a foregone conclusion. Therefore, the claim for unpaid rent should not be dismissed.

The court set aside the first judgment and allowed 28 days for the parties to request a retrial of the first claim and the counterclaim.

COMMENT

The Court of Appeal applied *Masood v Zahoor* which ruled where a claimant was guilty of serious misconduct in proceedings, the claim could be struck out if it would be completely unjust to allow the claim to be persued. However, *Masood* made clear it would be very rare for such an action to be deemed appropriate.

This case illustrates that the threshold for striking out a claim due to fraud is exceptionally high, and the more likely outcome is the judgment will be dismissed, and a retrial held.

MOTOR

FARMER LIABLE UNDER THE ANIMALS ACT 1971 FOR THE INJURIES SUSTAINED BY THE RESPONDENT DRIVER

Williams v Hawkes, **21.11.2017 Court of Appeal**

The claimant, C, collided with a Charolais steer owned by the defendant, D, on a dual carriageway in the hours of darkness.

C commenced proceedings for damages against the estate of D, who had since died.

C suffered post-traumatic amnesia and had no recollection of what had happened immediately before or after the accident, and there were no witnesses. An expert witness stated that the animal would have been running in a state of panic just prior to the collision, acting under aversive stimuli.

At first instance, the County Court found in favour of a negligence claim brought under the Animals Act 1971 (the Act). Under section 2(2) of the Act, the keeper of a non-dangerous species will be strictly liable for the damage the animal causes if the following conditions are met: "s2(2)(a) the damage was of a kind which the animal would be likely to cause if unrestrained or which was likely to be severe; s2(2)(b) the likelihood of the damage, or of it being severe, was due to characteristics of the animal which were not normally found in animals of the same species or were not normally so found except at particular times or in particular circumstances; s2(2)(c) the keeper knew of the characteristics".

The court at first instance accepted that the weight and size of the steer satisfied s2(2)(a), and the owner knew the animal's behaviour could be unpredictable when spooked and the Charolais breed was considered to be flighty when compared with other breeds of cattle, satisfying s(2)(2)(c). In addition, the court found that the steer had still been acting under the effects of the aversive stimuli that it had been exposed to and would have run in response to the approach of the respondent's car. In those circumstances, the trial judge concluded that the steer's characteristics had caused the accident, and held the owner strictly liable under the Act for the respondent's injuries.

D's estate appealed on the grounds the trial judge did not have enough evidence to conclude that the characteristics identified – namely that the steer had been spooked and was further affected by aversive stimuli such as its unfamiliarity with its surroundings, the failing light and its proximity to a busy road with the noise and lights of passing vehicles – were, in fact, causative of the accident. Because the evidence was not present, the 'but for' test was not satisfied. The cause of the accident was the steer being on the road, and the size and weight of the animal caused the damage, rather than the beast's particular characteristics, which could not be proven to have materially added to the accident.

C argued that the 'but for' test was satisfied in that but for the characteristics, the steer would not have escaped its field and would not have been running on the highway. The Court of Appeal agreed and held there was a sufficient link between s2(2)(a) and s2(2)(b) to satisfy C's claim.

COMMENT

This judgment clarifies the decision in *Mirvahedy v Henley* by making clear that the way the collision occurred between a vehicle and an animal, i.e. whether it be that the animal collides with the vehicle or the vehicle collides with the animal (or indeed the damage is caused by the driver swerving or breaking to avoid hitting the beast), will not be a deciding factor in a claim. What mattered was why the animal was on the highway in the first place, and the characteristics it was displaying at the time of the accident. The full case can be accessed here[4].

MOTOR

AN EARTHMOVER DUMPER TRUCK WAS A "MOTOR VEHICLE" FOR THE PURPOSES OF THE ROAD TRAFFIC ACT 1988 SECTION 185(1)(C), AS INTERPRETED IN ACCORDANCE WITH THE PURPOSE OF DIRECTIVE 2009/103

Charli Lewington v Motor Insurers Bureau, **27.10.2017 Queen's Bench Division**

The claimant, C, was appealing against an Arbitrator's decision that an earthmover was not a motor vehicle for the purposes of section 185(1)(c) of the Road Traffic Act 1988.

