court circular

ZURICH MUNICIPAL

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THE LATEST JUDGMENTS AND WHAT THEY MEAN TO YOU

Welcome to the Spring 2018 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 can be found at: http://www.bailii.org/

Like many of you, I have been wondering what has happened to spring this year. I hope that you all stayed safe during the dual onslaught from the 'Beast from the East' and Storm Emma. Now we are into April we can only hope for calmer forecasts and plenty of sunshine.

The year has started off with challenges. The collapse of Carillion has had a major impact on many local bodies. According to the Local Government Chronicle, at least 25 top-tier councils held major contracts with the conglomerate and the failure of the construction giant will be felt by many for years to come. The weather also provided trials for many local bodies, who were under great pressure to execute protective measures during the costliest snow storms since 2010.

There is some good news however, the National Institute of Economic and Social Research stated in February that UK economic growth was expected to rebound in 2018, predicting GDP growth of almost 2% this year and next. And as I trailed during our last customer days, the Ministry of Justice has announced the introduction of the Civil Liability Bill, including a tariff system for whiplash injuries, a ban on offers to settle without medical evidence and a mechanism to set the discount rate.

I would personally pick out in this Spring edition of Court Circular – under employer's liability, the case of *Carragher (Patrick) v Dawson (Frank), Council for Catholic Maintained Schools (CCMS) and Very Reverend T Rafferty as Nominee of The Board of Governors of St Ronan's Primary School* which dealt with liability for an employee's mental health. In *Ivor Cook v Swansea City Council*, the court held that the council was not liable for a slip on an icy car park. And in *James Spearman (a protected party by his brother and litigation friend Andrew Spearman) v Royal United Bath Hospitals NHS Foundation Trust* the defendant was found liable for breaching its duty to ensure patient safety after a vulnerable patient suffered severe injuries from a fall.

The landmark Supreme Court case of *Robinson v Chief Constable of West Yorkshire* examined the principles of Caparo and stated the police do not enjoy blanket immunity from prosecution for breaching a duty of care.

Bridgend Borough Council and London Borough of Tower Hamlets are awaiting HSE decisions on whether they will be prosecuted for health and safety breaches. The Crown Prosecution Service stated it would not be prosecuting the latter for corporate manslaughter or gross negligence manslaughter following the death of a five-year-old girl in a playground.

Under civil procedure, the Disclosure Working Group has announced proposed amendments to Part 31 of the CPR. In *Mohamed v Enright & Anor* it was held the late serving of expert evidence would be permitted to avoid splitting or delaying the trial and/or quantum. Finally, we examine two cases which discuss the qualified one-way costs shifting regime; *Jacob Corstorphine (an infant who proceeds by his mother and litigation friend Laura Ellis) v Liverpool County Council* and *Robert Barbour v Liverpool City Council*.

A case that will concern public bodies, private companies, and individuals alike: *Ronald Terrance Stocker and Nicola Stocker* held a person who posts defamatory comments on their Facebook Wall can be liable. And in privacy law, *Shakir Ali & Shahida Aslam v Channel 5 Broadcast Ltd* found a media company who filmed the plaintiff being evicted had breached their privacy rights and their rights under Article 8 of the ECHR.

On behalf of the team at Zurich Municipal, I would like to take this opportunity to thank you for supporting our long-term publication of the Court Circular. We hope it continues to assist you in keeping up to date with the latest cases so that you can adjust your practices, policies and procedures accordingly.

If you have any suggestions on how we can improve this publication, please do not hesitate to let us know.

Richard Shanks

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EMPLOYERS' LIABILITY

AN EMPLOYER'S ACTIONS HAD EXACERBATED AN EMPLOYEE'S EXISTING MENTAL HEALTH CONDITION, BUT THAT HAD NOT BEEN CAUSATIVE OF HIS MEDICAL RETIREMENT

Carragher (Patrick) v Dawson (Frank), Council for Catholic Maintained Schools (CCMS) and Very Reverend T Rafferty as Nominee of The Board of Governors of St Ronan's Primary School **6.11.2017, Court of Appeal (NI)**

The claimant, C, worked as a teacher for the second respondent at a school governed by the third respondents. The first respondent had been the Principal of the school.

C made a claim against all the respondents on the grounds that negligence on their behalf since 2000 had caused stress which resulted in him having to seek early retirement on medical grounds in 2011. C claimed the respondents had particularly failed to support him following his return to work after a depressive illness in 2007.

The court agreed C had suffered from chronic depressive adjustment disorder, that psychiatric injury was foreseeable after his return to work, and that the respondents were liable in negligence for failing to provide suitable support and training. The period of liability was held to be from January 2008 to December 2010.

Evidence from forensic accountants regarding damages was not heard on the agreement that such evidence would only be heard once the judgment had been given if relevant accountancy evidence was disputed.

C applied to recall his expert psychiatrist and to call his GP and forensic accountant on the grounds that the judge had not determined whether the three-year exacerbation period had caused or contributed to his medical retirement. This application was refused, and the court stated it did not believe the respondent's negligence had been a causative factor in C seeking early retirement on medical grounds.

General damages were assessed at £15,000, along with three years of lost earnings.

C appealed the award.

