Happy New Year and welcome to the Winter 2019 edition of Court Circular.

Court Circular is our regular publication examining the latest relevant judgments and what they mean to you. Full judgments of some of the claims featured may be found at http://www.bailii.org/.

On behalf of all the team here at Zurich Municipal, I would like to extend compliments of the season to all our readers.

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

One of the most important decisions discussed in this issue is the ruling that a company can be vicariously liable for an employer’s breaching of data (Wm Morrisons Supermarket). In the area of employer’s liability, we discuss several decisions, including a ruling which held an employee can bring a claim against a fellow director for a dismissal related to whistleblowing (Timis), a company found vicariously liable for an MD’s assault on an employee at drinks following a Christmas party (Bellman), and the striking out of an improperly pleased personal injury claim (Wrightson).

Moving onto the area of civil liability, we look at a decision whereby a stay in proceedings was ruled to not count towards the time limit regarding the service of a claim form (Grant), a defendant was not entitled to the protection of qualified one-way cost shifting (Waring). In addition, a historical sexual abuse claim was forbidden to proceed due to limitation (Catholic Child Welfare Society). And the court ruled that summary judgment should not have been granted prior to expert evidence being obtained (Hewes). A claim designed to thwart enforcement of a judgment was struck-out (Century Finance), and finally, the Court of Appeal ruling that Cypriot law had to be considered in a historic personal injury case (Sophocleous).

We discuss a case regarding what constitutes harassment (Evans). In highways, we examine why Highways England was deemed to have acted unlawfully when it failed to include the option of a tunnel (preferred by the local authority) in a consultation (Sefton). Continuing in highways, failure to maintain a road in which a cyclist was injured was held not to be in breach of section 41 of the Highways Act 1980 (Hillard) and the decision to begin construction on a cycle highway in central London despite a local authority’s objections was deemed unlawful (Westminster).

Under Administrative Law, we examine a ruling which deemed a Solicitor’s request for information deemed manifestly unreasonable (Scott) and in health and safety, the High Court was not satisfied a deceased woman’s Mesothelioma resulted from exposure to asbestos in her workplace (Lawrence).

In negligence, we outline a case where a conviction for gross negligence manslaughter was upheld (Winterton) and one where a local authority was told it should have inspected a tree near a bus stop more regularly (Witley Parish Council).

Finally, we look at an award of damages for £1.25m awarded to an RTA victim (Newman).

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

Richard Shanks
Head of Claims Operations.

Richard Shanks
Contents

Employer’s Liability
Claim struck out after Claimant failed to take steps to obtain disclosure – *Wrightson v Flor Projects Ltd & ors*, 22.10.2018, Queen’s Bench Division .................................4
Employee can bring claim against co-worker for whistleblowing dismissal – *Timis & Sage v Osipov*, 19.10.2018, Court of Appeal ........................................ 5
Company found vicariously liable for Managing Director’s assault on employee – *Bellman (a protected party by his litigation friend) v Northampton Recruitment Ltd*, 11.10.2018, Court of Appeal ...... 5

Equality Act 2010
Courts will look at the culture of the workplace when ruling on what constitutes harassment – *Evans v Xactly Corporation*, 23.10.2018, Employment Appeal Tribunal................................. 6

Highways
Highways England did not act unlawfully when declining to include an option for a tunnel in consultation – *R (on the application of Sefton Metropolitan Borough Council) v Highways England*, 16.11.2018, Queen’s Bench ....................... 7
Local authority found not to have breached section 41 of the Highways Act 1980 by not maintaining highway – *Hilliard v Surrey County Council*, 16.10.2018, Queen’s Bench Division ........................................ 8
Decision to begin construction of cycle superhighway deemed unlawful – *R (on the application of the City of Westminster v Transport for London & Ors)*, 13.09.2018, Queen’s Bench ............................. 9

Trespass
Owner of land entitled to an interim injunction to restrain protestors – *Fitzwilliam Land Co & Ors v Cheeseman & Ors*, 16.11.2018, Queen’s Bench ............ 9

Data Protection
Parliament had not excluded by necessary implication the application of vicarious liability under the DPA or the common law/equitable causes of action – *Various Claimants v WM Morrison Supermarkets Plc*, 22.10.2018, Court of Appeal ........................................ 10

Civil Procedure
The period of a stay of proceedings did not count towards the time limit required for service of a claim form – *Grant v Dawn Meats (UK)*, 16.10.2018, Court of Appeal ................................................. 11
Defendant not entitled to the protection of qualified one-way costs shifting in relation to the costs of the claimant’s successful claim – *Waring v McDonnell*, 06.11.2018, County Court (Brighton) ....................... 12
Judge should not have used discretion under the Limitation Act 1980, section 33 to allow a claim for rape to proceed – *Various Claimants v The Catholic Child Welfare Society & Ors*, 23.10.2018, Court of Appeal ............................................. 13
Summary judgment should not have been granted prior to expert evidence being exchanged – *Barry Frederick Hewes v West Hertfordshire Hospitals NHS Trust (D1), East of England Ambulance Service NHS Trust (D2) and Dr Pankaj Tanna (D3)*, 18.10.2018, Queen’s Bench .................................................. 14
Claims designed to thwart enforcement of previous judgment of the Court struck-out – *Century Finance Holdings Ltd & Ors v Jamttof Trading Ltd & Anr*, 30.10.2018, Queen’s Bench Division ......................... 14

Negligence
Conviction for gross negligence manslaughter following labourer’s death upheld – *R v Winterton*, 06.11.2018, Court of Appeal ............................................. 17
Local authority should have inspected large tree next to highway every two years as opposed to every three – *Witley Parish Council v Cavanagh*, 11.10.2018, Court of Appeal ................................................. 18

Damages
Man receives £1,250,000 based on 50% contributory negligence for the multiple injuries, including to the spinal cord, he sustained in a road traffic accident – *Newman v Broker*, 18.09.2018, Out of Court Settlement .............................. 18

Administrative Law
Solicitor’s request for information from Parish Council manifestly unreasonable – *Scott v Information Commissioner & Kirby Muxloe Parish Council*, 10.10.2018, First-tier Tribunal (General Regulatory Chamber) .............................. 16
Court not satisfied Claimant’s wife’s Mesothelioma resulted from asbestos exposure during the refurbishment of her workplace in the 1990s – *Lawrence v Bexley London Borough Council*, 16.11.2018, Queen’s Bench Division .............................. 16

Health and Safety
Court not satisfied Claimant’s wife’s Mesothelioma resulted from asbestos exposure during the refurbishment of her workplace in the 1990s – *Lawrence v Bexley London Borough Council*, 16.11.2018, Queen’s Bench Division .............................. 16
In 2012, the Claimant, C, was working as a helicopter pilot in Guinea. A bottle of bleach had been left on his desk in an unmarked container by a company cleaner. C drank from the bottle and suffered internal injuries.

