Recent Developments in Personal Injury Law

LIABILITY

Provision and Use of Work Equipment Regulations

Smith v Northamptonshire CC [2008] EWCA Civ 181

The Claimant (S) was employed by the Defendant local authority as a carer/driver. S was required to collect a client from her home and take her by minibus to a day centre. Some years previously the NHS had installed a ramp outside the front door of the client's home. As S was pushing the client in a wheelchair over the ramp, the ramp gave way causing S to injure herself. The ramp had previously been inspected by the local authority and nothing had been found to be wrong with it. In fact the edge of the ramp had rotted causing the accident. S brought a claim against the local authority alleging breach of regulation 5(1) ('failure to maintain').

At first instance the claim was dismissed. The Claimant appealed. The Court of Appeal unanimously rejected the appeal. Waller LJ treated the ramp as an installation. His Lordship held (at para 29) that for an employer to have the obligation to maintain something, it would normally have to be within their power to be able to do so without obtaining the consent of another. The duty could not normally apply to something which was a part of someone else's property. Furthermore, it could not apply to something to which access was limited. Richards LJ concurred noting that all the local authority could do if dissatisfied with the ramp was request that another party replace it thus demonstrating a lack of control or right to maintain on their part.

Allison v London Underground [2008] EWCA Civ 71

The Claimant was the driver of an Underground train. She developed tenosynovitis as a result of the way she gripped the brake lever. She had not been trained in the correct method. The Claimant alleged a breach of regulation 9 (duty to ensure "adequate" training provided). The Court of Appeal held that the duty under regulation 9 was not strict in that the duty is to provide that training which is needed in the light of what the employer knew or ought to have known about the risks arising from the activities of his business. What the employer ought to have known will be guided by matters such as those that would have been evident from a suitable and sufficient risk assessment. In the instant case, the brake lever ought not to have been put into service without taking the advice of a suitable expert. Had such advice been sought the need for the drivers to be trained in the correct way in which they held the brake lever would have been identified and, on the evidence, injury would have been avoided.

Harassment

Conn v Sunderland City Council [2007] EWCA Civ 1492

Mr Conn worked for the local authority as a paviour. He claimed he had been harassed by his foreman on 5 occasions and thus suffered a psychiatric illness. He left his job and sought to claim damages in negligence and for a breach of section 3 of the *Protection from Harassment Act* 1997 (which provides that damages for anxiety are available on proof of 2 or more incidents of harassment). The negligence claim was dismissed as the court did not accept that the psychiatric injury was attributable to the accident. The Claimant succeeded in the harassment claim (as section 3 allows damages for "anxiety" to be claimed even though no psychiatric illness has been suffered).

The first instance judge found 2 of the 5 incidents of harassment proved. The first incident involved the foreman asking the Claimant and two of his colleagues to tell him who had left work early. When the three of then refused to answer the foreman *"became angry, threatened to punch out the windows of the cabin and have them up before the personnel department."* The second incident occurred when the foreman approached the Claimant and asked why he was *"giving him the silent treatment"*. Mr Conn said, he was only prepared to talk about work matters. The foreman *"lost his temper and said he would give Mr Conn a good hiding".*

The Court of Appeal applied the dicta of the decision in *Majrowski v Guy's and St Thomas' NHS Trust* 2006 and confirmed that a civil claim for harassment could only be sustained where the two or more incidents were of such gravity as to justify the sanction of the criminal law. The first incident did not cross the threshold. The claim, therefore, failed. It was not necessary to make a finding as to whether the second incident crossed the threshold.

Stress at Work

Michael Deadman v Bristol City Council [2007] EWCA Civ 822

Mr Deadman was employed as a manager of BCC's Mechanical and Electrical Services Team. One of Mr Deadman's colleagues made a complaint against him and alleged that he had sexually harassed her. The complaint was investigated and upheld by BCC. The investigation, however, was not conducted in accordance with their own procedures as the complaints panel consisted of two rather than three members and included the Claimant's line manager. Mr Deadman, therefore, challenged the decision in accordance with the grievance procedure and the decision was set aside. It was decided that a new panel should be convened to deal with the unresolved complaint and this decision was communicated to C by a letter which was left on his desk. C found the investigation very stressful and suffered depression. He alleged that the manner in which the investigation was conducted and the manner in which the decision to renew the investigation was conveyed were in breach of his contract of employment and in breach of the duty of care which his employers owed to him.