The Court of Appeal (NI) held it was for C to prove causation on the balance of probabilities. Although the judge at first instance had not addressed this expressly in her written judgment, it did not mean the issue had not been considered. In any event, she made it clear in her extempore judgment that the respondents' breaches had not caused or contributed to the termination of the employee's employment, but rather that all special damages should be confined to the three-year period from January 2008 to December 2010. That conclusion was not made on an incorrect principle of law, and there was ample evidence on which she could have arrived at that decision.

COMMENT

This case illustrates the high threshold which must be reached when proving causation, especially in cases involving negligence and mental health. It also shows special damages (i.e. out of pocket expenses which occurred directly because of a defendant's negligence), will be limited to the period where causation has been established.

EMPLOYERS' LIABILITY

IN OBITER REMARKS, THE HIGH COURT STATED THE ASBESTOS INDUSTRY REGULATIONS 1931 DID NOT APPLY TO PREMISES IN WHICH ASBESTOS TEXTILES WERE MADE INTO OTHER PRODUCTS

Alan Hawkes (as the executor of the estate of Doris Helen Hawkes, deceased) v Warmex Ltd, **08.02.2018, Queen's Bench Division**

The claimant, C, was the executor of his mother's, M's, estate and was claiming damages for personal injury following her death from mesothelioma in October 2014. M had worked in the defendant, D's, factory between 1946 and 1952. C claimed she had been exposed to asbestos during that period and this had caused her to develop mesothelioma.

M's job involved threading wire through the linings of electric blankets. In a statement made shortly before she died, M said the linings were made of asbestos.

To successfully claim, C had to show, on the balance of probabilities, that the linings of the electric blankets were made of asbestos; and either the Asbestos Industry Regulations 1931 applied to the factory, or that the defendant had breached the Factories Act 1937 section 47 or its common law duty of care.

The court held C did not prove the linings were made of asbestos. Although asbestos had been present in the factory, the evidence showed that it was because the wires were coated with it, not because the linings were made of it. Evidence from the patent application record showed asbestos was an insulating material in the wire but did not mention it being present in the lining of either the jacket or the blanket, and the tests on a 1960s blanket showed asbestos in the heating element but not in the lining.

The court held that, as M's evidence was taken almost 70 years after the event, it was understandable she may have made a mistake.

The claim was dismissed.

In obiter comments, the court stated that had the blankets been made of asbestos, the Asbestos Industry Regulations 1931 would not have applied. Pursuant to para.ii of the Preamble, the Regulations applied to premises in which "all processes in the manufacture of asbestos textiles, including preparatory and finishing processes" were carried out. Although the Regulations had to be interpreted broadly, they did not apply to all asbestos-related activity. Threading electrical wire into the linings did not fall within para.ii, which covered the manufacture of asbestos textiles, nor the production of products made with such textiles.

COMMENT

In further obiter comments, the court looked at D's liability at common law and section 474 of the Factories Act 1937. For the latter to apply, work in the factory had to give off a decent amount of noxious substances and/or fumes. Even if C had established the linings were made of asbestos, there was no evidence they gave off a substantial amount of dust. If he had done so, liability would have been established under section 47 and at common law. This is because although at the time of M's exposure, it was not known that mesothelioma was caused by asbestos, it was known that exposure to asbestos could cause damaging diseases. D should have known that asbestos was considered a dangerous substance and that inhalation should be prevented. This case shows that, when it comes to foreseeability, to be liable at common law an employer does not have to know the type of illness which can result from exposure to a substance, only that a damaging disease can develop.

EMPLOYERS' LIABILITY

ON THE BASIS OF LIABILITY, A JUDGMENT DISMISSING A FATAL ACCIDENTS CLAIM BASED ON MESOTHELIOMA CONTRACTED AT WORK WAS OVERTURNED AND REMITTED FOR REHEARING

Veronica Bussey (Widow and Executrix of the estate of David Edwin Anthony Bussey) v 00654701 (formerly Anglia Heating Limited), **22.02.2018, Court of Appeal**

A was appealing the dismissal of her fatal accident claim following the death of her husband, H, from mesothelioma.

H had been employed by the respondent, R, between 1965 and 1968. In 1970, regulations came into force which required employers to put safeguards in place to protect employees from exposure to asbestos. In that same year, a technical data note (TDN13) was published containing guidance for assessing whether asbestos levels were such as to present a danger to health.

H developed mesothelioma and died in 2016.

At first instance, the court held that H's exposure was within the levels of set out in set out in TDN13. Therefore, it was bound by the decision in *Williams v University of Birmingham* [2011] EWCA Civ 1242. *Williams* held the correct test for breach of duty in a mesothelioma case was not whether the defendant had taken reasonable measures to ensure that the claimant was not exposed to a material increase in the risk of mesothelioma. The duty was to take reasonable care, including measures if necessary, to ensure that a person was not exposed to a foreseeable risk of asbestos-related injury. Given that H had been exposed to a level of asbestos that was regarded as safe at the time, his employer could not have foreseen he would develop mesothelioma. This was notwithstanding that later evidence determined the levels of exposure set out in TDN13 were too high to constitute a safe risk.

The Court of Appeal held that the judge at first instance was wrong to consider *Williams* as determinative. If the judge had not felt limited by the decision in Williams, he would have looked at other issues of foreseeability and examined the facts of the case more broadly.

The judgment for A had to be set aside. However, because R had produced no factual evidence of its knowledge of the risk in the 1960s, the Court of Appeal could not make a judgment, and the case was remitted.

