GUILDHALL CHAMBERS

PI News

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Team News

Claimant Seminar

For the second year running the Personal Injuries Team will be hosting a Claimant seminar at At Brisol on Wednesday 12th November. This year it will be a full-day seminar covering psychological injury, brain injury, CRPS and Ogden 6 with workshops taking up the afternoon. Guest speakers include neuropsychologist Dr David Quinn and clinical psychologist Dr Katrina Hinkley. The event is free of charge and includes a comprehensive delegate pack, lunch and refreshments. Further details and a full programme will be sent soon.

The PI team welcomes **Daniel Neill** who joined us as a pupil in 2007 and started his second six in April. Daniel came to the law after completing a PhD in Victorian literature at the University of Cambridge, where he also taught. He has proven to be a robust junior advocate and is regularly instructed in small claims and fast-track cases. He also undertakes advisory and drafting work.

I'm feeling rather optimistic at the moment. None of the weather men have predicted a good summer but politics is beginning to get interesting again, the Olympic Games have gone well and, to top it all the Court of Appeal has decided that Part 36 is now so vague that no one can tell whether an offer should be accepted. Add to that the decline in claims farming (top marks to the SRA – their lobbying failed so they resorted to draconian regulation to achieve the same result) and the fact that work equipment is now defined as "anything made of atoms" and it is difficult not to get excited. Indeed, I would have become completely carried away were it not for my disappointment upon discovering the destruction of the pier at Weston-Super-Mare.

Of course, being a barrister I live in a world of my own. The fact that no one can get a mortgage and that gas now costs more than gold has failed to register (save for reflecting that fraud cases may, as a result, increase; a colleague in chambers has begun to refer to "the green roots of recession").

But, as always, I am thinking of my readers. There is a creeping sense of insecurity that I associate with going on holiday – have I missed anything back home? Well, to allay your fears I bring you the news – a round-up of recent decisions (principally, decisions of the Court of Appeal and House of Lords) relevant to the world of personal injury litigation.

In addition, you will find a number of useful articles: **Anthony Reddiford** examines insurer liability in cases of asbestos exposure (the so-called "Trigger Litigation"), **Abigail Stamp** explores the recent Claimant-friendly developments in European cross-border RTA liability, **Peter Barrie** provides a brief overview of recent developments in relation to periodical payments and, finally, **James Hassall** considers in detail the recent fluctuating definition of work equipment and whether the current state of the law has left room for manoeuvre.

Your comments and suggestions are welcomed and should be addressed to me at gabriel.farmer@guildhallchambers.co.uk

Gabriel Farmer
Editor

Recent decisions

Liability

Work Equipment – Provision and Use of Work Equipment Regulations 1998 – Ambit

Smith v Northamptonshire County Council [2008] EWCA Civ 181

The Claimant was employed by the council as a carer. Whilst pushing a wheelchair-bound client down a ramp from her home she stepped on the edge of the ramp. The ramp gave way and she injured herself. The Judge at first instance held that regulation 5(1) of the Provision and Use of Work Equipment Regulations 1998 imposed strict liability on the council for maintaining the ramp because it was work equipment for use at work. The Defendant appealed contending that the ramp was not "work equipment."