The first instance judge found that there was no breach of the common law duty or care, however, he accepted that damages were recoverable on the basis that there had been a breach of contract. The Court of Appeal held that there was no breach of the duty of care or breach of contract which sounded in damages. There was no implied term in the contract to investigate complaints sensitively. Whilst the investigation procedure had been incorporated into the terms of the contract it was not suggested that the improper constitution of the panel would reasonably foreseeably have adverse consequences for the Claimant's health. Furthermore, was not reasonably foreseeable that the Claimant would sustain psychiatric injury from the way the news of the rehearing was conveyed to him. There was no causative breach of contract.

Fatal Accidents

Corr v IBC Vehicles [2008] UKHL 13

The deceased was employed by the defendant. In the course of his employment he sustained injury causing physical disfigurement and PTSD. He became depressed and his condition worsened He committed suicide. His wife claimed damages including financial losses under the Fatal Accidents Act arising from the suicide.

The House of Lords held that the duty owed by the Defendant was to avoid causing physical and psychological injury. The deceased had acted in a way he would not but for the accident. That being so his suicide did not fall outside of the scope of the duty owed. Depression was a foreseeable consequence of the breach of duty. In this case suicide was reasonably foreseeable. The claim was therefore upheld.

QUANTUM

Disability Multipliers and the Ogden Tables

Al Conner v Bradman & Company Ltd [2007] EWHC 2789 (QB)

Mr Conner, a mechanic aged 50 years, ruptured the anterior cruciate ligament in his left knee in a motorcycling accident. He was unable to continue working as a motor mechanic and retrained as a taxi driver (a lesser paid job). His movement was generally painful and restricted and he found it difficult going up and down stairs. He had difficulty walking more than 50 yards and had difficulty

squatting and bending. His knee became uncomfortable and swollen if he was on his feet all day and demonstrated a terrific amount of instability.

The High Court held that Mr Conner was disabled within the meaning of the Disability Discrimination Act. Lost earnings should be assessed on a multiplier/multiplicand basis. The Ogden Tables indicated that the multiplier should be reduced by 0.49 to reflect the fact that disabled employees did not remain in work as much as initially thought. The court, however, noted the relatively low threshold required to meet the definition of disabled. There was, therefore, a need for adjustment depending on the extent of the Claimant's disabilities. In Mr Conn's case the appropriate discount was 0.665. This figure was the middle course between the disabled multiplier of 0.49 and the non disabled multiplier of 0.82.

It should be noted that the Ogden tables provide multipliers for the notional average disabled Claimant. Little is known about this notional Claimant's characteristics. It is, therefore, difficult to assess the extent to which the averagely disabled multiplier should be increased or decreased to take into account an individual Claimant's characteristics.

Lost Entitlement to Sick Pay and Causation

Ann Brazier v Wolverhampton City Council [2007] EWCA Civ 1479

The Claimant worked as a carer. She sustained an injury at work in January 2003 which aggravated a pre existing condition by a period of 4 ½ years. As a result she was unable to work as a carer and was only capable of sedentary work. The sedentary work, however, would be as well paid as the care work and thus she would sustain no loss of earnings. The Defendants initially gave the Claimant a temporary job as a seamstress. Once this came to an end the Claimant was off work and in receipt of contractual sick pay equivalent to her pre accident earnings. She received notice of ill health retirement in November 2004 and retired in January 2005. She sustained no loss of earnings prior to January 2005. Unfortunately shortly before she retired she was injured in a RTA. This caused a deterioration in her condition and she was unable to work at all. A personal injury claim was outstanding in respect of the RTA.

The Claimant sought to argue that she had exhausted her sick pay as a result of the first accident thus did not receive sick pay after the second accident. The Court of Appeal rejected this claim for loss of entitlement to sick pay. The Court held that the first accident had not caused a loss of earnings as the Claimant had received full sick pay and, thereafter had the capacity to earn at her pre accident level. The lost earnings after January 2005 were attributable to the RTA.

It should be noted that the position may be different if the further injury was caused by a non-tortuous event.

