court circular

ZURICH MUNICIPAL

Summer 2018 THE LATEST JUDGMENTS AND WHAT THEY MEAN TO YOU

Welcome to the Summer 2018 edition of Court Circular.

Richard Shanks
Head of Retail and Zurich Municipal Claims.

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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/

At last, the warm weather has made an appearance and the newspapers are predicting one of the longest and hottest summers on record. Much has happened since our last edition. Britain rejoiced in the birth of a new royal baby and the marriage of Prince Harry to Meghan Markle. The World Cup has restored our faith in football and our young England team. However, I have no doubt that the incoming General Data Protection Regulations (GDPR) has preoccupied many of your thoughts.

Another major event for local bodies was the release of Dame Judith Hackitt's final report on building regulations following the Grenfell Tower tragedy. We have included a summary of the main findings and key recommendations in this edition. A major report on the mental health of workers was also released in May which showed a disproportionate number of public sector employees are suffering from stress, anxiety, and depression at work.

In addition to these reports, this edition of Court Circular looks at whether a workplace union could be vicariously liable for discriminatory acts committed by agents, *Unite the Union v Nailard*.

One of the most commented cases in the last quarter has been that of *Roy Sumner v Michael Colborne & Denbighshire County Council*, whereby it was held a local authority did not owe a duty of care to drivers to prune vegetation which obstructed road visibility. And in privacy law, *XKF v BBC* examined whether a former police officer could obtain an interim injunction to prevent the BBC from airing an interview which highlighted his criminal past.

We highlight four cases involving negligence in this edition, two of which involve serious injuries to children. In *CC v Leeds City Council*, the local authority was required to pay damages to a child injured at a laser game attraction. And we also discuss *Faisal v Younis (T/A Safer Superstore) & Active Brands Concept Ltd*, after a toddler suffered severe chemical burns due to a defective product.

In *Edwards v Simey*, it was held that when assessing damages in professional negligence cases, the court could not take into account fresh expert evidence which was not available at trial. And in *Clarke v Kerwin (T/A Dirtbikereaction)*, an event organiser was found to be not liable for a motorcyclist competitor who lost control whilst taking a bend at high speed.

Harrow London Borough Council v Engie Regeneration (Apollo) Ltd looked at whether the terms of a construction contract imposed an obligation for latent defects insurance. In a case involving a police officer sat in a parked police car that was hit by another car, the officer was found to have been contributory to the negligence for failing to turn on her side lights in *McIntosh v Harman*.

The importance of following and communicating health and safety procedures was illustrated when Southern Co-operative Ltd was fined £333,334.

Two of the cases in this edition discuss the limitation period: *Kimathi & Ors v Foreign and Commonwealth Office* and *Morimoto v Clarksons Platou Futures Ltd and Anr*. In the ongoing saga of *Various Claimants v WM Morrison Supermarkets Plc*, concerning a massive data breach, the defendant employer was ordered to pay 40% of the claimant's costs. And in, *Calderdale and Huddersfield NHS Foundation Trust v Atwal*, a claimant who grossly exaggerated the ongoing seriousness of a minor injury was found in contempt of court and jailed for three months.

Finally, in *Sube v News group Newspapers & Anr*, the court held a newspaper article did not pass the 'serious harm' threshold set out in the Defamation Act 2013.

On behalf of the team at Zurich Municipal, I hope you have a lovely summer break. 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

Contents

EMPLOYERS' LIABILITY

PRESENTEEISM AND LEAVISM INCREASE AS WORKPLACE STRESS LEVELS RISE CIPD SURVEY

Health and Safety Magazine, **June 2018**

The results of the *Health and Wellbeing at Work Survey* undertaken by the CIPD and health insurance group, Simplyhealth, has shown that levels of presenteeism have more than tripled since 2010. The survey suggests 88% of organisations surveyed had seen evidence of presenteeism in the past 12 months, compared with just 26% in 2010. In addition, 69% of employees reported problems with leavism.

Presenteeism occurs when employees continue to work whilst they are ill. It affects not only productivity, but also staff morale and delays the recovery process. Leavism concerns employees working outside contracted hours to complete work or working during their annual leave.

Mental health conditions such as anxiety and depression are on the increase and are more endemic in the public sector, where they are connected with 71% of long-term absences, compared with 45% in the private sector and 33% in the manufacturing and production sector.

Rachel Suff, senior employment relations advisor at CIPD, told *Health and Safety Magazine*: "Increasingly, the threats to wellbeing in the modern workplace are psychological rather than physical, yet too few organisations are discouraging unhealthy workplace practices and tackling stress".

CIPD published a separate survey in April based on a poll of 6,000 workers entitled *The Working Lives Survey*. The report was conducted by researchers from the University of Warwick, and found those in middle-management suffered most from mental health issues such as stress, anxiety, and depression. 22% of those interviewed said they felt exhausted "always or often", and the same number felt under "excessive pressure".

Recommendations following the reports included employers carrying out regular "stress audits" and mid-career MOTs for all workers.

EQUALITY ACT 2010 AND DISCRIMINATION

WORKPLACE UNION REPRESENTATIVES DECLARED AGENTS OF THE UNION AND THEREFORE THE UNION COULD BE VICARIOUSLY LIABLE FOR THEIR DISCRIMINATORY ACTIONS.

Unite the Union v Nailard, **24.05.2018, Court of Appeal**

The Respondent (R) was employed by the Appellant (A) as a regional officer at Heathrow Airport. The union also had two locally elected officials, who were employed by the airport but whose jobs consisted of full-time union duties.