The Court held that there must be some limitation on an employer's strict liability. Otherwise, on a very wide construction of the 1998 Regulations, absurd results were possible. (One example given was that of a van driver delivering a parcel across a bridge when the bridge collapses – is the bridge work equipment?) The Court of Appeal considered questions based on the degree of control that the employer had over the work equipment and the territorial link between the work equipment and the workplace. In drawing the line between items that were and were not work equipment, Lord Justice Waller held that work equipment for which an employer is strictly liable must in some way have been selected by the employer for use by the employee before it can constitute work equipment under the 1998 Regulations. However, if the employer had allowed the use by an employee of that employee's own equipment or if the employer had allowed the use of work equipment supplied by a third party, that may well have constituted sufficient selection by the employer for strict liability to be imposed. The test was relatively easy to apply to "tools of the trade." However, something which had been "installed" on a permanent or long-term basis and which may have had many uses needed different consideration. An installation which was put in place by a third party, which was not installed for the particular purpose for which an employer ultimately allowed an employer to use it, which was used most of the time by persons other than employees and in respect of which, in the ordinary course of things, there was no duty or indeed right to repair or maintain fell into a different category. For someone who had the obligation to maintain something, it would normally have to be within their power to be able to do so without obtaining someone else's consent. The duty to maintain did not normally apply to something which was part of someone else's property. Furthermore, it could not normally apply to something in relation to which access was limited and in relation to which, if some maintenance was necessary, consent to carry out the work was necessary.

The Court emphasised that each case must turn on its own facts, but on the facts of this case the ramp was deemed not to constitute work equipment. The Court considered the cases of *PRP Architects v Reid* [2006] EWCA Civ 1119 (employee injured by defective lift door in a building leased by her employers – the lift provided access to her workplace and was found to be work equipment) and *Cannon v Commissioner of Police for the Metropolis* [2004] EWCA Civ 830 (police mechanic working upon police vehicle – vehicle held not to amount to work equipment).

Comment

A very important decision in relation to the ambit of "work equipment". A careful reading of the Judgment is required. It is clear that tools of the trade and other installations which are temporary in nature (for example, scaffolding on building sites) remain work equipment. However, where the item is a permanent structure and it is not obvious that the employer was in a position to control the item, the position is less clear. The case of *PRP Architects v Reid* is, nonetheless, helpful. See also *Spencer-Franks* below.

Work Equipment

Spencer-Franks v Kellogg Brown and Root Limited [2008] UKHL 46

The Claimant was employed by the Defendant as a mechanical technician. The Defendant supplied the Claimant through the operator of a North Sea oil platform in order to perform work. The Claimant was asked to inspect and repair a door closer on the door of a potential control room. As the Claimant was repairing the closer a screw came out and the closer swung back and struck him in the face. He brought an action against his employers and the oil rig operator. He claimed that each had been in breach of the Provision and Use of Work Equipment Regulations 1998. The court at first instance held that the closer was not "work equipment" or, even if it was, the Claimant had not been using it within the meaning of the 1998 Regulations.

The House of Lords, disapproving the decision in *Hammond v Commissioner of Police for the Metropolis* [2004] EWCA Civ 830, held that the door closer was apparatus for use at work. The 1998 Regulations were intended to implement the Equipment Directive, but the Directive defined "work equipment" as "any machine, apparatus, tool or installation used at work". The Regulations use the words "for use at work." Therefore, they required that the purpose of the piece of apparatus had to be ascertained. If it was for use at work then it was work equipment, and on that simple approach the answer was clear. The duty under the Regulations and the Directive was strict and did not distinguish between the fabric of the installation and its equipment. Further, something could not be "work equipment" in relation to one employee but not another. In *Hammond* the question should have been not whether the equipment was work equipment but whether Mr Hammond was a worker to whom it had been supplied. The fact that the Claimant had been repairing the closer did not mean that he was not "using" it.

Comment

The House of Lords clearly favoured a very wide construction of the words of the Regulations and the Directive. The decision appears to contemplate that if an item is used at work by a worker (whether as a tool or as an item being worked upon) then it constitutes work equipment. This decision clearly favours Claimants but does not appear to detract from the decision in *Smith v Northamptonshire County Council*, although *Smith* does not appear to have been cited in the Judgment notwithstanding that it was published 5 weeks before *Spencer* was heard.