C issued claims against multiple defendants in 2012 but gradually dropped all actions bar three. He alleged that the first defendant (D1) had owned and operated the mine complex, that the second defendant (D2) had provided services at the site, and that the third defendant (D3) had provided cleaning services.

D3 never responded to the claim, so a default judgment was issued against it. At a Case Management Conference in 2018, the Master was not satisfied with the claims made against D1 and D2. This led to the claim being stayed until amendments were made to the particulars of the claim and directions sought, or D1 and/or D2 applied for a strike-out.

C’s draft amended proceedings failed to state where in the complex the incident leading to the injury took place and hinted that the precise contractual relationship between the defendants was unknown. It was alleged that D1 and D2 were occupiers of the premises, but it was not clear which parts of the large complex either occupied. The pleadings also alleged that C had been employed by D1 and D2, although that was contrary to his previous assertions that he had been employed by a defendant against whom the claim had been discontinued. In addition, although there was an allegation of vicarious liability against D3, this was not alleged against D1 and D2. Instead, C argued they had been responsible for a system of work which had led to the bleach being left in an unmarked bottle on the desk.

D1 and D2 submitted that the statement of case revealed no reasonable grounds for finding them liable. Both denied being C’s employer and argued that the particulars of employment should have been pleaded. The claims against D1 and D2 were struck out. While it appeared that C believed that D1 and D2 were liable, various matters had not been set out in the pleadings, including the basis of the alleged occupation of the complex, how they were liable for a system of work, and how that system had been inadequate. C accepted the cleaner worked for D3 and the general principle was that occupiers do not owe a duty of care to independent contractors, except under certain circumstances. None of these circumstances had been specified. C had also not obtained the disclosure necessary to outline the contractual relationship between the parties. He had also failed to comply with the Master’s order to apply for directions. The amended pleadings made a bare assertion about matters of occupancy and employment which did not help D1 and D2 to understand the case. C had had ample opportunity to amend the pleadings and seek directions and disclosure in the six years since the accident. It was not reasonable to expect D1 and D2 to investigate the incident after that length of time.

**Comment**

Striking out a case is a draconian move that is only used by the Courts as a last resort. This case illustrates the importance of properly prepared pleadings and complying with court directions.
The Court of Appeal confirmed the Employment Appeal Tribunal (EAT) judgment that an employee may bring a claim against a fellow worker for whistleblowing detriment under the Employment Rights Act 1996, s 47B where the detriment is a dismissal.

The Respondent, R, was CEO of International Petroleum Ltd ('IPL') until he was fired in 2014 after blowing the whistle about misconduct in relation to contracts in the Republic of Niger. He claimed Mr Timis (a non-executive director and majority shareholder) and Mr Sage (Chairman and also a non-executive director) had subjected him to the detriment of dismissal. IPL became insolvent; therefore R had to prove Mr Timis and Mr Sage were personally liable for his dismissal. Both carried directors’ insurance.

The EAT held there was no reason an employee could not bring a claim against fellow employees for a whistleblowing detriment amounting to dismissal, and for the fellow employees to pay compensation, which could be subject to an uplift for failure to follow the statutory code.

The two directors appealed on the grounds that s 47B (2) of the Employment Rights Act 1996 (which taken at face value excludes detriment claims where the detriment is a dismissal) meant they could not be liable for R’s dismissal or the losses which flowed from it.

The Court of Appeal disagreed, stating that reading s 47B (2) as not allowing a claim against a co-worker for detriment amounting to dismissal could not have been Parliament’s intention as it would produce an unsatisfactory result. Any anomalies between the protections under Part V and Part X of the Employment Rights Act 1996 – namely, availability of damages for injury to feelings and a looser causation test in the detriment provisions (s64 and s72-73) were viewed by the Court to be negligible. This is because Claimants would continue to pursue employers for automatically unfair dismissal claims wherever possible because additional remedies such as re-employment orders are only available under Part X.

Comment

In practice, this ruling provides an alternative to employees who have suffered detriment or dismissal due to whistleblowing in situations where the business they work/ed for becomes insolvent. If the whistleblowing employee has the funds to pay an award, a claim can be brought against them.

You can read the full text of the case here.
COMPANY FOUND VICARIOUSLY LIABLE FOR MANAGING DIRECTOR’S ASSAULT ON EMPLOYEE

Bellman (a protected party by his litigation friend) v Northampton Recruitment Ltd, 11.10.2018, Court of Appeal

The defendant company, D, had three directors. One of these directors was the Managing Director, MD, who was the directing mind of D and had a large scope to act on its behalf.

The incident in question occurred in the early hours of the morning following a Christmas party when the MD was lecturing a group of employees in a hotel lobby. The Claimant, C, was part of the group. Following an escalating argument, C was physically attacked by the MD and suffered a brain injury. This left C severely disabled.

At first instance, it was held D was not vicariously liable for MDs actions. However, the Court of Appeal, when looking at the context of the events which led to the assault, reversed this finding. It held the MD was giving a lecture to the employees on issues regarding work. On objective analysis, he was purporting to exercise his authority over the employees’ present. And although the drinking session in the lobby did not seamlessly follow on from the party, MD was not merely a fellow reveller. He was present as Managing Director of the Defendant, a relatively small company, and misused that position. Therefore, the company was vicariously liable for MD’s actions.