R was repeatedly bullied and harassed by the officials, and this was acknowledged by A after a grievance was raised and an investigation took place. However, no action was taken. Instead, she was offered a transfer which she refused. R subsequently resigned and brought a claim of sex discrimination and sexual harassment in the Employment Tribunal.

The employment tribunal found that the two elected officials had harassed the respondent within the meaning of the Equality Act 2010 s.26(1), and had subjected her to sex discrimination under s.39(2).

The Employment Tribunal ruled the two officials were agents of A and their actions constituted sex discrimination and sexual harassment. And because the men were agents, A was vicariously liable for their actions.

A appealed on the grounds the officials were neither agents or employees of the union; therefore it could not be vicariously liable for their conduct.

On appeal, the court held the officials could not be considered employees of A as they did not have an employment contract in place and the Union Workbook did not amount to one.

In addition, their wages were paid by Heathrow Airport. However, the men were classed as agents of A as they were authorised to speak at workplace meetings on behalf of the union and liaise with officers employed directly by Unite, and it was during these activities that the discriminatory conduct occurred. The fact that A had not authorised them to engage in the discriminatory conduct was no defence.

COMMENT

Following the #MeToo and #TimesUp campaigns, no organisation wants to be linked to claims of sexual harassment and/or discriminatory behaviour. The recent immediate cancellation of the Rosanne Barr Show following her allegedly racist tweet confirms how seriously organisations are now taking these types of claims and allegations.

This case illustrates that employers can and will be held vicariously liable for not only their employees' actions, but for the behaviour of its agents too. To manage the risk, employers need to put in place strict policies, procedures, and training programmes around discrimination and sexual harassment and provide these to agents as well as staff. You can view the full case here.

HIGHWAYS

HIGHWAY AUTHORITY DID NOT OWE A DUTY OF CARE TO DRIVERS TO PRUNE VEGETATION THAT WAS OBSTRUCTING VISIBILITY, IN A CASE BROUGHT BY A CYCLIST HIT BY A CAR.

Sumner v Colborne & (1) Denbighshire County Council (2) Welsh Ministers, **04.05.2018, Court of Appeal.**

A cyclist, C, previously brought a claim for negligence against the appellant, A, after being hit by his vehicle at a road junction. A denied liability claiming lack of visibility at the junction due to excessive vegetation, for which he stated the respondents (the local authority), R1, and the second respondent, R2, which owned the land on which the vegetation was growing, were responsible for managing. On bringing his Part 20 proceedings for alleged negligence and breach of duty, A relied on *Yetkin v Mahmood* [2010] EWCA Civ 776, to make the case that the layout of the land in question had been altered, therefore allowing vegetation to grow at risk to visibility. The judge at first instance found R1 and R2 not liable, stating the duty of care to cut back the shrubs only applied to the highway, not the adjacent land. The judge further made the point that there was no case for liability due to the vegetation protruding into the highway, as photos showed very little vegetation on the road.

On appeal, the court held that failure to cut back the vegetation to prevent obstruction of visibility was a failure on the part of R1, but did not give rise to a liability in negligence, following Stovin v *Wise [1996] A.C 923* and *Gorringe v Calderdale* MBC [2004] UKHL 15. The fact the vegetation had been cut back in the past by R1 had no bearing on liability. It was also stated that even if R2 had a duty of care to maintain the overgrown shrubs, this did not make a claim against R1 valid. *Yetkin* did not apply as it related to a road crossing, not land adjacent to the highway. The judge made the point that R had not created an expectation regarding the visibility at the road junction, and there are strong factors which mean landowners do not have a duty of care to ensure vegetation does not obstruct visibility on adjacent roads, including the risk this may then apply to buildings, fences, or other structures. As such, drivers must accept the road network is not perfect, and it should be taken as it is.

Finally, it was observed that C had not pursued R, and that a duty of care of landowners could encourage a large rise in claims by drivers' insurers following road accidents in which poor visibility was cited, and such claims could be extremely costly for little benefit. As such it was deemed unfair, unjust, and unreasonable to apply a duty of care. You can view the full case here.

COMMENT

This case has attracted a lot of attention. Going forward, landowners, and highway authorities may now choose to engage the court's summary and strike-out powers in non-maintenance-based highway claims. The case also shows the court's unwillingness to 'open the floodgates' to claims which provide little benefit, but could cost local authorities and therefore, ultimately the taxpayers, dearly.

PRIVACY LAW

BBC SUBJECTED TO INTERIM INJUNCTION RESTRAINING THEM FROM BROADCASTING AN INTERVIEW HIGHLIGHTING A FORMER POLICE OFFICER'S CRIMINAL PAST.

XKF v BBC, **14.05.2018, Queen's Bench Division.**

The claimant, C, was a former police officer. He had been convicted and had served a four-year prison sentence for stealing £165,000 during an investigation into a car theft. The convictions relating to the car theft were subsequently quashed. C had also been involved with a murder investigation, which led to the conviction of a man, L. L sought the help of the Criminal Cases Review Commission (CCRC), alleging C was corrupt. The Court of Appeal rejected L's allegations.

After his release from prison, C changed his name, qualified in a new profession and moved to a new area.

The BBC Panorama program was producing an episode which focused on the CCRC and its failings; one of the cases it wished to feature was L's. A BBC reporter approached C near his home and attempted to interview him about the allegations of corruption L had made against him and raised his previous convictions. Although C denied any knowledge of the reporter's claims about his past, he later answered the questions by email. However, C's responses which would ultimately be aired were heavily edited and failed to provide the full detail.