COMMENT

"The past is a foreign country, they do things differently there" – L.P. Hartley.

These words never ring truer than when trying to establish the liability of a person or company whose alleged negligence or misconduct occurred decades ago, when different laws applied. This case illustrates that although case-law precedent must be followed, when it comes to foreseeability, the court should consider the broader aspects of the surrounding circumstances to establish if the risk was foreseeable.

OCCUPIER'S LIABILITY

A COUNCIL'S OPERATION OF A REACTIVE SYSTEM WHEREBY CAR PARKS WOULD BE GRITTED UPON RECEIVING A REPORT FROM A MEMBER OF THE PUBLIC REGARDING A DANGEROUS AREA WAS APPROPRIATE

Ivor Cook v Swansea City Council **19.12.2017, Court of Appeal**

The claimant, C, had fallen on ice in a car park owned by the defendant, D. D admitted that in bad weather, it did not routinely grit unmanned car parks. Instead, it operated a reactive system, whereby it would grit an area if a member of the public reported it as unsafe.

A claim was brought for damages in negligence and/or breach of duty under the Occupiers' Liability Act 1957 s.2(2).

At first instance, the judge found this appropriate and rejected Cs argument that the accident would have been prevented if there had been a system in place whereby local authority employees who visited the unmanned car park during the day to collect money from the ticket machines checked for and reported icy conditions. In addition, the judge found there was no evidential burden on the local authority to show that the accident would have happened regardless of whether the area was routinely gritted.

The Court of Appeal found there was no breach of duty by D. Section 2 (2) required D to take reasonable care to ensure visitors to the car park would be safe. D had presented a strong argument as to why it would be unreasonable in all circumstances to impose a duty of care that would effectively require it to grit its unmanned car parks whenever icy conditions were reported. A balancing exercise must be carried out when considering what amounted to "such care as in all the circumstances of the case is reasonable" in s.2. That exercise involved a calculation of the likelihood that someone might be hurt, the gravity of any injury that might happen, the social value of the activity giving rise to the risk, and the cost of taking action to prevent it.

The court followed *Tomlinson v Congleton BC* [2003] UKHL 47 where the judge found that "the danger and risk of injury from diving in the lake where it was shallow were obvious", therefore there was no duty to protect against it.

The risk of ice in bitterly cold weather was obvious, and the public could be reasonably expected to take care in such conditions. Gritting would have to be by hand and would involve significant use of staff and material resources. That would constitute a disproportionate and costly reaction to the risk and would prevent D from concentrating gritting resources on parts of the community which needed more attention.

The appeal was dismissed.

COMMENT

The two main points to take from this decision are a) obvious dangers do not give rise to a duty to protect the public and b) the courts are alive to the commercial realities of undertaking protective measures and will perform a balancing exercise against the risk of harm and the reasonableness of protecting against it.

OCCUPIER'S LIABILITY

A HOSPITAL HAD BREACHED ITS COMMON LAW DUTY TO TAKE REASONABLE STEPS TO KEEP A VULNERABLE PATIENT REASONABLY SAFE WHILE ON ITS PREMISES WHEN HE FELL FROM A ROOF AFTER GAINING ACCESS TO IT VIA AN UNSECURED FIRE DOOR

James Spearman (a protected party by his brother and litigation friend Andrew Spearman) v Royal United Bath Hospitals NHS Foundation Trust, **4.12.2017, Queen's Bench Division.**

The claimant, C, suffered a brain injury in 1987. His injury resulted in significant personality changes and a phobia of hospitals. He also had diabetes. In 2017, after suffering from a hypoglycemic attack, he was admitted to hospital. Staff were told of his phobia and the fact he may try to escape the hospital.

Shortly after he was admitted, he tried to leave the hospital. He went through an unsecured fire door and ended up on a flat roof that was surrounded by safety fencing. Using furniture that was on the roof, he climbed over the fence and fell into a courtyard below, suffering a severe traumatic brain injury and multiple fractures. He required extensive treatment and neurorehabilitation. As a result of his injuries, C was left with cognitive dyspraxia and could not live independently, requiring almost constant care.

C claimed the defendant, D, had breached its duty to keep him safe under the Occupiers' Liability Act 1957 and/or the Occupiers' Liability Act 1984 or at common law.

The court first had to decide whether C was a visitor under the Occupiers' Liability Act 1957 or a "trespasser" under the Occupiers' Liability Act 1984. It was determined he was a visitor and the court held the meaning of "trespasser" was not solely determined by whether the person was in an "authorised" place; his state of mind and intention was an important additional factor.

When it came to D's duty, the court stated this was governed by the most vulnerable patient who could be expected to be in the hospital. D was required to take reasonable steps to keep patients reasonably safe while on the premises, which extended to providing adequate supervision and restricting activities and movements in the hospital, either by direct supervision or by physical means such as locking doors. D was also required to manage the flow of movement of patients around the premises. This was a common law duty as it encompassed wider duties than simply those relating to the "state of the premises" as under s.1(1) of the 1957 Act. This duty had to include management of the state of the premises by putting up appropriate notices and locking doors.

By not locking doors, failing to remove furniture from the roof space and not carrying out an adequate risk assessment regarding whether a vulnerable patient could access the roof via the fire door, D had breached its duty. It was also reasonably foreseeable that if the door to the roof was not locked, an at-risk patient could access the roof and go over the edge. The fact that a fence had been erected was evidence D was aware of the risk.