Comment

It should be noted that this case turns on its facts and should not be taken as authority for a position that companies automatically become vicariously liable for the violent acts of their employees. However, employers should be aware that vicarious liability may arise where the perpetrator of the assault occupies a dominant position and has a supervisory role in the organisation. Liability can also occur outside office hours or when the parties were off-duty, particularly if the perpetrator is in a senior position.

To read the full decision, please click here.

EQUALITY ACT 2010

COURTS WILL LOOK AT THE CULTURE OF THE WORKPLACE WHEN RULING ON WHAT CONSTITUTES HARASSMENT

Evans v Xactly Corporation, 23.10.2018, Employment Appeal Tribunal

The Claimant, C, brought proceedings against his former employer, D, after being dismissed from his role as a sales representative. The case was centred around several breaches of the Equality Act 2010 relating to race and disability, whereby the Claimant was called a ‘fat ginger pikey’, a ‘salad dodger’, ‘fat Yoda’ and ‘Gimli’. C argued that because he was associated with the travelling community, the references made were grounds for a race complaint. Also, his Type 1 diabetes was reasoned to mean C was disabled.

The Equality Act 2010 s26 deems that a person has been harassed if there is evidence of ‘unwanted conduct related to a relevant protected characteristic’ which has the effect of violating their dignity or ‘creating an intimidating, hostile, degrading, humiliating or offensive environment’. The protected characteristics being age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation.

The Employment Appeal Tribunal (EAT) held the comment ‘fat ginger pikey’ was a “derogatory, demeaning, unpleasant and a potentially discriminatory and harassing comment to make”. However, the Tribunal stated it was important to consider the overall relationship and behaviour of those concerns as a context for the comments made and whether they constituted harassment. Taking into account the context, it was concluded the comments did not constitute harassment because C “was such an active participant of the culture of banter”, and the remarks were not intended to violate the man’s dignity or create an intimidating work environment.

Comment

This decision highlights that the Tribunal is prepared to consider the culture, relationships, and overall context of comments which at face value would normally be classified as harassment. For employers, the fact the Tribunal acknowledged the culture within the workplace plays a part in determining how people speak to one another, may provide a valid defence when facing a claim of harassment. Therefore, potential Claimants, who readily engage in such banter, may struggle to satisfy the Tribunal they were in fact harassed.

To read the full text of the decision, please click here.
HIGHWAYS ENGLAND DID NOT ACT UNLAWFULLY WHEN DECLINING TO INCLUDE AN OPTION FOR A TUNNEL IN CONSULTATION

R (on the application of Sefton Metropolitan Borough Council) v Highways England, 16.11.2018, Queen’s Bench

A local authority sought Judicial Review of a consultation undertaken by Highways England regarding options for a new link road.

The defendant, D, undertook consultation to consider possible options for a new link road to improve access to the Port of Liverpool which was undergoing a major expansion. The consultation excluded the option of building a tunnel under a country park on the grounds such a solution would be too expensive and not provide value for money to the taxpayer. The Claimant, C, argued that the tunnel option was affordable and realistic. It also stated D’s preferred option, which was to build a dual carriageway through the park would cause environmental damage.

The Court held that D was required to exercise its functions in the public interest. Therefore, its position differed from that of a private developer. D was required to build and maintain the road network with public money, stick to a budget, and take guidance from the Secretary of State. Although it was required to engage with local authorities, there was no strict formula on how this should be conducted. D was not obliged to consult widely or in detail, although, on major infrastructure projects, it would be prudent to do so.

In this case, the Court held D had informed all interested parties and provided reasons for its proposed decisions, including why constructing a tunnel was not a viable option. An argument in favour of a tunnel would be considered but not accepted unless there was a substantial increase in the budget. D was entitled to limit the scope of the consultation in the way it did. There was no obligation to consult on the tunnel option on an equal footing with alternatives and D did not have to spend time and public money on a detailed examination.

The Court also ruled that excluding the tunnel option was not unfair. C argued D had promised in a newsletter to include ‘consultation’ on dismissed options; however, the Court held the wording in the newsletter did not elevate the discounted options to that of an equal footing with the serious contenders. In addition, no legitimate expectation was created.

Deciding that the tunnel option was too expensive and excluding it was not unfair – fairness did not require time and public money to be spent on a suggestion which was well outside of the budget. The balance between cost and environmental protection was a matter for the executive and would be discussed when the Development Consent Order was applied for.

Comment

This was the first Judicial Review of Highways England. It has served to clarify on the extent of the organisation’s duty to consult and co-operate with interested/affected parties. The judgment also allows the project, which is important economically for the area, to proceed.
LOCAL AUTHORITY FOUND NOT TO HAVE BREACHED SECTION 41 OF THE HIGHWAYS ACT 1980 AFTER CYCLIST INJURED

Hilliard v Surrey County Council, 16.10.2018, Queen’s Bench Division

The Defendant, D, was appealing a District Judge’s decision that he breached section 41 of the Highway’s Act 1980 and therefore was liable for damages.

The Claimant, C, had taken part in a 100-mile closed-road cycle event. There were 16,000 cyclists participating and they occupied the entire road. Section 41 of the Highways Act 1980 required D to maintain the highway at public expense. C hit a depression of around 30mm which was located on the carriageway, fell off his cycle and suffered an injury.

The organiser of the race had carried out a pre-race inspection and reported defects to D. Any defects over 40mm were to be repaired; those with less depth were to be monitored. D had also issued Thames Water with a notice under the New Roads and Street Works Act 1991, section 81. In addition, Thames Water had commissioned an inspection of the highway, which referred to “trip hazards”. The depression which caused C’s accident was identified as such. A further inspection was carried out by the race organisers in which the 30mm depression was not mentioned. Evidence showed that at the time C suffered the accident, 12,400 cyclists had passed the defect safely. The Judge at first instance held the highway was dangerous and D failed in its duty to maintain the road. C was awarded £38,000 in damages.

D appealed on the grounds that: 1) the judge at first instance applied the wrong legal test; 2) the fact 12,600 riders passed the defect without incident was not evaluated; and 3) placed undue weight on the Thames Water report which had been commissioned for a different purpose.