The injunction preventing broadcast of the interview was granted on grounds the applicant would have likely succeeded at trial. The court held there was no real distinction between C's right to a private life under Article 8 of the European Convention on Human Rights and his right to a reasonable expectation of privacy. C had made a sincere attempt to rehabilitate himself and re-establish a good life since leaving prison. He had a right to live without the fear of being ambushed by the media for an incident that occurred years ago. With regards to proportionality, the BBC would be prevented from showing footage of C at or near his home. This would not prevent them from carrying out their overall aim of reporting a miscarriage of justice.

COMMENT

This case is important for two reasons. First, it illustrates how the courts will approach a case involving a breach of the right to private life under Article 8. Secondly, it demonstrates that when a claim is likely to succeed at trial, an application for an interim injunction is likely to be granted.

DATA PROTECTION

GENERAL DATA PROTECTION REGULATIONS AND THE DATA PROTECTION ACT 2018 COME INTO FORCE

On 25 May 2018, the GDPR and the Data Protection Act 2018 came into force. Although preparing for the implementation of the new law has resulted in over a year's work for Local authorities, businesses and charities, the long-term effects of the GDPR will be positive – allowing local bodies to foster public trust in the way they work, and process and use personal data.

One ongoing issue to consider is the importance of continually reviewing relationships with suppliers who have access to and/or process data that is provided to the authority. Data controllers and processors have a duty to ensure GDPR principles are implemented correctly and complied with. Therefore, it is imperative that all contracts, whether they are IT-based or not, are checked to ensure they are GDPR compliant.

Another positive effect of the GDPR is it is likely to have provided your organisation with an opportunity to review its cyber-security processes and procedures. Local authorities are more exposed than ever to cyber-security breaches. The process of retrospectively cleansing, pseudonymising or anonymising data, a key part of GDPR compliance, will provide an opportunity to minimise the value and sensitivity of data that was vulnerable to exploitation by cyber criminals.

NEGLIGENCE

NEW EXPERT EVIDENCE NOT AVAILABLE AT TRIAL SHOULD NOT HAVE BEEN RELIED ON WHEN ASSESSING DAMAGES FOR PROFESSIONAL NEGLIGENCE.

Edwards v Simey, **06.06.2018, Court of Appeal**

The claimant, C, who is deceased, claimed under a government scheme to compensate former miners for vibration white finger.

C had developed the symptoms of vibration white finger in the early 1980s. Following his retirement in 1997, he was diagnosed with acute osteoarthritis of the knees. In accordance with usual practice under the scheme, C underwent a defined medical assessment process (MAP). A MAP report was then produced, confirming that he suffered from vibration white finger and indicating its severity by reference to a pre-set scale. The severity indicated by the MAP report gave rise to the presumption he had a services claim which was duly lodged. C's solicitor, D, sent him a standardised client letter regarding the services claim, stating he would need to produce evidence to be successful.

The claim's handler subsequently offered C a lump sum for general damages in a final settlement. C accepted this and decided against pursuing a services claim as he had other conditions which prevented him from carrying out specific tasks and he, therefore, felt he would not be able to produce the required evidence.

C later brought a claim against D for a loss of opportunity to make a services claim.

The Recorder at first instance found that the letter sent to C by D (a) had been written in terms which the deceased was likely to misunderstand as meaning that, unless vibration white finger was the only cause of his inability to perform a task, he had no services claim in respect of that task; (b) wrongly implied that the deceased might be liable for the future costs of the claim when his "no win no fee" agreement would apply; and (c) made no attempt to state how much damages could be claimed if the deceased pursued his action.

The Recorder then turned to a piece of evidence submitted by D which consisted of a report by an expert which, after assessing the severity of C's condition, concluded it was less severe than had been stated on the MAP report and would not have produced any disability for the purposes of a services claim. This evidence, which was not available at the time C accepted the offer of compensation, resulted in the Recorder concluding a services claim had no chance of success.

The Court of Appeal held the Recorder was wrong to take into account expert evidence which was not, and could not, have been available at the time C made his decision not to pursue a services claim.

Those who had suffered losses from professional negligence were entitled, so far as possible, to be put back in the position they would have been in without the negligence. The loss was measured by the amount the claimant received by way of compensation and the amount he would have received without D's negligence.

In every case, the court had to establish what had been lost by the claimant as at the date of the original settlement. Applying *Mount v Barker Austin* [1998] P.N.L.R. 493, the court held that this principle applied even if subsequent evidence arose. The judges went on to say that there was no established threshold over which a party had to cross before additional evidence, which could not and would not have been known at trial, should alter the outcome. However, there had to be a significant or serious scale to the consequences of the supervening event before it should be permitted to establish an exception to the normal principle.

The Recorder's decision was quashed, and the case submitted for rehearing.

COMMENT

Local authorities will welcome this decision as it means in normal circumstances, evidence which was not and could not be presented at trial cannot be subsequently relied on when quantifying damages if negligence is proven. The full decision can be found here.

NEGLIGENCE

COUNCIL ORDERED TO PAY DAMAGES TO A CHILD INJURED AT A LASER GAME ATTRACTION

CC v Leeds City Council, **04.06.2018, High Court**

The defendant, Leeds City Council, D, appealed against damages awarded to the claimant, C, a 10-year-old boy, who was injured at a games centre where laser fights took place. Whilst participating in a laser fight game, C tripped on a ridge between 'pods' and smashed a toy gun against his teeth, which caused serious injuries to his mouth.