Judgment was found in favour of C. No contributory negligence could be attributed to C because doing so would mean penalising him for his state of mind.

COMMENT

This case emphasises how important it is for local authorities and businesses to think about the type of people who visit their premises and perform adequate risk assessments based on the most 'vulnerable person'.

HIGHWAYS

SECTION 58 DEFENCE ESTABLISHED

Stanton v Knowsley Metropolitan Borough Council, **13.08.2017, Liverpool County Court**

In December 2014, the appellant, A, was cycling along Knowsley Lane, Knowsley in Merseyside, in the company of his brother, when he was caused to fall from his bicycle by a cast iron drainage cover set in the pavement adjacent to the kerbstone, but which was protruding into the roadway by several inches, having become displaced from its original position. He sustained a serious injury to his left shoulder.

A brought proceedings in negligence and breach of statutory duty against Knowsley Metropolitan Borough Council, the respondent, R, as highway authority responsible for the drainage cover. R relied on the statutory defence under section 58 of the Highways Act 1980 to the effect that they had taken such care as was reasonable in all the circumstances to ensure that there would be no danger within the highway.

The fast-tracked claim failed. The court was satisfied A's injury was caused by a genuine accident. The protruding drain cover was an actionable defect, thus rendering the council as highway authority in prima face a breach of section 41 of the Highways Act 1980, but held R had discharged the evidential burden and satisfied the court that the system of inspection in place was a reasonable one in all the circumstances.

Leave to appeal was granted.

During the appeal, R made reference to section 58(2)(d) of the Highways Act 1980. This required the court to have regard to "whether the highway authority knew, or could reasonably have been expected to know that the condition of the part of the highway to which the action related was likely to cause danger to users of the highway…" R relied on the unchallenged evidence of two highway inspectors who stated they were unaware of any previous problems with other drainage covers in the area.

In two inspections which occurred prior to A's accident, no defect relating to the drainage cover had been noticed. In addition, after the incident, the drainage cover was inspected and found to be free from problems.

A placed significant reliance on the principles of *Atkins v Ealing London Borough Council* [2006] EWHC. This case proposed that once the existence of a defect is established, and the risk of injury is also identified, the highway authority has a significant duty regarding inspections to ensure there is no danger to the public. However, the appeal judge stated that Atkins "does not establish a principle that manual inspection is the threshold for reasonableness. Rather, it emphasises the objective nature of the assessment; what is reasonable depends entirely upon the nature of the defect, the extent of the injury, and the proportionality of any necessary step which must be taken to eliminate danger".

The appeal judge held that on the evidence which was placed before the trial judge, he was entitled to come to the conclusion that a visual inspection was appropriate. *Atkins* was distinguishable because of the nature of the defect which could be seen by visual inspection. In the present case, this was the protrusion of a drainage cover; *Atkins* involved a collapsing manhole cover which could not have been seen with the naked eye.

The appeal was dismissed.

COMMENT

This case highlights the mechanics of the section 58 defence. It also makes clear that a visual inspection by a highway authority is reasonable in cases where the defect which could cause an injury is visible. In addition, what is a reasonable discharge of duty will depend on the facts of the case before the court.

POLICE

WHEN INVESTIGATING CRIMES, POLICE MUST ABIDE BY A STANDARD OF CARE; AND WHILE THESE STANDARDS SHOULD NOT BE UNREALISTIC, THE POLICE FORCE WAS NOT IMMUNE FROM NEGLIGENCE SUITS

Robinson v Chief Constable of West Yorkshire, **08.02.2018, Supreme Court**

In July 2008, a 76-year-old woman, A, was knocked down by a group of men who were struggling with one another. Two of the men were sturdily built police officers, and the third was a suspected drug dealer whom they were attempting to arrest. As they struggled, the men crashed into A, and they all fell to the ground, with A becoming trapped underneath. She suffered injuries because of the incident.

The Court of Appeal held the respondent, R, did not owe A a duty of care and was therefore not liable for the injuries she sustained during the struggle. The court applied the test in *Caparo Industries Plc v Dickman & Ors*, stating that most negligence claims for acts and omissions by the police in the course of investigating and preventing crime would fail the third stage of that test, namely whether it was fair, just, and reasonable to impose a duty of care.

The Supreme Court held that the existence of a duty of care did not rely on all aspects of the Caparo test being met. Caparo rejected the idea that there was a single test for establishing the existence of a duty of care and urged an approach based on common law, precedent, and the incremental development of the law seeking similarity with established authorities.

In this case, the court stated the existence of a duty of care depended on whether established principles of negligence applied, not on the Caparo test. The police were governed by the same general law of tort as all other members of society.

The court found the police acted carelessly. It was foreseeable the subject may try to resist arrest and passers-by could be injured if there was a struggle to bring him into custody on a busy street.

COMMENT

This judgment provides a critical examination of the case law surrounding the police and duty of care. Although the Supreme Court overturned the Court of Appeal's finding that no duty was owed, it did agree that the duty imposed on the police could not be unreasonable. In some cases, a risk to public safety when the police were carrying out their duties, would be justified (one could imagine this would apply in a terrorist situation where many lives were in danger). You can read the full text of the judgment here.