PROCEDURE

Limitation

A v Hoare: C v Middlesbrough Council: X & Anor v Wandsworth LBC: H v Suffolk County Council: Young v Catholic Care (Diocese of Leeds) [2008] UKHL 6

These six appeals raised the question of whether claims for sexual abuse which took place many years before the commencement of proceedings were time barred. The Court of Appeal concluded that the claims were time barred on the basis of *Stubbings v Webb* [1993] A.C. 49. (In *Stubbings* it was held that intentional trespass to the person was not an action for negligence, nuisance of breach of statutory duty within the meaning of section 11 and thus limitation expired after 6 years with no discretion to extend). Sections 11 (3 year limitation period), 14 (date of knowledge) and 33 (discretion to extend) of the Limitation Act were considered.

The House of Lords overruled the decision in *Stubbings* on the basis that it was unsatisfactory and causing uncertainty. It was noted that the *Stubbings* decision forced Claimants to plead their case on an artificial basis which came within the language of section 11. For example, cases would be put on the basis that the injury was the result of systemic negligence within the Defendant's institution rather than the result of an assault for which the Defendant was vicariously liable.

Having decided to depart from their own decision in *Stubbings* the Court went onto consider the meaning of "significant injury". In *Young v Catholic Care (Diocese of Leeds) and the Home Office* the Claimant had been seriously sexually assaulted in care between 1974 and 1977. He commenced proceedings in 2003. The Court of Appeal fixed the date of knowledge by reference to when the Claimant could reasonably have been expected to commence proceedings. The House of Lords held that the inhibiting effect of effect of sexual abuse upon a victim's preparedness to bring proceedings was not relevant to the determination of section 14(2). Nor could it be said that the victim did not have knowledge of the significant injury sustained because he had blocked the abuse out of his memory and was in denial about it. The standard was impersonal; *"You ask what the Claimant knew about the injury he had suffered, you add any knowledge which may be imputed under section 14(3) and then you ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a Defendant who did not dispute liability and was able to satisfy a judgment. ... Judges should not have to grapple with the reasonable unintelligent person. Once you have ascertained what the Claimant knew and what he should be treated as having known the actual Claimant drops out of the picture. Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are by their very nature impersonal and do not vary with the person to whom they are applied."*

The House of Lords did, however, find that the explanation for the delay was a factor to be considered under section 33 and offered some guidance about how the discretion under section 33 should be exercised. The House of Lords observed that:

- Not everyone who brings a late claim for sexual abuse can reasonably expect the Court to exercise the section 33 discretion in their favour as in many cases a fair trial is likely to be impossible.
- Complaints arising out of vicarious liability for sexual assaults as opposed to systemic negligence are likely to involve narrower factual issues and that is likely to bear significantly upon the possibility of having a fair trial.
- Whether the Defendant can investigate complaints properly will depend on a number of factors such as when the complaint was first made and with what effect.
- *"If a complain has been made and recorded, and more obviously still, if the accused has been convicted of the abuse complained of that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or convicted of similar abuse in the past), that would be quite another thing."*
- In *Hoare* the Defendant won the lottery whilst serving his sentence for the sexual abuse complained about. In respect of cases where timely proceedings were not brought because the Defendant perpetrator was initially unable to satisfy any judgment it was noted that, it

would not ordinarily be sensible to sue a defendant who was not able to satisfy judgment and it would be unfortunate if people felt obliged to bring proceedings against indigent Defendants simply with a view to their future possible enforcement.

Furniss v Firth [2008] EWCA Civ 182

The claimant claimed for noise induced hearing loss arising out of his employment with the defendant from 1976 until around 1982. At first instance the judge held that the claimant had constructive knowledge for the purposes of limitation around 1996 - certainly 'well before 1998'. The claim was found to be statute barred. There was no specific finding as to when the claimant's symptoms were significant.

The Court of Appeal held that, on the facts, a finding as to significance of injury could not be inferred. In this case the claimant's evidence that from a point in time he found difficulty using the telephone and required the television to be turned up did not necessarily assist. Nor did the claimant's speculation as to the cause of symptoms amount to a demonstration by him that he knew his symptoms were significant. With no finding as to significance and the burden of proof being on the defendant, the limitation defence was not made out.

Curiously, the appeal had not initially been presented on the specific issue of significance of symptoms. As was noted in the judgment (at para 22): "…in the course of the examination of the evidence, Lord Justice Laws observed that the judge did not appear to have made any findings at all as to when the appellant knew that his hearing loss was significant." Unsurprisingly the point was quickly adopted by the appellant's counsel!