Protection from Harassment Act – Bullying – Criminal Liability

Conn v Sutherland County Council [2007] Court of Appeal 7 November 2007

The Claimant had worked for many years as a paviour for the council. He claimed he had been harassed and threatened by his foreman on several occasions. He left work and issued proceedings under the Protection from Harassment Act 1997. The Judge at first instance found that:

on the first occasion, the foreman had demanded to know (from three employees, including the Claimant) who had left work early. When the workers refused to tell him, he shouted and threatened to punch out the window and brought them before the Personnel Department; and

on the second occasion, the foreman approached the Claimant and asked why he was not talking to him. The foreman was incensed at being given the silent treatment and responded by swearing at the Claimant and threatening him with a hiding.

The Trial Judge held that there had been a course of conduct that amounted to harassment under the 1997 Act. Following the decision in *Majrowski v Guys & St Thomas' NHS Trust* [2007] 1 AC 224, the Judge found the council vicariously liable for harassment and awarded £2,000.

The Court of Appeal held that a civil claim for harassment is only available for conduct that amounts to a breach of section 1 of the 1997 Act (which, in addition, must constitute at least two incidents). In any particular case, the question would arise whether "harassment" was made out. The Court applied the dicta in *Majrowski* (at paragraph 30), where Lord Nicholls concluded that the Courts were well able to recognise the boundary between conduct that was unattractive, even unreasonable, and conduct which was oppressive and unacceptable. The touchstone of whether the facts in a particular case crossed the boundary from the regrettable to the unacceptable was said to be whether the gravity of the misconduct was of an order which would sustain criminal liability under section 2 of the 1997 Act. The Court of Appeal allowed the appeal and underlined the requirement that the conduct in question has to be both oppressive and unacceptable. Given that the first incident found by the Judge had not been targeted at the Claimant but involved other workers, neither of whom had found such behaviour intimidating, clearly demonstrated that it fell far short of the conduct criminalised by the 1997 Act. The course of conduct had not been made out.

Comment

Some are suggesting that the effect of this decision is to make it harder for Claimants to establish harassment under the 1997 Act. In fact, a careful reading of the Judgment shows that it adds nothing to *Majrowski*. It is important to note that Mr Conn was originally seeking a six-figure sum in damages for a stress-at-work claim which then failed. His award at first instance of £2,000 might therefore be viewed as a consolation prize. It does appear relatively clear that the conduct found by the Judge at first instance simply did not meet the test set out in Majrowski.

Breach of Statutory Duty – Occupiers' Liability – Overlap

Lough v Intruder Detections and Robert Fulton (third party) Court of Appeal 26 June 2008

The Defendant appealed against a decision refusing a claim for contribution against Mr Fulton following the Defendant's settlement of the Claimant's personal injury action. Mr Fulton had been refurbishing his home when he had engaged the Defendant to install a security system. In the course of the refurbishment, a staircase had been replaced and temporary banisters had been erected. These were removed in order to fit the final structure. Mr Fulton had instructed contractors not to replace the temporary balustrade in the intervening period. The Claimant and other employees of the Defendant attended Mr Fulton's home unexpectedly. Mr Fulton was reluctant to admit them because he was not expecting them but permitted entry and warned them about the missing balustrade. He therefore accepted that he had given the Claimant permission to go upstairs onto the unguarded landing. The Claimant subsequently fell from the landing and sustained injury. The Claimant's claim against the Defendant under the Construction Regulations was settled. The Defendant then brought a claim in Occupier's Liability against Mr Fulton. The Judge at first instance concluded that, since Mr Fulton had not been supervising the Claimant, which responsibility had fallen to another of the Defendant's employees, Mr Fulton had not been in breach of duty under the Occupiers' Liability Act 1957. He went on to conclude that even if Mr Fulton had been in breach of this duty the Defendant would have been 100% to blame for the Claimant's accident.

The Court of Appeal held that the fact of liability under statutory duties did not absolve an occupier for breach of duty under the 1957 Act. The fact that the Claimant had been supervised by one of the Defendant's employees did not of itself absolve Mr Fulton of his personal duty as occupier. No amount of supervision could have prevented the Claimant from taking the false step off a landing and therefore the Judge's reasoning was flawed. Liability had to be apportioned. Taking a broad-brush approach, the Court of Appeal held Mr Fulton 25% responsible.