NEGLIGENCE

THE MOJ OWED A DUTY OF CARE TO ENSURE PRISONERS COULD ACCESS HEALTHCARE. THIS DUTY DID NOT EXTEND TO RESPONSIBILITY FOR CLINICAL NEGLIGENCE

Benius Razumas v Ministry of Justice, **12.02.2018, Queen's Bench Division**

This case required the court to establish whether the defendant, D, was directly or vicariously liable for clinical negligence, whether the claimant's personal injury claim was barred under the Criminal Justice and Courts Act 2015 s.57 by reason of fundamentally dishonest assertions in his particulars of claim, and whether his treatment was in breach of the Human Rights Act 1998.

The claimant, C, was a prisoner for various periods between 2010 and 2013. He had received treatment for cancer whilst incarcerated. The treatment was negligent and, as a result, his leg was amputated above the knee.

The court held D owed C a duty of care on matters which arose out of the fact C was in custody. This included providing a safe environment and making sure he had access to healthcare. However, the direct duty did not include a responsibility to actively monitor the standard of care provided by healthcare professionals. The system for the provision of access to healthcare was not deficient in the claimant's case, it was the healthcare providers whose negligence caused C's injury, and there had been no separate default by the MoJ.

COMMENT

This case will be of great interest to local government as it provides clarity on where the scope of their duty of care ends and another body's begins. For example, it may follow from this judgment that if a patient in a council run care home was taken to an NHS hospital or private healthcare provider to receive treatment which could not be provided at the care home facility and that treatment was negligent, the local authority would not be liable.

NEGLIGENCE

MINISTRY OF JUSTICE CONFIRMS THE SMALL CLAIMS LIMIT FOR MOTORING CLAIMS WILL INCREASE TO £5,000 IN APRIL 2019

Plans to increase the small claims limit for motoring claims will be implemented in 2019, MoJ officials have stated.

As expected, the Law Society vehemently opposes the limit increase, with President Joe Egan stating:

"The timeline for introducing the whiplash reforms has been made public before the justice select committee has had a chance to issue its report on raising the small claims limit for RTAs to £5,000, and all other personal injury to £2,000.

"In our submission to the select committee we outlined the extensive steps that can be required in low-value personal injury claims. We also highlighted new research findings that show 76% of medical experts would not accept instructions from claimants without a lawyer.

"These changes will mean people injured through no fault of their own will struggle to get justice.

"The Law Society does not accept that these limits are reasonable, and we continue to oppose these reforms."

However, the news is welcomed by the Association of British Insurers and insurance customers, who have lobbied hard for the law change, stating they are "under siege" from spurious whiplash claims. Insurers say the increase in the claims limit will ultimately decrease the cost of motor insurance. This is something cash-strapped local bodies will look forward to coming to fruition.

HEALTH AND SAFETY

WELSH COUNCIL TO BE PROSECUTED FOLLOWING STUDENT'S DEATH

Bridgend County Borough Council, Wales, **court date to be confirmed**

The Health and Safety Executive has confirmed that Bridgend County Borough Council is to be prosecuted following the death of a student who died in a collision with a school minibus.

A 15-year-old boy suffered fatal injuries in 2014. Another student was slightly injured.

At the inquest, it was noted there had been previous concerns about road safety at the school. A bus driver stated there was insufficient room to park the bus in the bays provided, meaning pupils had to cross the road in a "free for all". In addition, buses lined both sides of the road, obstructing visibility. The driver had raised his concerns with the school board but felt they had not been acknowledged.

The boys were hit by a PE teacher driving a minibus. According to evidence, the teacher was driving safely and at an appropriate speed when the two boys stepped out in front of him. Welsh police have confirmed he will not face charges.

Bridgend County Borough Council will face a charge under section 3 (1) of the Health and Safety at Work etc Act 1974. This section provides "it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety".

COMMENT

The death of a pupil is a tragedy no school wishes to have happen. The council said in a statement after the announcement of the prosecution that they have cooperated fully with the investigation and their thoughts are with the family of the deceased pupil.

If the council pleads guilty to the charge, or is found guilty, it is the sentence applied which will most likely cause the most interest. Under the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guidelines, the level of fines imposed can be in the millions, depending on the defendant's culpability and the harm caused. Research published in the Safety and Health Practitioner Magazine last year showed fines issued to local bodies for health and safety breaches had risen by a staggering 1,870% since the guidelines were published in 2016.

There is an argument that, whilst it is vital that local bodies are held accountable for health and safety breaches, unlike a corporate body who can raise prices or increase sales to mitigate the impact of a six or seven figure fine on their bottom line, all a local body can do is a) raise taxes, or b) cut services. Neither of these options, it could be argued, are good for the community they serve.

We will keep you updated with the developments of this case.

HEALTH AND SAFETY

CPS DECIDE NOT TO PROSECUTE LONDON BOROUGH OF TOWER HAMLETS OVER THE DEATH OF A FIVE-YEAR-OLD GIRL WHO WAS KILLED WHILE PLAYING IN AN EAST LONDON PARK

The Crown Prosecution Service (CPS) has decided not to prosecute London Borough of Tower Hamlets after a five-year-old girl was killed when a rotting log supporting a rope swing she was playing on fell on her, causing fatal injuries. The CPS held the local body's failings did not meet the threshold for corporate manslaughter or gross negligence manslaughter.