The Court discussed the legal test. Rider v Rider [1973] Q.B. 505 stated the question was whether there was a chance that someone would be injured, or whether that chance was so remote that the risk should be dismissed. This had not been overruled; however, the law had developed since the decision. James v Preseli Pembrokeshire DC [1992] 10 WLUK 343 held that the defect in the highway had to present the sort of danger which an authority might reasonably be expected to guard against. Jones v Rhondda Cynon Taff CBC [2008] EWCA Civ 1497 stated the highway had to be maintained so that it was reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition. This was deemed to be the correct approach and set out in the judgment at first instance. All authorities had been carefully considered and attention had been paid to the fact it was not permissible to impose an unreasonably high standard on a local authority, and there had to be a reasonable balance between public and private interest.

However, the order was set aside by the appeal court on the grounds that the fact the depression had been passed over by 12,600 cyclists without any problems provided overwhelming evidence that section 41 had been complied with.

Comment

This case clarifies the correct legal test regarding a breach of section 41 is Jones v Rhondda Cynon Taff CBC. Rider v Rider, although still good law, was not the test to determine whether a defect in a highway was dangerous.
A Judicial Review of the Defendant, D’s, decision to begin construction of a cycle route was sought by the Claimant, C, a local authority.

As part of the Mayor of London’s transport strategy, a cycle route was proposed to run on the roads between Swiss Cottage and Portland Place in central London. Two sections of the route were on roads for which C was responsible (acting as both highway authority and traffic authority). C had to approve to those parts of the route. C stated that although it approved the scheme in principle, it had serious concerns regarding the debenefits of the scheme and the mitigation of those debenefits. Until these were addressed, C’s stance was not to approve the route.

D subsequently published a report entitled CS11 Authority Request in March 2018 and a decision was made to begin building the route.

C told the Court that D’s decision to begin construction was wrong because it had not taken into account the fact C had not agreed to parts of the scheme. Therefore, these were addressed, C’s stance was not to approve the route.

In the instant case the Authority Request contained nothing to suggest that any thought was given in implementation of the strategy under the Greater London Act 1999 to the risk of TfL failing to obtain the necessary consents from D. In giving his decision, Sir Ross Cranston stated: “The risk that the local authorities might be slow in granting consents was mentioned, but not that there might be a complete refusal to do so. Westminster’s opposition is absent from the document, as is its position that satisfactory modelling and mitigation measures were a prerequisite”.

Comment

The decision highlighted flaws in Transport for London’s (TfL) due diligence process. Westminster stated that the proposals need to be assessed in more detail and TfL must consider the effects of the entire route before an informed decision can be made.

“As a result, we’re happy with the judge’s decision and call on TfL to work collaboratively with us and other stakeholders to ensure all impacts of CS11 and similar projects are fully assessed for the benefit of everyone, including residents, before they go ahead”, the local authority stated in a press release.

Comment

Local authorities will welcome this decision as it clearly illustrates that the Courts will grant an interim injunction where there is a real and imminent risk to trespass and injury to property and people.

You can read the full judgment here.
MORRISON’S SUPERMARKET VICARIOUSLY LIABLE FOR DATA BREACH

Various Claimants v WM Morrison Supermarkets Plc, 22.10.2018, Court of Appeal

The ongoing saga relating to Morrison Supermarket’s data breach continues. It concerned a serious data breach in which the personal details of 99,998 of the defendant company, D’s, employees appeared on a file-sharing website. The breach was executed by a disgruntled employee, S. 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. The judge found that the employer had not directly misused or permitted the misuse of any personal information and was therefore not primarily liable in that respect. He also dismissed the claim under the Data Protection Act 1998, s.4(4). However, he held that there was sufficient connection between the position in which S was employed and his wrongful conduct to justify holding the employer vicariously liable.

D argued that the Data Protection Act 1998 excluded the application of vicarious liability.

The Court of Appeal disagreed. It held that if it had been Parliament’s intention to exclude vicarious liability, which is a substantial common law and equitable right, it would have expressly done so. Justice Langstaff stated:

“the concession that the causes of action for misuse of private information and breach of confidentiality are not excluded by the DPA in respect of the wrongful processing of data within the ambit of the DPA, and the complete absence of any provision of the DPA addressing the situation of an employer where an employee data controller breaches the requirements of the DPA, lead inevitably to the conclusion that the Judge was correct to hold that the common law remedy of vicarious liability of the employer in such circumstances (if the common law requirements are otherwise satisfied) was not expressly or impliedly excluded by the DPA”.

Comment

This judgment should be of concern to all employers as it means they are significantly exposed to potential claims from the victims of a data breach caused by a rogue employee in cases where the employer in question was the data controller. This applies even in cases where the disgruntled employee’s sole aim was to injure the employer and the employer was not itself in breach of data protection laws.

Although Morrisons was denied leave to appeal by the Court of Appeal, it is believed the company intends to seek leave to appeal from the Supreme Court. We will update you on the case if it goes further. Click here for a full text of the judgment.
THE PERIOD OF A STAY OF PROCEEDINGS DID NOT COUNT TOWARDS THE TIME LIMIT REQUIRED FOR SERVICE OF A CLAIM FORM

Grant v Dawn Meats (UK), 16.10.2018, Court of Appeal

This case involves an appeal by an employee who argued his claim form had been served ‘within time’.

The Appellant, A, brought a claim under the Pre-Action Protocol for Low-Value Personal Injury (Employers Liability and Public Liability) Claims for injuries sustained at work in October 2013. The respondent admitted liability, but the parties were unable to agree on quantum. Worried about limitation, A issued a claim under Part 8 of the Civil procedure Rules (CPR) on 24 June 2016. Because medical evidence needed to be obtained, a stay of proceedings was also applied for and granted until 7 October 2016 and extended until 30 November 2016.

A served the claim form on the Respondent, R, on 6 March 2017.

R applied for a declaration that the claim form had been served out of time, stating the stay did not affect the obligation to serve the claim form within four months of its issue.