The game venue's structure was divided into pods to separate changes in level. Lighting was dim.

In the High Court, Mr Justice Turner upheld the decision at first instance. He found the interior of the game was so dark that it would take children a minute or so before their eyes became accustomed to the contrast, and that the council had issued no warning about the 'tripping points' or made them more visible by attaching fluorescent strips.

A health and safety script was read to children prior to the game. However, it contained no information about the tripping points. This was despite the fact that since 2014, several injuries following tripping accidents had occurred.

COMMENT

Risk assessments need to be continually updated to ensure lessons learned from previous incidents are applied and the risks identified mitigated. In addition, health and safety briefs to patrons need to encompass all known risks. It is worth noting that ten days after C's accident, another child tripped and required stitches to his lip. To prevent a claim in negligence, known risks must be eliminated or mitigated as far as possible. Here is a link to the full decision.

NEGLIGENCE

PERSONAL INJURY CLAIM FOLLOWING A MOTORBIKE ACCIDENT AT A PUBLIC EVENT DISMISSED

Clarke v Kerwin (T/A Dirtbikereaction), **24.04.2018, Carlisle County Court.**

The claimant, C, was a motorcyclist who suffered serious injuries at an all-terrain motorcycle event organised by the defendant, D.

The event C was injured in was a rally which comprised two laps of a forest, including public roads and forestry tracks. The rally was not a race between participants, and no prizes were awarded. There was a speed limit of 25mph at the instigation of the Forestry Commission for the protection of forest users.

When registering for the event, participants were given a leaflet which advised them to stick to the speed limit and gave notice of a morning briefing, which C did not attend.

C was an inexperienced rider and soon after the event began he went over the handlebars of his bike and suffered serious injuries to his spine and wrist.

He brought a claim against D alleging D had failed to carry out a proper inspection and risk assessment of the course, contrary to the Management of Health and Safety at Work Regulations 1999 reg.3, and that very dusty conditions had exacerbated the hazard. C stated that D should have foreseen that riders from one group were likely to overtake slower riders and that their forward visibility would be affected by the dust thrown up by the bikes ahead. C also stated the rider briefing was inadequate and should have been made mandatory for participants, and actions to enforce the speed limit were inadequate.

The court contended the real issue was the balance between the extent of the duty of care owed by the organiser of the event and the degree of risk that the participant had willingly accepted by taking part. If the cause of the accident was due to the risk participants freely accepted as part of attending such an event, no claim in negligence could be made.

Headcam footage attached to participants showed that the course presented riders with several natural hazards which they needed to avoid, including potholes and unevenness as well as drainage channels, gullies, ditches, boulders, and stacked logs. C admitted he was going too fast for the conditions. The accident occurred as he tried to overtake another rider at speed on a bend. Dust was found not to be a hazard, and if it was, it was because the rider was too close to another bike and should have slowed down.

The court also stated that the course had been inspected prior to the event, but it would be completely unrealistic to erect a warning sign near every potential hazard. These were an intrinsic part of the terrain and any rider exercising reasonable care would have realised that and would not have needed a warning to alert them to it. Although the speed limit was not enforced, D had no duty to enforce the speed limit and besides, non-enforcement was not a causative factor in the accident. C was wholly responsible for the cause of the accident, due to his excessive speed upon making the overtaking manoeuvre.

COMMENT

Organisers of events are often understandably nervous of having a claim brought against them for negligence and/or a health and safety breach. This case illustrates the courts will not absolve participants from taking responsibility for the risk they have accepted by taking part and for ensuring their own safety, provided adequate precautions and risk assessment has taken place.

NEGLIGENCE

HARROGATE COUNCIL PAYS £33,000 COMPENSATION AFTER CHILD KILLED BY UNSTABLE GRAVESTONE

Harrogate Council has paid £33,000 in an out-of-court settlement to the parents of a six-year-old boy who was killed when a tombstone fell on him. The child suffered fatal head injuries.

The boy's mother, who witnessed the tombstone being lifted off her son, has suffered from depression and post-traumatic stress disorder (PTSD).

The payment made by the local authority, who has not admitted liability, is mainly in recognition of the trauma suffered by the boy's mother.

Evidence obtained by solicitors working on the claim showed the council was aware of the potential dangers posed by old tombstones located in the cemetery.

NEGLIGENCE

RECORDER APPORTIONS RESPONSIBILITY BETWEEN A SHOPKEEPER AND MANUFACTURER AFTER CHILD SUFFERED INJURY FROM DRINKING CAUSTIC SODA

Faisal v Younis (T/A Safer Superstore) & Active Brands Concept Ltd, **10/005/2018, Queen's Bench Division**

The claimant, C, had gone into the first defendant's, D1's, store with his mother. He was two and a half years old and in a pushchair. Whilst in the store, C got hold of a bottle of caustic soda, opened the cap and poured some of the contents into his mouth. He suffered terrible chemical burn injuries, as did his mother, whilst attempting to help her child. The product was manufactured by the second defendant, D, and the bottle was defective: it required a child-resistant cap complying with ISO 8317; however, the cap it had did not comply and could easily be removed by a toddler. The labelling on the bottle contained a warning that the contents could cause severe burns and that the bottle should be kept out of the reach of children. D1 did not have the required licence to sell the product.

At first instance, the Recorder apportioned liability: two thirds to D2, one third to D1. He also ordered D1 should pay D2's cost of the contribution proceedings.