C was seriously injured following an incident where she swerved to avoid two stolen earthmovers travelling on an unlit road without any rear lights.

The drivers absconded, so A made a claim to the Motor Insurers Bureau, D, under the Untraced Drivers Agreement. Her claim was refused on the grounds that an earthmover was not a motor vehicle for the purposes of section 185(1)(c) of the Road Traffic Act 1988 and, therefore, the unidentified drivers had not required insurance to drive them on public roads.

The Arbitrator stated that the difference in the language in section185(1)(c), which provided that "motor vehicle" meant "a mechanically propelled vehicle intended or adapted for use on roads", and Directive 2009/103 Art.1, which provided that "vehicle" meant "any motor vehicle intended for travel on land ...". The EU Directive 2009/103 relates to the insurance against civil liability relating to the use of motor vehicles. The Arbitrator held that the two definitions could not be reconciled, and a reasonable man would not consider an earthmover was "intended or adapted for use on roads".

C argued that the Arbitrator should have interpreted the Act in a way that was compatible with the Directive and applied the Marleasing principle. Under this principle, derived from the European Court of Justice case, *Marleasing SA v La Commercial Internacional de Alimentacion SA*, the domestic court of a member state of the EU must construe its national law so far as possible in the light of the wording and purpose of the Directive in question.

The court applied the test set out in *Burns v Currell* namely to look at whether "a reasonable person looking at the vehicle would say that one of its users would be a road user". The court concluded that when having regard to the common purpose of the Act and the Directive, namely to ensure that if vehicles were used on roads, there was insurance in place, and if there was not, there was redress through the relevant body for anyone who suffered loss or injury in consequence, section 185 and Article 1 could be reconciled.

It was also held that the Arbitrator had erred in law when he said that a reasonable person would not have contemplated the use of the earthmover on a road unless that use had been lawful. It was concluded that a reasonable person could have contemplated thieves stealing an earthmover and driving it on a public road to transport it to an intended destination. Such a conclusion was entirely in agreement with the purpose of the statute and the Directive.

COMMENT

An earthmover was held to be a vehicle within the meaning of section 185. As it was being driven on the road at the time of C's accident, it was required to be insured. Therefore, the D was liable to pay the claim.

MOTOR

IMPACT OF CLAIMANT'S ALLEGED DISHONESTY ON DAMAGES AWARD

Fletcher v Keatley, **12.10.2017 Court of Appeal**

In 2007, the claimant, C, was a passenger in the defendant's, D's car which was involved in an accident. C suffered a mild head injury. At trial in 2016, questions were raised as to whether C had exaggerated the effects of his injury. Neurologists agreed that his injury had led to a post-concussional syndrome which lasted until late 2008, but that there would be no other lasting effects beyond that time.

Both parties sought expert evidence from a neuropsychiatrist and a neuropsychologist. Taking evidence from C's neuropsychiatrist, the judge found that C continued to suffer from post-concussional syndrome until late 2009. From then until 2014, he suffered from a psychological disorder.

The appellant's neuropsychiatrist rejected this diagnosis.

Evidence showed that by May 2009, C was failing to cooperate with medical tests. He also found that if C's family had acted reasonably in obtaining the support he needed, he would have fully recovered by the end of 2013. This was the latest C could claim for loss.

The amount awarded for pain, suffering and loss of amenity was subsequently reduced by 50% to reflect C's deliberate behaviour which may have prolonged his injuries. For the same reason, damages for lost earnings were reduced by 40%.

The D appealed on the grounds that the judge at first instance was wrong to rely on the opinion of C's neuropsychiatrist over that of his neuropsychiatrist, and that any damages claimed post-2008 should be struck out as they were a result of deliberate exaggeration.