At first instance, the Court held the claim had been served on time. This was overturned on appeal. The Court of Appeal stated the stay halted proceedings and no action by either party to the claim was required or permitted during the period of the stay.

The stay expired on 30 November 2016. It had been in operation since 7 July, which was 13 days after the proceedings had been issued. Applying the usual principles relating to a stay, the employee had four months, less 13 days, from November 30 in which to serve the claim form. Accordingly, service had to be affected on or before 17 March 2017. On that basis, the employee had served the claim form in time.

That conventional analysis could only be wrong if there was a reason to treat service of the claim form as different to any other procedural step, such as service of the particulars of claim.

R tried to argue the service of the claim form stood alone, regardless of the stay. The Court of Appeal held this was contrary to the CPR and interpreting the rules this way would lead to consequences which would not have been intended. In addition, there was nothing in the CPR to justify distinguishing between the service of the claim form on the one hand and any other procedural step, such as service of the particulars of claim.

Comment

The Court held that any other interpretation other than the one they provided would introduce an unnecessary level of complexity into what should be a straightforward situation. This ruling would seem to follow the trend of the last five years since the implementation of the Jackson Rules, that the litigation procedure should be made simpler, not more complicated. The Disclosure Pilot Scheme, which will launch in the Business and Property Courts in January 2019, supports this observation.

Read the full judgment here.
The Court was required to decide whether the qualified one-way costs shifting (QOCS) regime applied to a defendant who brought a counterclaim for damages for personal injury following a cycling collision.

The Claimant, C, and the Defendant, D, had been cycling in opposite directions when they collided head-on. They were both injured and pursued personal injury claims. C was successful, and D's counter-claim was dismissed.

D argued that under *Ketchion v McEwan* [2018] 6 WLUK 625, he was protected by QOCS under CPR r.44.13, thus any cost order made against him was unenforceable.

C stated that *Ketchion* was wrongly decided and not binding.

The Court stated the purpose of the QOCS scheme was to protect victims of personal injury from the risk of adverse cost orders obtained by insured or well-funded defendants. The scheme was not designed to protect those who were ordered to pay damages to an injured party from an adverse costs order made against them in their capacity as a defendant or liable party.

If this approach was taken, it would lead to several undesirable consequences, including: a) insurers of defendants in RTAs would be incentivised to encourage counter-claims for personal injury. Even if the counter-claim was weak and unsuccessful, there would be no liability for costs; b) Claimants in RTA claims (in cases where a counter-claim was highly likely) would be significantly worse off than claimants in other personal injury cases such as work accidents and public liability claims, as counter-claims for these types of cases were rare; c) Solicitors would be unlikely to continue to act for claimants once a counter-claim had been issued as cost recovery would be unlikely and this would reduce access to justice; d) the Part 36 regime would be rendered ineffective as costs recovery would be limited to the amount of damages recovered in the counterclaim (if any); e) liability insurers would not only avoid having to pay ATE premiums and success fees under CFAs, they would, in many cases, not have to pay any costs to a successful claimant at all.

In this case, D was not protected by the QOCS scheme when he brought the counter-claim: in his capacity as a defendant, he was not making a claim for damages for personal injury. In the context of r.44.13 and its application to the instant case, applying *Howe v Motor Insurers’ Bureau (Costs)* [2017] 7 WLUK 84 and *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23 the word “proceedings” was synonymous with “a claim”. Therefore, D was not an unsuccessful claimant in C’s claim for damages (he was not a claimant at all), he was an unsuccessful defendant (and an unsuccessful claimant in his counterclaim for damages for personal injury). The QOCS regime only protected D in respect of his claim for damages for personal injury. D obtained no benefit in relation to C’s personal injury claim.

**Comment**

If the consequences listed above were meant to flow from the CPR, then they would have been set out within the rules themselves. *Ketchion* was not followed because the judge wrongly described a multi-defendant personal injury claim as a single set of proceedings, comprising of multiple claims. A personal injury claim brought against multiple defendants is a single claim in a single set of proceedings. In this case, it was interpreted that a counterclaim (for personal injury or otherwise) is separate from a claimant’s personal injury claim and therefore constitutes separate proceedings.

At present, there is conflict at County Court level over whether Part 20 claimants can rely on QOCS protection in personal injury claims and legal professionals will eagerly await a binding decision on the matter.

The full decision can be accessed here.
JUDGE SHOULD NOT HAVE USED DISCRETION UNDER THE LIMITATION ACT 1980, SECTION 33 TO ALLOW A CLAIM FOR RAPE, WHICH HAD OCCURRED 24 YEARS EARLIER TO PROCEED

Various Claimants v The Catholic Child Welfare Society & Ors, 23.10.2018, Court of Appeal

The Respondent, R, was part of a group litigation which had begun proceedings against the Appellant, A, a residential children’s home, in 2006. His claim was based on physical abuse by staff; however, in 2014, he claimed to have been raped by a member of staff. The staff member was convicted in 2015 of serious sexual offences against pupils at the home, but R was not one of them. The judge had exercised his discretion under the Limitation Act 1980 s.33 to disapply the limitation period under s.11 in respect of the rape claim.

A appealed.

The Court of Appeal stated that limitation was designed to protect defendants from stale claims and protect society. Delay in bringing a claim would not in itself preclude disapplication; it was the prejudice to the defendant which must be considered. The loss and quality of evidence also mattered. The focus should be on how the delay would affect the defendant’s ability to defend a claim. In this case, A could not have known R planned to instigate a rape claim eight years after issuing proceedings. A had a duty to set out their full claim at the earliest opportunity.

At first instance, the judge considered the effect of the delay in issuing proceedings starting from the expiry of the limitation period under section 28, namely three years after R attained his majority. However, section 28 did not purport to amend section11. Rather, section 28(1) recognised the finish of the limitation period but permitted an action to be brought, effectively providing for a parallel limitation period. That tied in with s.33(3)(b), which s.28 does not mention. Therefore, the strength of the evidence had to be assessed under section 33(3) by comparing it with what it would have been if brought within the time allowed by section 11, not section 28.