Fatal Accidents Act

Welsh Ambulance v Jennifer Williams [2008] EWCA Civ 81

Mr Williams (W) died as a result of a collision with an ambulance driven by an employee of the trust. Liability was admitted. Before the accident W had established a business, property portfolio and collection of assets worth in excess of £6M. His wife (J) and two adult children (D and S) were equal partners in the business. After W's death all three, in addition to a third adult child (R), continued to run the business. They made a success of things and also added to the property portfolio and collection of other assets. On behalf of T it was submitted that in the first instance the children could not be seen as dependents. In the alternative there was no dependency as the family were at least as well off after the death as before. It was argued that the judge was wrong to focus on the efforts of W and should instead have focused on the business and the generation of profit.
At first instance the judge rejected the submissions and made a global award of £1.7M.

On appeal, the decision at first instance was upheld. Smith LJ found that at the time of the accident D and S were plainly dependent on their father for the profits from the business to the extent that those profits exceeded their own efforts. As such they were clearly dependents under the Act. Her Ladyship held that the fact that each was as well off after the death as before does not affect the quantification. A dependent cannot by his or her own conduct after the death affect the value of the dependency at the time of the death.

Mental Capacity

CPR 21 and the *Mental Capacity Act* 2005

The amendments to CPR 21 came into force on 1st October 2007. Patients have been replaced with protected parties and protected beneficiaries. The court will first consider whether a party is a protected party. If the individual is a protected party the court will go onto to consider whether they are also a protected beneficiary. A protected party lacks capacity to conduct the proceedings. A protected beneficiary lacks capacity to manage and control money received during proceedings.

Capacity is determined in accordance with the principles in the *Mental Capacity Act* 2005. A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself

in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (section 2(1)). Capacity is, therefore, time and issue specific. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (section 1(3)). A person is not to be treated as unable to make a decision merely because he makes an unwise decision (section 1(4)). A person is unable to make a decision for himself if he is unable to understand the information relevant to the decision, to retain that information, to use or weigh that information as part of the process of making the decision, or to communicate his decision (section 3(1)).

Carlo Saulle (by his mother and litigation friend) v Olivier Nouvet [2007] EWHC 2902 (QB)

The Claimant sustained a severe brain injury in a road traffic accident. As a result he suffered from an impaired memory and had difficulty processing information. This gave rise to occasional violent behaviour. Sometimes he was able to make decisions. On other occasions he was too irrational and aggressive. During these latter periods he would probably lack capacity to make an important decision. There was, however, no evidence that he had ever attempted to take an important decision whilst in this state. He had enough control over himself to take important decisions when he was able to do so. He was not a protected party. If at some point in the future the Claimant insisted on making some unwise decision in his litigation the Claimant's solicitors could return to court with an application for a litigation friend. They may need to involve the official solicitor. Where a person is held to have capacity because he can understand and seek suitable professional advice it may be necessary to include in the award a sum which is designed to enable him to retain such advisors. Provisional damages or a discounted lump sum may be appropriate to provide for the contingency that the Claimant's condition may deteriorate and require him to seek the assistance of the Court of Protection. Provisional payments may afford the Claimant some protection against exploitation and profligacy.

COSTS

Carleton & Others (a Partnership) [2008] EWHC 424

A costs dispute arising from a claim for professional negligence. Held by Jack J that where one party exaggerates their claim or otherwise adopts an unreasonable stance such that mediation is rendered impossible, that party should be in the same position as one who unreasonably refused to mediate. Such conduct should be taken into consideration when making costs orders.

Carver v BAA [2008] EWCA 412

The Defendant made a payment into court in June 2006 which, with an earlier interim payment, brought the total available to the Claimant to £4,520. At trial (June 2007) the Claimant was awarded £4,686.26. With interest on the payment in, it was calculated that the judgment beat the payment in by £51. At first instance the judge held that the Claimant had not, in all the circumstances, obtained a judgment more advantageous than the offer. The Claimant was ordered to pay the Defendant's costs from 21 days after the date of payment in. Moreover there was no order as to costs from November 2005 (when the defendant had offered £4,006) to June 2006. The claimant appealed.

The Court of Appeal held that the 'new' Part 36 rules allow a trial judge when making orders as to costs to perform a wide-ranging review of the circumstances which in this case involved consideration of whether the judgment was 'worth the fight'. In respect of the payment in it was not. As regards the November 2005 offer, the matter was one for the discretion of the judge under Part 44. In this particular case it did not amount to an unreasonable exercise of that discretion for the judge to order as he did.

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