The appeal was dismissed. The Court of Appeal found the trial judge's reasoning for relying on the evidence of C's neuropsychiatrist was reasonable and the balance of expert evidence favoured C.

Regarding striking out all post-2008 claims, the judge correctly followed the principle in *Summers v Fairclough Homes Ltd.* Here, the court held it had the inherent jurisdiction to strike out a case at any stage of the proceedings, even when it had already been determined that the claimant was, in principle, entitled to damages. However, that power was to be exercised only where it was just and proportionate to do so, and that was likely to be only in very exceptional circumstances. The Court of Appeal found that C had proven to the trial judge that he had suffered adverse consequences between 2009-13, although these may have been exaggerated towards the end of the period. The judge had reached a pragmatic solution within the guidance of *Summers* and made a fair assessment of past lost earnings.

COMMENT

This case illustrates the difficulties that are inherent in assessing and quantifying a psychiatric injury. It also shows that a judge does not need to follow one party's line of expert evidence (although such evidence will always be persuasive), and is free to reach their own conclusion based on an holistic view of the facts. You can view the full judgment here[5].

HEALTH AND SAFETY PROSECUTIONS

COUNCIL FAILED TO IMPLEMENT ITS OWN HAVS POLICY

Wrexham County Borough Council, **03.11.2017 Mold Magistrates' Court**

In September 2015, a 57-year-old employee, X, was diagnosed with Hand Arm Vibration Syndrome (HAVS). X worked in Wrexham County Borough Council's (D's), "street scene" department, which looks after public spaces. Workers are required to regularly use vibrating machinery such as lawn mowers, leaf blowers and strimmers.

A further 12 workers were alleged to have developed HAVS while working for D.

The court heard how D revised its HAVS policy three times between 2004 and 2011; however, none of the policies had been implemented. The final revision followed a safety audit which criticised D for failing to assess the risk of vibrating machinery to employees' safety. In addition, none of the workers received adequate training.

D was prosecuted under Section 2(1) of the Health and Safety at Work Act 1974 which 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.

D pleaded guilty and was fined £150,000 and ordered to pay costs of £10,901.

COMMENT

This prosecution and subsequent fine illustrates how important it is for health and safety risk assessments to be conducted, and the policies and procedures deriving from the assessment to be communicated and implemented. It is also crucial that employees working with vibrating machinery receive proper training on using the machinery and the risks identified in the assessment are eliminated or controlled.

HEALTH AND SAFETY PROSECUTIONS

LOCAL AUTHORITY FINED AFTER SOCIAL WORKERS ASSAULTED

London Borough of Brent, **29.11.2017 Westminster Magistrates' Court**

On 3rd July 2015, two social workers employed by the London Borough of Brent were visiting the home of a vulnerable child. While they were taking notes, the mother of the child attacked the employees with a metal bar, knocking one of them unconscious. Both social workers received serious head wounds and one suffered from Post-Traumatic Stress Disorder.

The investigation by the Health and Safety Executive (HSE) found the local authority failed to follow its corporate lone working policy, or violence and aggression guidance. There had been no risk assessment made, and the two employees were not properly trained to deal with such a situation. In addition, the mother was known to have a history of violence, and this knowledge was not shared with the social workers.

D pleaded guilty to breaching the Health & Safety at Work etc Act 1974, section 2(1) (see above) and were fined £100,000 and ordered to pay costs of £10,918.88.

COMMENT

An HSE investigator commented after the case that "violent and aggressive incidents are the third biggest cause of injuries reported to HSE from the health and social care sector".

"The local authority in this case failed to adhere to and implement its own systems and procedure for the management of lone working and violence and aggression against social workers. This risk could have been reduced in a number of ways including carrying out the visit in a controlled environment, such as the local social workers' office."

It is imperative that local authorities sending staff into potentially dangerous situations put together and implement a detailed risk assessment to avoid not only HSE fines but compensation claims from employees injured by violence.