The time allowed by section 28 was when the relevant period of delay began. However, as the Court was required to consider “all the circumstances of the case”, the delay since the accrual of the cause of action had to be considered.

The Court of Appeal held the judge had erred several times when exercising his discretion, especially around matters concerning the cogency of R’s evidence and the prejudice against A due to not being able to call R’s key workers. The judge accepted R’s explanation that he was too embarrassed and ashamed to speak up earlier but did not adduce whether this was reasonable. He also stated that a fair trial could take place when this was far from certain.

The appeal was allowed in part on the grounds that, after 24 years’ delay, R’s claim was stale. R had been receiving legal advice for almost a decade but still delayed in making the claim. A had lost touch with many key witnesses, and this resulted in a real danger of them not being able to defend the claim. In addition, R’s claim was unexpected, uncorroborated, and contradicted his previous statements.

Comment

Claims of historical sexual abuse are among the most distressing to come before the courts. It is well established that some victims take years to develop the courage to speak out. However, this case illustrates that, although the law can be sympathetic to the plight of alleged victims, the right to a fair trial forms one of the foundations of the Rule of Law. The Limitation Act 1980 is there to protect defendants from the risk of a claim which would be difficult to defend due to the passing of time. The Court’s discretion should, therefore, be used sparingly and cautiously.

Click here to read the full decision.
MASTER WAS MISTAKEN TO GRANT SUMMARY JUDGMENT PRIOR TO EXPERT EVIDENCE BEING EXCHANGED

Barry Frederick Hewes v West Hertfordshire Hospitals NHS Trust (D1), East of England Ambulance Service NHS Trust (D2) and Dr Pankaj Tanna (D3), 18.10.2018, Queen’s Bench

The Appellant, A, appealed against a Master’s judgement granting the third Respondent, D3, summary judgment.

A developed symptoms of cauda equina syndrome (CES). He alleged that a delay in surgery caused permanent bowel and bladder dysfunction.

A brought claims against the first respondent NHS trust, the second respondent ambulance service, and the doctor, alleging that each had contributed to an unreasonable delay in performance of the surgery. Regarding D3, A argued that following a conversation, the hospital should have been contacted immediately, allowing the orthopaedic team to prioritise assessment and move A quickly to surgery.

At a case management conference, the Master gave directions, including for the exchange of experts’ reports by 3 July 2018. On 28 February 2018, D3 applied for summary judgment, stating A had no reasonable grounds for bringing the claim against him. D3 included an expert’s report which concluded no responsible GP would have contacted the hospital to expedite assessment.

Summary judgment was granted on the basis the Master felt A had plenty of time to produce an expert report.

On appeal, it was held there were few cases in which an application for a summary judgment could be considered before expert reports had been exchanged. The Master’s view that A’s expert evidence at trial would not be a sufficient response to the doctor’s expert’s view and that, accordingly, A would not be able to establish his case against the doctor, was unjustified. Although it was correct that A had plenty of time to obtain an expert’s view, it was crucial that at the Master’s hearing, the expert’s view had not been articulated and was not required until 3 July.

The full text of the decision can be found here.

CLAIMS DESIGNED TO THwart ENFORCEMENT OF PREVIOUS JUDGMENT OF THE COURT STRUCK-OUT

Century Finance Holdings Ltd & Anr v Jamtoff Trading Ltd & Anr, 30.10.2018, Queen’s Bench Division

This case originated from a breach of contract concerning the sale of chemicals. The first Defendant, D1, made a delivery of chemicals to the purchaser but had not been paid under two letters of credit issued by the claimant company, C1. D1 subsequently brought proceedings and it was held it had been a victim of fraud by the buyer’s commercial manager, M, and D1 and its controller, S. Damages were awarded in which the defendants were jointly and severally liable, on the basis they all collaborated to commit the fraud.

Permission to appeal was refused by the Court of Appeal.

Arguing that new evidence had become available, C1 brought two claims: 1) to set aside the Judge’s order; and 2) a delivery up of the bills of lading for the second consignment of chemicals or for damages for conversion. C1 stated the new evidence showed the Judge had been misled by P’s fraud in concluding all parties had been in the fraud together.

D1 applied to have the proceedings struck out and was successful. The Court stated the evidence showing the trial Judge had been misled was misconceived. Even if the evidence was new and true, it would not undermine the misrepresentations on which the judgment relied or the fact that D1 had relied on them. Therefore, the claim to set aside the judgment was struck out on the grounds it had no real chance of success. In addition, it was seen as an abuse of process as it was deliberately designed to circumvent the refusal of leave to appeal and thwart execution of the judgment.

The claim regarding the delivery up of the bills of lading was also struck out on the grounds that all the information required for the claim to be pursued was known previously and should have been raised at the initial proceedings.

Comment

The striking out of this claim clearly puts on notice that claimants attempting to thwart a rejected leave for appeal by bringing a new claim that has little or no merit will see that claim struck out. To avoid the wasted cost of legal fees, careful thought should be given to whether such a claim is in the organisation’s overall best interests, as such an action not only has a negative financial impact, it can also cause serious reputational damage.
ENGLISH LAW ALONE DID NOT GOVERN PERSONAL INJURY CLAIMS BROUGHT BY 34 DEFENDANTS SEEKING DAMAGES FOR INJURIES SUSTAINED IN CYPRUS

Sophocleous & Ors v (1) Secretary of State for Foreign and Commonwealth Affairs & (2) Secretary of State for Defence, 09.10.2018, Court of Appeal

The Claimants, C, brought claims for personal injury stemming from assaults received during the Cyprus Emergency from 1956-58. The assaults were alleged to be perpetrated by security forces who were made up of British armed forces, seconded police officers, and servants or agents of the Colonial Administration, including the Cyprus Police Force. The Defendants, D, were alleged to be jointly and/or severally liable with the Colonial Administration for the acts of assault and/or failing to prevent the assaults.

A preliminary question for the Court’s was one of limitation. Under Cyprus law, a two-year, non-extendable limitation period applied, therefore, if the Cyprus jurisdiction applied, the case would be time-barred.