D1 appealed, arguing D2 should have been held 100% liable. In addition, as D2 had been required to contribute twice as much as he was, it should have been ordered to pay D1's costs.

The appeal was dismissed on the basis that it was based on an attempt to reopen the issues and invite the court to reach a different conclusion than that made by the Recorder. Such an action is impermissible.

The decision was made on its facts, in accordance with the correct legal principles. The Recorder had been entitled to conclude that, given the facts, the risk of injury was one which should have occurred to a reasonable shopkeeper, and that although what happened was an unlikely occurrence, the risk of exposure to the product was more than negligible.

With regards to costs, the Recorder was correct in stating D2 was successful in the contribution proceedings as they secured a ruling that D1 was liable, even though he denied all liability.

COMMENT

Liability may be apportioned in cases where there is more than a negligible risk of harm. This type of situation, although differing on facts, could occur in any facility owned and/or operated by local bodies. This case makes it clear that, when it comes to liability for defective products, the person or organisation that stocks dangerous products have a duty of care in addition to the one which applies to the manufacturer. A copy of the full case can be found here.

INSURANCE

CONSTRUCTION CONTRACT TERMS BETWEEN A CONTRACTOR AND A LOCAL AUTHORITY DID NOT IMPOSE AN OBLIGATION ON THE LOCAL AUTHORITY TO TAKE OUT LATENT DEFECTS INSURANCE.

Harrow London Borough Council v Engie Regeneration (Apollo) Ltd, **25.05.2018, Technology and Construction Court**

A local authority, who was the claimant, C, sought a declaration that it was not obliged to take out a latent defects insurance policy under several materially identical contracts entered into with the defendant, D, for the design and construction of a number of school expansions.

The works involved 18 schools in C's area. Following completion, numerous defects were discovered, and the cost of rectifying these was expected to exceed £8 million. A dispute regarding who was liable for the defects developed. D argued the contracts had obliged C to take out latent defects insurance and it should, therefore, look to the insurer to cover the cost of rectifying the defects. C had not taken out latent defects insurance and stated it was under no obligation to do so.

The school expansion project was delivered under a framework agreement, pursuant to which the parties entered into a separate partnering contract in relation to each school, on the terms of the ACA PPC 2000 (amended 2008) Standard Form of Contract for Project Partnering, as amended by the applicable Project Partnering Agreement, and a commencement agreement. Under the partnering terms, the hierarchy of priority of the documents was first the commencement agreement, then the partnering agreement and then the partnering terms. Clause 19.6 of the partnering terms provided "If so stated in the Commencement Agreement, Latent Defects insurance shall be taken out by the Partnering Team member stated in the Commencement Agreement, in the amount and for the risks and period stated in the Commencement Agreement". The relevant part of each commencement agreement provided in respect of cl.19.6 "if applicable (Note: The Client to confirm if relevant)" "Latent Defects Insurance by: As above".

C argued the commencement agreements did not certify latent defects insurance had to be taken out. The obligation to take out the insurance was conditional (as stated in the partnering terms) and D had not fulfilled those conditions. In addition, the commencement agreement did not state the amount of insurance, or the risk or period it would cover; therefore, if an obligation did exist, it was too uncertain to enforce.

The defendant relied on the fact that the references in the commencement agreement to environmental insurance and whole project insurance had been deleted, whereas the reference to latent defects insurance had been retained.

The TCC held that it was clear from the contractual terms that latent defects insurance was optional. Although the parties disputed what was referred to with the term "as above", even if it did refer to the client, it was for the client to confirm such insurance was applicable. The conditions required for an obligation to insure to arise had not been satisfied as they did not appear in the commencement agreement. It was not possible for "as above" to include the terms of the project, site or third-party property insurances because those were separate types of insurance. The court also agreed that without reference to the amount, risks, and period of cover, any obligation to take out latent defects insurance would be too uncertain to enforce. Therefore, judgment was found for C.

COMMENT

This case illustrates the complexity of construction contracts, especially for multiple site projects. Careful drafting, ensuring the absence of any ambiguity is essential. For an obligation to insure to arise, the conditions had to be stated within the commencement agreement. As this was not done, no requirement could arise.

POLICE

LEVEL OF CONTRIBUTORY NEGLIGENCE FOR POLICE OFFICER HIT BY CAR WHILE PARKED WAS 30%

McIntosh v Harman, **06.04.2018, Queen's Bench Division**

This case relates to a personal injury claim by the claimant, C, a police officer, against the defendant, D. D had driven head-on into a parked police car in which C was sitting in the driving seat. The incident occurred at night, and the road was semi-rural, unlit, and undulating. C had been searching for a missing elderly lady, when she pulled over to park on the opposite side of the road to speak to a group of people. In doing so, C was facing towards oncoming traffic and so turned off the vehicle's lights so to avoid dazzling drivers coming towards her. D, who was driving towards the police car, hit the vehicle head-on. On reviewing the police dashboard camera, it showed an undulation in the road approximately 120 metres away, which obscured D's car until much closer to the police car. C's contention was that police car was obviously visible, and there was sufficient time to stop or avoid it. D stated he recalled seeing headlights from an oncoming vehicle, dipping his headlights and slowing down in response. By the time D had noticed it was a stationary car, the crash was inevitable. D's main argument was that the police vehicle should have had blue lights, or hazard warning lights, and should not have parked where it did.