NEGLIGENCE

TRIAL JUDGE EXERCISED HIS DISCRETION UNDER THE LIMITATION ACT, SECTION 33 CORRECTLY, DESPITE THE FACT THE DEFENDANT DIED BEFORE THE CLAIM WAS BROUGHT

Estate of Mohammed Mossa v Barbara Wise, **19.10.2017 Queen's Bench**

In 2007, the appellant, A (who is now deceased, therefore is represented by his estate), performed a surgical procedure on the claimant, C, using vaginal tape to treat her urinary stress incontinence. Although her symptoms improved, she suffered a relapse after six months and required corrective surgery in September 2011, and a hysterectomy two years later. As well as bringing a product liability claim against the manufacturer of the tape, C issued a claim against A on the grounds that he did not obtain her informed consent prior to the operation.

By this time, A was in the final stages of a terminal illness and passed away before he was made aware of the claim. A argued that C's claim was time-barred under the Limitation Act 1980. At first instance, the Master found the date of C's knowledge was September 2011, so the claim was out of time; however, he went on to exercise his discretion under s.33 and stated that it would be equitable to allow the claim to proceed.

A appealed the Master's decision.

On appeal, the court recognised A faced significant potential prejudice if the claim proceeded. For example, if the claim had been brought within the three-year time-limit, A could have instructed his solicitors and provided witness statements. However, this fact was not ignored by the judge at first instance. The Master had considered all the factors under section 33(3), including the length of the delay and the reasons C failed to bring a claim within the three-year time limit.

The Master at first instance then went on to consider the potential prejudice allowing the claim to proceed could cause A. As the case against the deceased was based on a lack of properly informed consent, the principles set out in *Montgomery v Lanarkshire Health Board*– that in an informed consent case, the verbal evidence of the clinician is likely to be of great importance – were applied and followed. The Master acknowledged that although the deceased's clinician's evidence was less persuasive because he was not at trial, it was unlikely that he would have had "any detailed recollection of the claimant or his dealings with her". This reasoning was deemed correct by the court as was the fact the Master had ensured he asked the fundamental question – "it was still possible to have a fair trial of the issues on the available evidence"? He deemed, after evaluating all the evidence, that a fair trial was indeed possible, and the court saw no reason to interfere with his decision on appeal.

COMMENT

This case is in clear contrast to *Olawale v XOP Supply Chain UK Ltd* (see above). In *Olawale*, it was held, after examining the evidence, that allowing the claim to proceed would prejudice the defendant's chance of a fair hearing. In this case, after carefully considering the factors under s33(3) and relevant case law, it was held that allowing the claim out-of-time would not prejudice the defendant. The full version of this case can be accessed here[6].

NEGLIGENCE

SURVIVING PARTNER OF A COHABITING RELATIONSHIP OF TWO OR MORE YEARS IS ENTITLED TO COMPENSATION UNDER THE FATAL ACCIDENTS ACT 1976

Smith v Lancashire Teaching Hospitals NHS Foundation Trust and Others, **28.11.2017 Court of Appeal**

The appellant, A, had lived with her partner for over two years before he died because of the first and second defendants' negligence.

A had made a dependency claim under section 1 of the Fatal Accidents Act 1976 (the Act), which had been amended so that a "dependant" included any person who had been living as a husband, wife, or civil partner of the deceased for at least two years immediately before the death of the deceased.

A's dependency claim was held to be invalid under the Act. At first instance, the court had to decide on the compatibility of section 1A(2)(a) of the Act with the European Convention on Human Rights (ECHR). He found that there had been no direct breach of Article 8 – the provision which protects the right to family and private life. In addition, he held that a claim to bereavement damages was not within the ambit of Article 8 because there was no sufficiently serious infringement and because the absence of a right to compensation for A's grief was only vaguely linked to respect for the family life, which she enjoyed with the deceased and was not linked at all to her private life.