At first instance, the Judge acknowledged that as the incidents had occurred in Cyprus, the double actionability rule applied. However, he then applied the flexible exception rule in Boys v Chaplin [1971] A.C. 356 grounds including: it was fair to judge the D by reference to the “superior” law of England and Wales which had made the Cyprus law rather than by reference to the “inferior” local law of Cyprus; Cyprus had no interest in the application of its law to the issues in the case (fifth reason); and English law was well suited to determine the issues because it had refined and sophisticated reasoning techniques (sixth reason).

D argued that it was wrong to completely dismiss Cyprus law.

The Court of Appeal deemed that it was not appropriate to label Cyprus law as ‘inferior’ and the law of England and Wales as ‘superior’. Each law had full effect in its own country. It was also incorrect to say that Cyprus law was made by English law, without stating the laws were formed by the Queen in Counsel in her right of position as sovereign of Cyprus. There was no difference between the law of Cyprus and that of France or America when it came to the principle of double actionability.

When applying the flexible exception, consideration had to be given as to whether the foreign State had an interest in applying its own law. Given that the alleged assaults occurred in Cyprus and perpetrated by members of the Cypriot Administration and/or Cypriots, it was wrong to assume Cyprus would have no interest in having its own law applied to the case. The rationale behind the double actionability rule was it would not be right to impose liability on defendants in cases where there would be no such liability in the country the alleged action was committed. The Court of Appeal held that the six reasons given by the Judge at first instance did not amount to “clear and satisfying grounds” as required by Boys. Both the law of Cyprus and England and Wales applied, and the Judge’s original decision was set aside.

Comment

The Court of Appeal warned that if the exception laid out in Boys was applied too often, there was a danger of it becoming a rule, giving primacy to English law, rather than to the country in which the alleged action was committed.

Click here to read the full judgment.
SOLICITOR’S REQUEST FOR INFORMATION FROM A PARISH COUNCIL MANIFESTLY UNREASONABLE

Scott v Information Commissioner & Kirby Muxloe Parish Council, 10.10.2018, First-tier Tribunal (General Regulatory Chamber)

The Appellant, A, a Solicitor, had requested copies of surveyor’s reports concerning leases of a recreational ground. The request was refused by the parish council, D2, on the grounds that it was “manifestly unreasonable” for the purposes of the Environmental Information Regulations 2004 reg.12(4)(b) and “vexatious” within the meaning of s.14(1). It was believed by D2 that the requests were part of an ongoing negative campaign and A was acting in cahoots with others who had made previous requests and been refused. D2 relied on three previous decisions from the Information Commissioner, D1, which found relevant requests vexatious or manifestly unreasonable. D1 was informed by D2 that immense stress had been caused to parish councillors and the parish clerk, leading to staffing difficulties, because of the reluctance of staff members to deal with freedom-of-information requests. In addition, D2 cited burdensome costs and staff time incurred by the requests, unjustified levels of disruption, a disproportionate burden in workload, distress caused to councillors and staff, and a lack of willingness of the residents concerned to co-operate with the council. D1 accepted those points and in the instant case stated that in her view, A’s request was manifestly unreasonable.

The Court upheld D1’s decision on grounds which included the fact that A’s request continued to cause pressure on time and resources, already stretched by A’s clients and others he whom he worked closely with. In addition, it was concluded that granting the request would be unlikely to satisfy A and only lead to more, and the request was part of the activity of a group of people who persisted unreasonably in pursuing issues.

Comment

Local authority resources are already stretched to breaking point. Vexatious administrative requests simply add to pressure. This decision should provide confidence to local authorities that the courts are alive to vexatious and unreasonable requests, even from professionals, and will uphold refusals where appropriate.

The full decision can be read here.

COURT NOT SATISFIED THE CLAIMANT’S WIFE’S MESOTHELIOMA RESULTED FROM ASBESTOS EXPOSURE DURING THE REFURBISHMENT OF HER WORKPLACE IN THE 1990S

Lawrence v Bexley London Borough Council, 16.11.2018, Queen’s Bench Division

The Claimant, C’s, wife had died at the age of 67 from Mesothelioma. She worked at a college operated by the Defendant, D, as a lecturer of hairdressing. D accepted C’s wife had contracted Mesothelioma following asbestos exposure. The question for the Court was whether the exposure had occurred at her place of work.

The deceased’s statement recorded that she had been exposed to asbestos in the early 1990s, following refurbishment work being carried out at the college. The Court also had statements from two others, who had either died or been too unwell to take part in the litigation. In addition, there was expert evidence and evidence from a chartered environment health practitioner, S.

D initially denied any refurbishment work had taken place in the college in the 1990s; however, this was contradicted by expert evidence. In her statement, the deceased stated she attended the refurbishment regularly to check the salon was properly set up. S reported that it would be common for a college building built in the 1960s to have asbestos and that there was little evidence of the substance in 2014. This suggests it could have been removed during the refurbishment.

The Court was satisfied that refurbishment work was carried out in the 1990s but held there was no direct evidence that the works had involved the removal of asbestos without proper precautions. It was also not clear whether the college building had ever contained asbestos. Although the deceased had been at the site when the walls were ripped down, there was no evidence to prove asbestos had been present. The claim was therefore dismissed.

Comment

This case illustrates the need for a Claimant to have a strong case in these types of claims, they need to show that not only was asbestos present, but that it was removed negligently. Otherwise, the claim is bound to fail on causation.
CONVICTION OF SITE-MANAGER FOR GROSS NEGLIGENCE MANSLAUGHTER FOLLOWING LABOURER’S DEATH UPHELD

R v Winterton, 06.11.2018, Court of Appeal

The Appellant, A, was a construction site manager who was in charge of the overall health and safety of the construction site where the deceased, A, worked. A died in 2014 when a trench he was working in or on the edge of collapsed.