The Health and Safety Executive (HSE) is continuing its investigations. A report by the CPS did conclude that the council, two of its employees, and the contractor who designed and fitted the play equipment had "breached their duty of care". Its investigation found the most serious breach was the use of poplar or willow for the rope swing log that fell on the child. Both have a lifespan of three years, and the log was fitted in 2011, four years before the girl's death.

Quoted by the *Evening Standard*, the report stated, "There is no evidence Employee A (or any other council employee) paused to consider if industry standards would be adhered to, nor to ask if suitable materials were being used, nor to clarify what materials were being used."

The report said, "the council fell below the standard of a reasonably competent council ... and was negligent".

However, it found that gross negligence manslaughter charges could not be brought because no individual could have foreseen an "obvious and serious risk of death". No charges of corporate manslaughter could be brought as the duty of care failings could not be linked to senior management. Instead, the report found the failures were due to junior employees.

We will keep you updated with the developments of this case, including the HSE's decision on whether or not to prosecute.

CIVIL PROCEDURE

DISCLOSURE WORKING GROUP OUTLINES PROPOSALS TO AMEND CIVIL PROCEDURE RULES, PART 31

In 2016, in response to concerns regarding the excessive costs, scale and complexity of disclosure, Sir Terence Etherton, the Master of the Rolls, established a Disclosure Working Group ("the Working Group"). Chaired by Lady Justice Gloster, the Working Group is comprised of a wide-range of lawyers, judges, and legal experts. Because of the amount of disclosure material available now, especially in electronic form, the Working Group concluded the current rules were no longer fit for purpose.

The proposals, which will form a pilot scheme, will be delivered to the Civil Procedure Rules Committee for consideration and approval in March/April 2018. The Pilot will then be published and be put in place. The Business and Property Courts in the Rolls Building and the centres of Bristol, Cardiff, Birmingham, Manchester, Leeds, Newcastle and Liverpool will initially trial the pilot over a two-year period.

The proposed changes recommended by the Working Group include: a) introducing the concept of Basic Disclosure which will require all parties to disclose key documents when one party files its Statement of Case; b) further disclosure, known as Extended Disclosure, must be applied for and the court will only grant it after considering certain circumstances such as the complexity of the case; c) disclosure will be broken down into five different set models and a bespoke model will only be permitted in exceptional circumstances.

In addition, the proposal recommends a Form H Costs Budget should be completed only after an order for disclosure has been made. This prevents the common scenario that occurs under the current Rules whereby parties substantially underestimate the costs associated with disclosure because Form H is completed before the collection of documents had been finalised.

CIVIL PROCEDURE

THE SERVICE OF LATE EXPERT EVIDENCE ALLOWED IN A PERSONAL INJURY ACTION SO AS TO AVOID VACATING OR SPLITTING THE TRIAL

Mohamed v Enright & Anor, **06.03.2018, Queen's Bench Division**

The trial of both quantum (damages) and liability was due to start on 1st May 2018. The claimant, C, was finding it challenging to instruct an expert neuropsychologist, and one was not due to examine her until March 2018. That expert had said that it would take four weeks to produce a report. The defendants, D, asked for more time to present their expert evidence, and said C should disclose any updated medical notes in her possession, and that the trial should be split so that only liability was to be determined on 1st May. D stated this was justified due to the delay in getting the neuropsychologist's evidence, which meant their expert evidence was incomplete and they would not be ready for the trial date.

The court held that although D had not called for disclosure of the medical documents as quickly as they should have, C did have to disclose the medical reports in her possession. However, the Master found that it was too late in the process to consider a split trial. The defendants maintained that it was not possible to keep the trial date because they had to assess the claimant's care needs after they had received the neuropsychology expert evidence, although it would be possible to have a trial on liability only in May. On consideration of this argument, the Master held that although the evidence from the neuropsychologist would be delayed, the rest of the expert evidence could be examined almost immediately. Joint expert reports regarding neuropsychology and care could be served in April. Therefore, it was not necessary to vacate the trial date.

COMMENT

When making the decision, the court stated that vacating the May trial date would result in a large delay in dealing with quantum. It held that this was not consistent with the Civil Procedure Rules objectives of dealing with cases quickly and proportionately.

CIVIL PROCEDURE

DECISION TO MAKE A COSTS ORDER AGAINST THE UNSUCCESSFUL CLAIMANT IN A PERSONAL INJURY CLAIM ON THE BASIS THAT THE QUALIFIED ONE-WAY COSTS SHIFTING REGIME IN CPR R.44.13 TO R.44.17 DID NOT APPLY TO PART 20 DEFENDANTS ADDED TO THE PROCEEDINGS OVERTURNED ON APPEAL

Jacob Corstorphine (an infant who proceeds by his mother and litigation friend Laura Ellis) v Liverpool County Council, **13.02.2018, Court of Appeal**

This case and the one that follows deals with the Qualified One-Way Costs shifting (QOCS) regime. For readers unfamiliar with this regime, it is used if a successful defendant cannot recover their costs from the losing claimant, except in a selection of very precise circumstances. It applies to all personal injury cases post-April 2013, unless the claimant has/had a pre-April 2013 CFA/ATE in place. Exceptions to this rule include matters where the claimant fails to beat a Part 36 offer at trial, the action is struck out for being an abuse of court process, or the claimant is found to have been fundamentally dishonest.