Comment

The transcript of this Judgment is not yet available. The Court of Appeal's decision is in fact not surprising when one bears in mind that Mr Fulton himself was responsible for the absence of the balustrade. Of course, even if he had instructed an independent contractor to replace the balustrade and they had failed to do so then technically he may still have been liable because section 2(4)(b) of the 1957 Act provides that where work is entrusted to an independent contractor "the occupier is not to be treated without more and answerable for the danger if in all the circumstances he had [...] taken such steps (if any) as he reasonably ought in order to satisfy himself that [...] the work had been properly done."

Damages for Personal Injury Recoverable in Public Nuisance

Claimants appearing on the register of the Corby Group Litigation v Corby Borough Council [2008] EWCA Civ 463.

The Claimants had all been born with upper limb deformities following the local authority's decision to pursue a programme for the development of contaminated land within its area. The Claimant claimed that their mothers had been exposed to toxic materials emitting from the land during the embryonic stage of their pregnancies and that this exposure had caused their deformities. One of the Claimants' causes of action was in public nuisance. The local authority applied to strike out that aspect of the claim on the basis that *Hunter v Canary Wharf Limited* [1997] AC 655HL and *Transco Plc v Stockport NBC* [2003] UK HL 61 were authority for the fact that damages for personal injury could no longer be recoverable in public nuisance.

The Court of Appeal held that the cases cited did not support the contended proposition. Neither of the cases reversed the long-

established principle that damages for personal injury could be recovered in public nuisance. Insofar as the decisions related to the tort of public nuisance, the observations in them were obiter because neither of the claims was based in public nuisance and neither of them included claims for personal injury.

Comment

This decision does not decide that damages for personal injury are recoverable in public nuisance. It is merely a decision on the question of whether the Claimants' pleaded cause of action should be struck out. The Court of Appeal held that the claim in public nuisance did not have "no real prospect of success." Reference in the Judgment is made to "The Boundaries of Nuisance" by Professor Newark [1949] 65 LQR 480 which proposed excluding damages for personal injury from the tort of public nuisance. However, the Court of Appeal stated it was difficult to see why a person whose life, safety or health had been adversely affected should not be able to recover damages. Accordingly, the current position is that the question remains open.

Highways – ICE

Pace v Swansea City & County Council (10th July 2007)

The Claimant lost control of her car on a bend due to the presence of ice on the road. The local authority contended that the road had been salted in the early hours of that morning in accordance with a reasonable and proper system. Nonetheless, there was evidence that there had been black ice present on the road and that other road users had skidded upon it.

The Court held that the accident was caused partly by the presence of ice on the road and partly by the Claimant's own failure to control her car. Further, the Highway Authority had in place an adequate and proper policy for salting the roads and the policy had been implemented on the occasion in question. Therefore, the Authority were able to rely upon the statutory defence under section 41(1A) of the Highways Act 1980. The Authority operated a winter maintenance plan based upon the Code of Practice for Maintenance Management. It was clearly impossible for a highway authority to eliminate all risk of ice forming on roads and impossible for the highest level of protection always to be provided. The Code envisaged a reasonable system based upon best practice using sufficient quantities of salt to address the foreseeable risks. The local authority's plan had achieved that and they were therefore entitled to resist the claim.

Comment

Section 41(1A) (which was inserted by the Railways & Transport Safety Act 2003 section 111) provides: "In particular, a highway authority is under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice". It is important to note that this duty does not create an absolute duty on the highway authorit., Indeed, it has been observed that the Claimant in *Goodes v East Sussex County Council* [2000] 1WLR 1356 would not have recovered had this provision been in place at the time of her accident. Given the standard of "reasonable practicability" councils often simply point to their policy or code of practice for assessing the risk of ice and salting accordingly. Unless a Claimant possesses information which suggests that a council have breached the provisions of their own policy or of the code of practice (and such policies and codes of practice vary between local authorities), it is unlikely that a claim based purely upon the presence of snow or ice will succeed.