The prosecution, P, successfully argued that the accident was entirely foreseeable and preventable, and W’s gross negligence meant he was responsible. Expert evidence from a civil engineer concluded the trench was prone to collapse and therefore precautions should have been taken. Evidence also showed an employee of a local water company visited the site the day before the tragedy and warned of the trench’s instability. A was convicted of gross negligence manslaughter. He was granted permission to appeal on the ground that the judge at first instance erred in law in directing the jury that they were entitled to consider what A ought to have known about the way in which the trenches were being dug on site at the time of any alleged breach of duty by him. A relied on the ratio in R v Rose (Honey Maria) [2017] EWCA Crim 1168. This case concerned an optometrist who was found not guilty of gross negligence manslaughter of a young boy after she failed to identify an abnormality in his optic nerve as there had not been a “serious and obvious risk of death” at the time of the breach.

The Court held that the ratio in Rose had to be judged objectively and prospectively at the moment of breach, not but for the breach. Therefore, the facts of the case are critical.

Here, the evidence regarding the digging of the trench demonstrated the workmanship was highly dangerous, and there was a real risk of death. Evidence was also available for the jury to conclude that A had knowledge of this or adopted wilful blindness to the dangers. A’s duty regarding the safety of the trench was continuous. The factual matrix was that it was a question of when, not if, the trench would collapse, and that was, or should have been apparent to anybody. Consequently, there was a reasonable foreseeability of serious and obvious risk of death to anyone in or near the trench. The evidence showed that A could not possibly argue that if the trench had not collapsed, no objective person would have been aware, given the facts available at the time, that there was a significant risk of death arising from a breach of duty. The warning signs and risks were there for all to see. Therefore, the appeal failed.

Comment

Under new sentencing guidelines published in summer 2018, it is possible to receive a life sentence if convicted of gross negligence manslaughter. Local bodies need to ensure all staff fully understand their duty of care and also that health and safety policies and procedures are updated, communicated, and fully implemented across all sectors of the organisation.

Read the full case here.
LOCAL AUTHORITY SHOULD HAVE INSPECTED LARGE TREE NEXT TO HIGHWAY EVERY TWO YEARS AS OPPOSED TO EVERY THREE

Witley Parish Council v Cavanagh, 11.10.2018, Court of Appeal

The Appellant, A, appealed against a decision that it was liable in negligence for failing to conduct sufficiently frequent inspections of a tree that fell and injured the Respondent, R, a bus driver.

The local authority owned the land at the side of the road where the accident which brought about the claim occurred. On the land stood a large lime tree, which was next to a bus stop. On a stormy evening in January 2012, the tree fell onto the road, colliding with a bus driven by R, causing him serious injuries.

At the time, A inspected the tree every three years. A tree surgeon had inspected the tree in 2006 and 2009. By the time of the accident, there was an indication of internal decay which had begun to form at some stage after the 2006 inspection. R claimed against A and the tree surgeon. At first instance, it was held the tree surgeon's actions did not cause the accident. This finding was not disputed by A. The critical issue was whether the local authority's three-year inspection regime, where there was no obvious defect in the tree, was reasonable, or whether, as R argued (backed up by his expert evidence), given the tree's size and location, more frequent inspection was required.

At first instance, the judge held that the tree was in a high-risk position (being so close to the bus stop). Even if there were no defects, it was large, old, and leaned over the road. It was clear that if it fell, it could cause serious damage, not least to the house opposite. Therefore, the Court concluded the tree should have been inspected every two years, as disease could have struck at any time (as in fact it was), and a 2-year inspection would have meant the defect would have been identified well before the accident.

On appeal, the Court stated the appeal was in the trial judge's finding of fact. The Court of Appeal could not see how the judge had erred and dismissed the appeal. It stated the judge's reasoning as to the relevance of the size and weight of the tree and its potential to cause very serious injury or damage reflected R's expert's oral evidence and all the expert evidence as a whole. Although A's expert stated in evidence that the three-year inspection cycle was appropriate and reasonable for this tree, other aspects of his evidence supported more frequent inspection; for example, he accepted that a mature tree with such internal decay could fail in two years.

Comment

Local authorities should be on notice that if large trees or other objects which may cause potential harm to people or property are on local authority land, it is wise to ensure an inspection is conducted regularly. And if the condition of the tree or object changes, the inspection rota should be reviewed and inspection's increased.

The full decision can be found here.

MAN RECEIVES £1,250,000 BASED ON 50% CONTRIBUTORY NEGLIGENCE FOR THE MULTIPLE INJURIES, INCLUDING TO THE SPINAL CORD, HE SUSTAINED IN A ROAD TRAFFIC ACCIDENT

Newman v Broker, 18.09.2018, Out of Court Settlement

In February 2016, the claimant, C was driving a motorcycle in a 40mph zone on the left side of stationary traffic. The defendant, D, was driving his van. He emerged from a side road, made a left turn and collided with C.

C sustained serious injuries of permanent duration, including: a burst fracture at L1 of the spinal cord and fractures of the left ankle, left metacarpal, and right scapula. He suffered urinary incontinence, back pain, and severe spasms that sometimes prevented him from getting out of bed. C also suffered hypersensitivity in the left ankle and was unable to walk barefoot due to the increased sensitivity in the feet.

After the accident, C was initially confined to a wheelchair but he was able to move on to only requiring a Zimmer frame, and later crutches. When he was discharged from hospital, he was able to walk with crutches but relied on a wheelchair when outside.

C was a chef, and he was able to return to work in a sheltered position. Expert evidence stated he would need to retire at 55 years.

The case was settled, with a breakdown of damages as follows:

- Pain, suffering and loss of amenity: £150,000;
- Future care costs: £630,000;
- Future loss of earnings: £500,000;
- Future assistance and DIY costs: £75,000;
- Future increased heating costs from aged 55: £25,000;
- Future mobility aids costs: £25,000;
- Future occupational therapy and podiatry costs: £220,000;
- Future physiotherapy costs: £16,000;
- Future vehicle costs: £40,000;
- Future UTI review costs: £225,000;
- Future spinal review costs: £105,000;
- Future accommodation costs: £250,000;
- Future medication costs: £150,000;
- Future sundry item costs: £25,000;
- Future case manager costs: £3,000.
While every effort has been made to ensure the accuracy of these reports, this publication is intended as a general overview and is not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Neither Zurich Municipal, nor any member of the Zurich group of companies, will accept any responsibility for any actions taken or not taken on the basis of this publication.