The appellant, A, had suffered a serious personal injury on a dangerous tyre swing in a playground. The respondent, R, was responsible for the area where the accident occurred. In August 2012, A entered into a conditional fee agreement (CFA) with solicitors to cover his intended personal injury claim against R, and an after the event (ATE) insurance policy providing cover against any order for him to pay R's costs. A brought his claim against R in November 2012. On 1 April 2013, the QOCS regime came into effect.

R subsequently issued a Part 20 claim against the company that had designed and manufactured the tyre swing, and the company from which the swing had been purchased. These actions were joined to the primary claim as second and third defendants.

A's claim was dismissed.

With regards to costs between A and R, the judge at first instance stated A had a pre-commencement funding agreement (PCFA) within the meaning of r.48.2, which, because it related to "the matter that is the subject of the proceedings in which the costs order is to be made", included the claims brought against the second and third defendants. The judge held the QOCS did not apply. Therefore, pursuant to CPR 44.17, A was ordered to pay all the costs of the primary claim. The second and third defendants' costs of the additional claim were to be paid by R, but R could add them to the costs of the primary claim because the claims were based upon interconnected facts and issues.

The Court of Appeal adjusted the costs order, requiring R to pay the cost of the second and third defendant. In reaching their decision, the court stated the purpose of the QOCS scheme was to protect claimants from adverse costs orders (a protection which was previously provided by legal aid, then complex ATE and CTE policies). Under r.44.14(1) the QOCS ensured orders for costs made against a claimant in a personal injury claim might be enforced only to the extent that the amount did not surpass any damages and interest awarded to the claimant.

Regarding the costs of the second and third defendant, if the QOCS was not applied, C would have no protection against an adverse cost order as no ATE or CTE policy applied to claims against second or third defendants in this context. In addition, at the time of the inception of QOCS, the appellant had no vested rights or expectations in respect of claims against the second or third defendants. His sole rights and expectations concerned the claim against the local authority, which alone was the subject matter of the PCFAs.

Given these facts, the Court of Appeal held it was fair, just and proportionate to vary the costs order in favour of C.

COMMENT

This decision shows the courts will apply the QOCS to protect PI claimants against adverse cost orders. Legal teams need to take this into consideration when budgeting for costs; unless there is a Part 36 offer which is not beaten, a claim brought without merit, or fundamental dishonesty on behalf of the claimant, the QOCS is likely to apply.

CIVIL PROCEDURE

DISHONEST CLAIMANT NOT ENTITLED TO QUALIFIED ONE-WAY COSTS SHIFTING PROTECTION

Robert Barbour v Liverpool City Council, **16.11.2017, Liverpool County Court**

The claimant, C had tripped on a public highway. His claim for personal injury and damages was dismissed under the Criminal Justice and Courts Act 2015 s.57. C's evidence was not considered credible as it was discovered his claim for loss of income was fraudulent. A gratuitous claim for care also damaged his credibility.

C argued costs could not be enforced against him under the Civil Procedure Rules, r.44.14 as he had not received any damages. He also stated r.44.16 could not apply as the claim had not been fundamentally dishonest. The essential claim of breach of duty by the defendant, D, had not been found to be dishonest and the court's disapproval of C's dishonesty regarding his loss of income had already been marked by the court's rejection of the entire claim. C, therefore, contended that costs should be assessed on the standard basis and should be limited to D's costs of dealing with the loss of earnings claim.

The court, in noting that the claim for loss of earnings amounted to around half the total claim, held C's dishonesty was related to a fundamental part of the claim. It did not go to some collateral matter or minor, self-contained head of damage. In addition, the gratuitous care claim increased the dishonesty. The fact C had not lied about the actual incident that caused his injury did not preclude the court from invoking r.44.16.

The court held it had the discretion to permit the order for costs to be enforced against the claimant and had to have regard to the underlying policy of the qualified one-way costs shifting (QOCS) regime. C was not a litigant who merited protection against adverse costs liability. And there was a reasonable justification for making an adverse costs order in such a case to deter future dishonest claimants.

COMMENT

In coming to his decision, the Recorder recognised that a public body had been subjected to significant costs and inconvenience in investigating and defending a claim that comprised of significant elements of dishonesty. It was considered fair and just to compensate D for the costs and public exposure resulting from having to defend such a claim. As a result, C was ordered to pay half D's costs.

DEFAMATION

A PERSON IS RESPONSIBLE FOR ANY DEFAMATORY COMMENTS THEY PUBLISH ON THEIR FACEBOOK WALL WHICH ARE INSTANTLY VISIBLE TO THEIR "FACEBOOK FRIENDS"

Ronald Terrance Stocker and Nicola Stocker **12.02.2018, Court of Appeal**

The appellant, A, befriended the respondent's, R, new partner, B, on Facebook. R was the ex-partner of A.

A lengthy exchange of comments took place on B's Facebook Wall. A referred to R being arrested in the past and said he had "tried to strangle me". The judge at first instance found the comments defamatory. He referred to dictionary definitions of the word "strangle", which included "to constrict painfully (of the neck or throat)". He held that the use of the word "tried" would have led the reader to believe R had tried, but failed, to kill A by compressing her neck. The judge concluded that the overall effect of the words used implied R was a dangerous man.