Occupiers' Liability – Common-Law Duties of Care – Climbing Wall

Poppleton v Trustees for the Portsmouth Youth Activities Committee [2007] EWHC 1567 (QB) and [2008] EWCA Civ 646

The Claimant had previously attended an activity centre and signed in at reception. On the day of the accident, when he sought to participate in an activity involving free climbing on a wall he was not asked to sign any participation statement or shown any rules or given any instructions. In addition, there was no discussion of the risks inherent in the activity and he was not asked if he had climbed before. Whilst participating in the activity, the Claimant was not supervised or monitored. In attempting to carry out a particular manoeuvre, the Claimant fell onto the matting below (landing on his head) and sustained a serious spinal injury. He maintained that he would not have attempted a similar manoeuvre outside because he would not have had the security of the matting to land upon. The Claimant alleged that the Defendant had breached its statutory duty under the Occupiers' Liability Act, had failed to carry out a risk assessment in accordance with the Management of Health & Safety at Work Regulations 1999 and had breached its common-law duty of care in failing to assess or monitor ability, failing to provide a proper induction, adequate surveillance or supervision and failing to warn users that the safety matting did not render the wall safe.

At first instance, the Court rejected liability under the Occupiers' Liability Act 1957 because there was nothing wrong with the state of the premises ("the occupancy duty"). The "activity duty" did not apply because that related to any activity that the occupier permitted to take place that might endanger others and had no relevance to the circumstances of the accident. The Court further refused to find that the provisions of the Management of Health & Safety at Work Regulations 1999 could give rise to a freestanding duty of care outside the ambit of the Regulations. Further, the Court held that it would not be fair, just and reasonable to impose a duty upon the centre to provide an assessment of the Claimant's abilities as a climber and thereafter to provide some form of supervision or training as necessary. Absent any assumption of responsibility, it would be inappropriate to impose a duty of care of that nature (*Caparo Industries Plc v Dickman* [1990] 2AC 605 and *Fowles v Bedfordshire County Council* [1996] ELR 51 applied). However, the Court held that there was a common-law duty to inform and warn the Claimant in respect of the latent danger of falling onto the matting and, in particular, that he should not be misled into believing that the matting rendered the activity of falling off the wall safe: the Claimant should have been warned of the particular danger that the matting gave participants a false sense of security. Breach of the Management of Health & Safety at Work Regulations 1999 provided evidence of the knowledge that the Defendant should have possessed at the material time because a competently made risk assessment would have revealed the failure in the centre's systems and enabled remedial steps to be taken. The Claimant was found 75% contributory negligent.

The Defendant appealed and the Claimant cross-appealed on the contributory negligence finding. The Court of Appeal, applying *Tomlinson v Congleton BC* [2003] UKHL 47, held that it was extremely rare for an occupier of land to be under a duty to prevent people from taking risks which were inherent in the activities that they freely chose to undertake. The judge was wrong to find that it was not obvious that a fall onto the matting might cause injury. The law did not require the Defendant to train or supervise the Claimant nor to prevent the Claimant from engaging in the activity.

Comment

This is another example of the relatively hard line now taken in occupiers' liability cases. It is interesting to note that (whilst overturned in principal on appeal) at first instance the Claimant was able to establish on the evidence that had a risk assessment been performed pursuant to the Management of Health & Safety at Work Regulations 1999 then the centre would have become aware of the danger posed by the mistaken belief held by its participants that the matting rendered the climbing wall safe and that such knowledge then founded a claim in negligence.