Because no claim could be made under Article 8, the claim under Article 14 (which prohibits discrimination on grounds of "sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status"), was also dismissed.

On appeal, C's claim under the Act was allowed.

To begin with, the court looked at the correct test of whether a law fell within the ambit of Article 8, which would then trigger Article 14. The court stated that the test set out in *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 W.L.R. 1237 was binding. *Steinfeld* was a Supreme Court decision regarding whether opposite-sex couples could enter into a civil partnership. The couple claimed that the bar on opposite-sex couples entering into a civil partnership by virtue of section 3(1)(a) of the Civil Partnership 2004 Act was incompatible with Article 14 read together with Article 8.

The relevant test set out was: "If the State has brought into existence a positive measure which, even though not required by Article 8 is a model of the exercise of the rights guaranteed by Article 8 , the State will be in breach of Article 14 if the measure has more than a tenuous connection with the core values protected by Article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant other than the fact that the complainant is not entitled to the benefit of the positive measure in question".

Therefore, in applying this test, it was held that the judgment in the first instance was incorrect. The court had been mistaken to say that the bereavement damages scheme was not within the remit of Article 8 to engage Article14 unless the link was sufficiently serious. Further, there was no authority for the suggestion that if a measure did not engage Article 8, it would often fall outside its domain for the same reasons. It had also been wrong for the court to hold that, as the bereavement damages regime did not indicate any disapproval by the State of the way that A and her deceased partner had chosen to live, the complaint did not achieve the level of serious impact required to put it within the ambit of Article 8. Finally, the court had been wrong to conclude that the absence of a right to bereavement compensation was only slightly linked to respect for the family life which A enjoyed with the deceased and not linked at all to her private life.

The Court of Appeal concluded that the damages available for bereavement were, by their very nature, designed to reflect the grief brought about by the death of someone exceptionally close, such as a spouse or civil partner. It followed that the award of damages was an example of the State showing respect for family life, which is a core value of Article 8.

Article 14 of the ECHR was also held to be engaged. The court held that A's situation – a long-term relationship in every respect equal to a marriage in terms of love, loyalty and commitment – was sufficiently equivalent to that of a surviving spouse or civil partner to require discrimination to be justified under Article 14 when read in conjunction with Article 8. In addition, Parliament had failed to provide any justification for excluding cohabiting partners from benefiting under section 1A. Therefore, it was appropriate to make a declaration that section 1A was incompatible with Article 14 in conjunction with Article 8 in its exclusion of cohabitees for over two years.

COMMENT

This case has been hailed as a major step forward in recognising the rights of couples who choose to cohabitate rather than marry. It also demonstrates the court's flexibility in determining not only Article 8 of the ECHR but that of what constitutes discrimination, which will naturally expand over time as societal norms change. You can access the full version of this judgment here[7].

DAMAGES

NO CONTRIBUTORY NEGLIGENCE FOUND

Casson v Spotmix Ltd (In Liquidation), **01.12.2017 Court of Appeal**

The left hand of the claimant, C, had become trapped in a piece of machinery. He had been cleaning a vertical metal surface that was near the moving parts of a conveyor belt when his glove got caught in some rollers.

It was revealed to the court that C was an inexperienced employee and had not been provided with adequate training on using the machine. Other workers also cleaned the machine in the same manner as C had been doing when the accident occurred.

The Court of Appeal held that all other things being equal, C and other employees who cleaned the machine, were acting in a way that fell below the standards of a reasonable man. The conveyor was in constant motion; therefore, no employee had an opportunity to clean the machine when the rollers were not running. However, they concluded that the trial judge had erred in placing such heavy reliance on the fact that C, under cross-examination, had acknowledged "albeit with the application of hindsight and common sense, the risk arising from moving his hand close to the machinery".

The fact that other employees cleaned the machinery in the same manner supported the conclusion that, although C's conduct could be criticised, it fell far short of contributory negligence.

The full version of this judgment can be accessed here[8].

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