A contended the judge had not been entitled to reach his conclusion as to "dangerousness" because the respondent himself had not attributed that meaning to the words. Finally, A stated she could not be held liable for defamation because she believed her comments had been made in private and therefore, she was not responsible for their publication to third parties who read them on Facebook.

The Court of Appeal held the judge at first instance had given the word 'strangle' its natural and ordinary meaning. The use of dictionaries did not form part of the process of determining the natural and ordinary meaning; what mattered was the impression conveyed by the words to the ordinary reader.

Regarding the publication of the comments, because they had been published on A's Facebook Wall, they were instantly available, not only to A's friends but any third parties if the content was shared. The court stated the law of republication did not apply as the posting of comments on Facebook was effectively no different from putting comments on a public notice board. A knew that Facebook is a semi-public platform and she had deliberately posted on it without thinking about who might see her comments. Therefore, there was nothing unjust in holding her responsible for the defamatory content of her post.

COMMENT

It is all too easy for local bodies, businesses, and individuals to post comments on a social media platform which may be viewed as defamatory. Organisation and individuals need to absorb the brutal truth that liability for libel can occur if comments posted on social media platforms are found to be defamatory. One way to reduce the risk of legal action is to have all social media activity run through a central responsible person who can evaluate the content of the statements.

PRIVACY

THE BROADCASTING OF A COUPLE BEING EVICTED FROM THEIR HOME BREACHED THEIR PRIVACY AND THEIR RIGHTS UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Shakir Ali & Shahida Aslam v Channel 5 Broadcast Ltd

Having fallen into arrears, the claimant's, C, landlord had obtained a possession order. The local authority advised the couple to wait until they were evicted before they could be rehoused.

When enforcement officers came to the property to carry out the repossession, they were accompanied by the defendant's, D's, film crew. Shortly before they left the property, the first claimant agreed to be interviewed. The landlord's father also attended the eviction and posted on social media two videos he had recorded of the eviction. D broadcast edited footage as part of a series of programmes called "Can't Pay? We'll Take It Away". The programme containing C was seen by 9.65 million viewers. C's daughter suffered bullying at school as a result of the programme.

C claimed damages against D for misuse of private information. D argued the programme illustrated matters of public concern, including rising debt and dependence on housing benefits. In addition, D stated it had rights under Article 10 of the ECHR (freedom of expression).

The court held C had a reasonable expectation of privacy and their Article 8 rights were engaged because the property had remained their home until the writ was executed, which was at the expiry of the hour provided for them to vacate. The principles of open justice did not justify the broadcasting of any information beyond the fact they were being evicted nor the subsequent impact on C's children. The broadcasting of the eviction was not a foreseeable consequence of falling behind in rent and receiving an eviction order.

It was also held that at no time did C give informed consent in relation to the broadcast. He had agreed to be interviewed after twice objecting to the filming (his complaints regarding the filming itself were ignored). This did not amount to true consent; in effect, it was an agreement to participate under protest.

When balancing C's rights under Article 8 and D's rights under Article 10, the court stated the programme's focus was not on the matters of public interest but on the drama of the conflict between C and the landlord's father. In addition, D had the power to edit the footage to show C in an unflattering light. Therefore, the balance had to come down on the side of protecting C's Article 8 rights.

COMMENT

Television and media are awash with reality shows, and unfortunately, the concept of "if it bleeds, it leads" applies to documenting people's misfortunes. Although a local authority was not involved in this case, the judgment illustrates how careful they have to be when dealing with media companies, or any other situation which may compromise the privacy or Article 8 rights of a member of the public.

DAMAGES

CLAIMANT AWARDED £4,100 FOR INJURY TO HIS NOSE AFTER WALKING INTO A SHOWROOM DOOR

Richard Thomas v CEM Day Ltd, **12.10.2017, Aldershot County Court**

In October 2015, the claimant, C, walked into a heavy plate glass window of a showroom operated by the defendant (D). He remained conscious after the impact but was temporarily stunned. The skin of his nose was left hanging off, and he was bleeding profusely. The accident caused a deviation of the nasal septum to the left side and deflection of the caudal edge of the septum into the left nostril. The left nasal bone was also lateralised. C suffered from nosebleeds, pain, and swelling around his nose which lasted around a month. He did not have ongoing breathing difficulties; however, he now has a permanently deformed nose and a small scar.

The court awarded £4,100 damages in accordance with the Judicial College Guidelines 9(A)(c)(ii) for a displaced fracture where recovery was complete but only after surgery was performed. An award above the middle of the bracket was made due to the deformity being reasonably significant, with the addition of tenderness to the nose for a month and nosebleeds.

DAMAGES

WOMAN RECEIVED £4,411.89 FOR SOFT-TISSUE INJURIES SUSTAINED IN A ROAD TRAFFIC ACCIDENT IN SEPTEMBER 2016

Angela Safiq v Ageas Insurance Ltd, **07.12.2017, Derby County Court**

The claimant, C, was a passenger in a vehicle which suffered a rear-end shunt in 2016. C suffered soft tissue injuries to her neck and back, and subsequent travel anxiety.

The neck injuries resolved in 12 months, along with the lumbar spine injury. The thoracic spine injury resolved within nine months. The travel anxiety resolved within six months.

General damages of £3,500 were awarded for pain, suffering and loss of amenity. Special damages of £911.89 were also awarded.