At court, it was held that D was liable. He had seen the headlights before clearing the brow of the hill, thinking they were headlights from an oncoming vehicle, but the judge did not accept this meant he should continue to believe this was still the case as he crested the brow. D should have anticipated there was a hazard in his path once he had cleared the brow of the hill. There was sufficient space to stop or avoid the police car but, in the event, D braked too late. Therefore, the judge held the cause of the accident was D not paying full attention or travelling too fast to react.

Regarding contributory negligence, it was deemed C had taken into consideration the necessary risks and acted appropriately by switching off the vehicle main beam to prevent dazzling of oncoming drivers. However, she was in error in also switching off the side lights. While the blue flashing lights were a matter for her discretion, it was considered that it may have been prudent to switch on the hazard lights, but it was accepted she thought the vehicle was adequately lit and she would only be away for a short duration. The level of contributory negligence was therefore set at 30% because C had acted in error by switching off the vehicle side-lights.

COMMENT

The judge in this case reemphasised the need for vigilance when driving. The fact D had the stationary vehicle's take down lights in his vision for approximately eight seconds before impact meant he was negligent in failing to heed that the lit object ahead was stationary and on his side of the road. Please click here for the full decision.

HEALTH & SAFETY

SOUTHERN CO-OPERATIVE LTD FINED £333,334 AFTER EMPLOYEE SUFFERED HORRIFIC LEG FRACTURES: HEALTH AND SAFETY POLICIES NOT COMMUNICATED NOR FOLLOWED BY STAFF

waiting for case name, **08.05.2018, Brighton Crown Court**

Southern Co-operative Ltd was handed a fine of £333,334 following a breach of s 2(1) of the Health and Safety at Work Act 1974. The fine was reduced from £500,000 to reflect the early guilty plea and mitigating factors.

The incident which led to the prosecution involved a female worker who suffered severe fractures to her leg when a broken roll cage loaded with milk cartons toppled.

Horsham District Council brought the case, after investigations found procedures which would have prevented the accident from occurring were theoretically in place, but were not known by the staff or, if they were known, followed. Staff had very little knowledge of health and safety, and it was discovered e-learning modules on the topic were completed on behalf of some staff by their senior colleagues.

COMMENT

The fine handed down to Southern Co-operative Ltd shows two things: firstly, health and safety compliance cannot be viewed as simply a check-box exercise; policies and procedures must be implemented, communicated and followed. Secondly, the courts appear committed to imposing significant fines for breaches of health and safety. Local authorities should take note of this as, unlike the private sector, high fines issued to public bodies can only be paid by either cutting services or raising taxes, neither of which are popular moves given the ruthless budget and service cuts already applied in some areas during austerity.

HEALTH & SAFETY

DAME HACKITT FINAL REPORT FOLLOWING GRENFELL FIRE TRAGEDY PUBLISHED

Independent Review of Building Regulations and Fire Safety: Final Report

Dame Judith Hackitt, former Chair of the Health and Safety Executive, has released her final independent report investigating building regulations following the Grenfell Tower fire which claimed the lives of 71 people.

According to Dame Hackitt, the final report confirms the findings of the interim report, published in December 2017 – that the regulatory system covering high-rise and complex buildings was not fit for purpose.

The key issues highlighted by the final report are:

- Regulations and guidance are not always read by or communicated to those who need to comply with it. In addition, regulations and guidance are often misread or misinterpreted.
- There are instances of organisations not prioritising safety when doing building work, in an effort to complete projects as quickly and cheaply as possible.
- A lack of clarity over who has ultimate compliance responsibility and fragmentation within the industry.
- Regulatory enforcement is often inadequate.

The report called for a total overhaul of the current regulatory and guidance system in England and Wales and for the establishment of 'joint competent authority' (JCA), comprising local authority building standards, fire rescue, and the Health and Safety Executive. A system of mandatory occurrence reporting to the JCA should then be established and a failure to report should be regarded as non-compliance and sanctions applied.

CIVIL PROCEDURE

DEFENDANT EMPLOYER ORDERED TO PAY 40% OF COSTS AFTER BEING FOUND VICARIOUSLY LIABLE FOR EMPLOYEE'S DATA BREACH.

Various Claimants v WM Morrison Supermarkets Plc, **16.05.2018, Queen's Bench Division**

You may remember this case from our winter edition. It concerned a serious data breach in which the personal details of 99,998 of the defendant company's, D's, employees appeared on a file-sharing website. The claimants had alleged D was directly liable for the data breach, and it was vicariously liable for the actions of the employee who had disclosed that data. Only the claim for vicarious liability succeeded.

On the issue of costs, the court ruled that most of the trial had been taken up with direct liability claims, which failed. If the trial had been confined to the claim of vicarious liability, the court estimated it would have taken less than half the time to conclude.

The Honourable Mr Justice Langstaff stated:

"The Claimants have had the indulgence of pursuing claims which were tenuous (to which the Defendant early on gave cogent answers), at unnecessary length, pursuing disclosure that was principally related to those claims. The Defendant should not in justice be required to pay for this, but rather be made subject to a costs order which reflects the fact that it succeeded in resisting those claims".

COMMENT

Justice Langstaff had regard to Parts 44(4) and (5) of the Civil Procedure Rules, in particular, Part 44(5)(b) which states when looking at the conduct of the parties, the court should consider whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue. He stated that at trial, *"the Claimants could have adopted a more focussed approach, concentrating on areas which might yield success, to the benefit of the trial as a whole and shortening the length of time taken, and should have done so"*. However, he did concede that this stance was not so clear at the pre-trial stage.

Since the Jackson reforms, ensuring costs are reasonable and controlled is an essential duty of all parties involved in a trial. This decision illustrates the financial penalty which can be incurred if issues or allegations which have little chance of success are pursued at trial stage. The full case can be viewed here

CIVIL PROCEDURE

DEFENDANT WHO GROSSLY AND FRAUDULENTLY EXAGGERATED THE ONGOING EFFECTS OF A MINOR INJURY WAS JAILED FOR THREE MONTHS FOR CONTEMPT OF COURT. NHS TRUST AWARDED £75,000 IN COSTS.

Calderdale and Huddersfield NHS Foundation Trust v Atwal, **01.06.2018, Queen's Bench Division**

The Calderdale and Huddersfield NHS Foundation Trust, C, applied to have the defendant, D, sent to prison after it was found he was in contempt of court. D had been a victim of assault in 2008 and was subjected to negative treatment for which he had a genuine claim for damages for moderate finger disability. However, D grossly and fraudulently exaggerated the long-term effects of these claims. C offered compensation of £30,000, but D claimed £837,000.

The fraud was uncovered in 2015 and proceedings for contempt of court were brought against D. D was not legally represented until 2018 when he accepted the findings of contempt. C brought an action for £82,000 for the cost of bringing the proceedings.

The Court held that although the amount for costs claimed was large; this was because proceedings had been prolonged for 18 months due to D refusing to engage and seek legal representation.

Had D made admissions at the outset, a great deal of time and expense would have been saved. Instead, C had to prepare the case at every stage to be able to prove each allegation, working on the assumption that D would not participate in the proceedings.

When examining whether the damages claimed by C were disproportionate, having regard to CPR r.44.3(5), the court considered the fact there had been a fraudulent attempt to claim damages of £837,000 when only £30,000 was justified. The case was complex and D's failure to engage considerably added to the amount of work required to bring proceedings. In addition, the proceedings were in the public interest as it concerned the possibility D would be imprisoned. Therefore, the costs claim was not disproportionate.

With regard to the charge of contempt of court, it was held D continually misrepresented the long-term effect the injury had on his life. He maintained that he was unable to drive, lift and pursue his career as a DJ and, as such, his earning capacity was seriously reduced. He also required a great deal of help in managing day-to-day tasks. D did admit these claims were misleading and inaccurate, but the admissions were made very late in the piece.

The fact the fraudulent admissions were made to try and extract money from the NHS, a taxpayer-funded institution, made the conduct even more serious.

The court stated that the public had to clearly understand that false claims undermined the administration of justice in several serious ways: insurers and other institutions had to spend a great deal of time and money identifying such claims; they damaged the system of adversarial justice which depended on openness, transparency and honesty; and they took up a great deal of court time and resources. Therefore, a prison sentence must be expected for those that chose to play the system in such a way. You can read the full text of the decision here.

COMMENT

Beleaguered local authorities will welcome this decision. The cost, stress and reputational damage caused by fraudulent and/or exaggerated claims is something local bodies have to deal with on a regular basis and it is vital they know they can claim the costs relating to fighting such claims. In addition, the court's decision to impose a custodial sentence will hopefully deter others from acting in a similar way.

CIVIL PROCEDURE

LIMITATION ACT 1980, SECTION 32 (1)(B) NOT APPLIED AS CLAIMANTS FAILED TO SHOW FCO HAD CONCEALED FACTS RELEVANT TO THEIR RIGHTS OF ACTION.

Kimathi & Ors v Foreign and Commonwealth Office, **24.05.2018, Queen's Bench Division**

The court was required to decide whether an exception to the limitation period, available under section 32 (1)(b) of the Limitation Act 1980, applied to the claimant's, C's, case.

C alleged the Foreign and Commonwealth Office, D, was vicariously liable for alleged assault, battery, false imprisonment, negligence, trespass to goods and conversion during the 1950s.

C accused D of deliberately destroying documents at the end of colonial rule to conceal relevant facts, and that it had hidden further documents at Hanslope Park in Buckinghamshire until 2011. C argued that until the Hanslope documents were disclosed, it had been impossible to assess the relevance of the destroyed documents. Therefore, time for bringing the action ran from 2011, meaning the claims, brought in 2013, were in time.

The court had to decide whether the actions were, prior to the 1980 Act's entry into force in 1980, barred under s.26. If so, nothing in the 1980 Act would lift the bar. If the claims were not barred before 1980, s.32 would be applied.

It was ruled that s. 32 was to be interpreted narrowly. New facts had to be relevant to the right of action: following *Johnson v Chief Constable of Surrey Times*, November 23, 1992, and *C v Mirror Group Newspapers* [1997] 1 W.L.R. 131, if a right of action was already complete, new facts would not be relevant to it. A prima facie case had already been made out for the allegations of assault, battery, and false imprisonment. Regarding negligence and joint or vicarious liability, C had always alleged the perpetrators were agents of D, and these claims could be pleaded without access to the concealed documents. Regarding trespass to goods and conversion, C had known since the 1950s the relevant facts on which a claim could be made against the primary perpetrator, and D had not concealed any fact relevant to its own liability.

The court concluded that prima facie cases could have been pleaded against all of the torts alleged at the time they occurred or shortly after. With regards to the concealed documents, the court held that before this action, D had been under no obligation to disclose the concealed documents and, upon examination of the Hanslope documents, it was concluded that no new cause of action could be brought based on the information contained in them. In addition, evidence showed there had been no deliberate concealment in the first place. The limitation clock could not be reset by the concealment alleged. Finally, there was no evidence documents had been deliberately destroyed, they could have simply gone missing.

Judgment was found for D. Click here to read the full judgment.

COMMENT

Many local authorities are facing historical negligence cases, especially surrounding historic child sex abuse. The courts have made clear the limitation period may be extended in such cases. However, this decision shows there is still an obligation to provide strong evidence to allow a time-barred claim. Evidence of concealment or destruction of information which could have led to an action being brought earlier must be substantial. In addition, it must be shown, on the balance of probabilities, such evidence would have led to a new cause of action, or led to a claim being made earlier for s.32 (1)(b) to apply.

CIVIL PROCEDURE

COURT OF APPEAL UPHELD SUMMARY JUDGMENT BEING GRANTED FOR THE RESPONDENTS ON THE BASIS THE APPELLANT'S CLAIM IN NEGLIGENCE AND BREACH OF CONTRACT WERE TIME-BARRED.

Morimoto v Clarksons Platou Futures Ltd and Anr, **16.05.2018, Court of Appeal**

The Appellant, A, had several companies which dealt in shipping. The Respondent, R, brokered a deal whereby the Appellant and his companies had agreed to sell freight forward agreements (FFA) to another company (L) in July 2008 and buy them back one month later at a higher price. After L had completed its part in the agreement, A failed to buy back the FFA position.

L brought a claim against A in 2011. A freezing order was granted after the court found L had an arguable case and A was personally liable for the breach of contract. The freezing order was upheld by the Court of Appeal in July 2012.

In November 2014, A was found personally liable for breach of contract and ordered to pay L damages.

A year later, A launched proceedings against R, alleging their negligence led to A being personally liable for not buying back the FFA at a higher price.

The respondents applied for summary judgment against A on the basis that his claims were time-barred under the Limitation Act 1980 s.2 and s.5 or, alternatively, if A tried to rely on s.14A in respect of his negligence claim, that he did have the knowledge required to bring an action for damages in July 2012; over three years before he issued the claim.

At first instance, the court found the causes of action in both contract and negligence had formed in July 2008, when A became bound by the FFA contract and incurred personal liability. Summary judgment was granted for R on the basis that A must have had the relevant knowledge at the latest by the time of the Court of Appeals judgment in July 2012.

The Court of Appeal upheld this decision. It stated that section 14A provided a special time limit for negligence claims where facts relevant to the cause of action were not known at the date of accrual. It could not assist with a claim for breach of contract. The court observed that a person's knowledge included knowledge which may reasonably be expected to be obtained from facts observable or ascertainable by them, or by their professional advisor. It needed to be more than a suspicion; knowledge would be present if there was enough information to result in it being reasonable to investigate further.

The court ruled that by July 2012, A knew the particulars of L's claim for breach of the FFA contract. A also knew the Court of Appeal considered L had a good enough case regarding A's personal liability to grant a freezing order (an action which is not taken lightly). Therefore, the judge at first instance was correct in ruling there was no real prospect of A establishing at trial he had only acquired knowledge less than three years before commencing proceedings in November 2015.

COMMENT

The fact that the Court of Appeal upheld this summary judgment should provide confidence to local bodies that s.14A does have a reasonably high threshold concerning what constitutes a lack of knowledge. Therefore, resources and money can be saved by having a decision on a matter being time-barred made in a summary judgment. You can read the full decision here.

DEFAMATION

NEWSPAPER REPORT ON CLAIMANTS' REJECTION OF SOCIAL HOUSING DID NOT CROSS THE LINE INTO DEFAMATION

Sube v News group Newspapers & Anr, **25.05.2018, Technology and Construction Court**

The claimants, C, a married couple, were provided local authority housing for themselves and their eight children. The father was studying at the time. C disputed the size of the house being offered and this was covered in a newspaper. The article referred to the fact C was on benefits, and had a very negative tone. The comments section below the article was rife with negative and abusive content with references to C's race.

C claimed damages and sought an injunction restraining further publication of the articles. They also sought to add claims on further articles and the comment posts relating to harassment, malicious falsehood, breaches of the Equality Act 2010 and/or breaches of duty under the Data Protection Act 1998.

In court, C argued the readers of the articles were guided by notorious events such as Brexit. This was considered highly speculative, and the court held that the social and political attitudes of the readers could not influence the ordinary meaning of words conveyed to a hypothetical ordinary reader. In addition, the comments made by readers could not be relied on as a source of serious reputational harm. The claimants' argument that by publishing inflammatory articles in the wake of the Brexit referendum, casting the claimants as foreign benefits scroungers, the defendants foreseeably provoked readers into racist and otherwise unpleasant comments, was misconceived as an argument under the Defamation Act 2013 s.1(1). The court commented that while characteristics of arrogant, greedy, unreasonable or abusive behaviour was undesirable, they were not the most important of societal norms and at no point did the article indicate C were dishonest or had claimed benefits for which they were not entitled.

The court also held the claim for malicious falsehood fell woefully short of requirements: C had to establish that an article was false, malicious and caused special damage or fell within a statutory exception to that requirement; none of these were adequately shown. The corporation could not be vicariously liable as no individual liability was present.

COMMENT

Although it has been claimed domestic and international political developments such as Brexit and the Trump presidency have altered attitudes towards certain groups in some sections of society, this case illustrates that defamation laws and thresholds remain constant, regardless of the political and socio-economic climate. It is for Parliament to expand or change defamation laws if the general feeling is they are not fit for modern times, rather than for the courts to expand their interpretation of the legislation. Click here to read the full case.

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