Ogden 6 – Disability Multiplier – Adjustment

Conner v Bradman & Company Limited [2007] EWHC 2789 (QB) (HHJ Coulson QC)

The Claimant sustained injuries to his left knee following a motorcycle accident. As a result, he required an arthroscopic assessment and anterior surgical repairs. Further, it was agreed that the Claimant would require a total knee replacement within 12 months and revision surgery in a further 10 years. At the time of the accident the Claimant had worked as a motor mechanic for Saab earning £20,327 net per year. The Judge found that as a taxi driver he would earn only £13,645 net. It was also found that following the total knee replacement he would not be able to return to work as a motor mechanic.

The Defendant contended that the Claimant was not "disabled" for the purposes of the Disability Discrimination Act 1995 and therefore not disabled for the purposes of the Ogden Tables. The judgment carefully considers this first question by reference to section 1 and Schedule 1 of the 1995 Act and the associated Guidance Notes. In particular, it was noted that for the purposes of assessing whether a person was disabled it was necessary only to establish that a person suffered an impairment for at least 12 months; measures taken to treat or correct any impairment were to be ignored. Such measures included medical treatment or the use of a prosthesis or other aid.

It was therefore not surprising that the Court found that the Claimant was disabled. On the basis of this finding, the Claimant submitted that in assessing his residual earning capacity a "disabled" multiplier discount of 0.49 should be applied to his working-life multiplier of 11.40. Had the Court found that the Claimant was not disabled a "non-disabled" multiplier of 0.82 would have applied.

Relying upon paragraph 49 of the judgment of Lord Lloyd in *Wells v Wells* [1999] AC 945, paragraphs 31 and 32 of the introduction to the 6th Edition to the Ogden Tables and paragraph 10-015 of Kemp the Court held that (especially because the threshold of disability was so low) it would be appropriate to adjust the "disabled" multiplier discount of 0.49. The Court held that the just result was in fact the mid-point of the "disabled" multiplier of 0.49 and the "non-disabled" multiplier of 0.82, that being 0.655.

Accordingly, the Claimant's earnings but for the accident were assessed at £20,327 x 11.4 x 0.82 = £190,155 and his residual earning capacity was assessed at £13,645 x 11.40 x 0.655 = £101,887. His loss was therefore assessed at (£190,155 – £101,887 =) £88,267.

Comment

At face value, the 6th Edition of the Ogden Tables gave rise to the prospect of significant awards for future loss of earnings. This was because in assessing the difference between what a Claimant would have earned had the accident not occurred and his residual earning capacity, the Tables suggested that a significant discount should be applied to the future earnings multiplier to account for disability-related contingencies. For example, an unemployed disabled 54 year old male should have his lifetime multiplier reduced by 94% under Table B of Ogden 6 whereas the same man who was not disabled would have his multiplier discounted by only 41%.

This decision provides Defendants with good arguments to mitigate the effect of the discounted multipliers in "disabled" cases. Of course whether the Court is inclined to depart from the discounts suggested by the Tables and the degree of any such departure will always be governed by the facts of the individual case. Logically, a Claimant could argue for a discount greater than that suggested by the tables in an appropriate case.

General Damages – Psychiatric Injury – Injury to Feelings – Assessment

Hugh Martins v Mohammed Chowdry [2007] EWCA Civ 1379

The Claimant developed a generalised anxiety state following a course of conduct by the Defendant which included making racist remarks and deliberately colliding with the Claimant's vehicle. Judgment was entered for the Claimant at which point an injunction was made against the Defendant restraining him from harassing the Claimant, his family or witnesses. However, the Defendant continued to harass witnesses and was committed to prison. He was later released. The Judge held that due to the Defendant's conduct during the litigation and his harassment of witnesses, the Claimant's fear for his family's safety had not subsided. The Judge awarded £12,500 for personal injury and £10,000 for injury to feelings.

The Defendant appealed on the basis that the Judge had wrongly awarded damages for symptoms caused by events after the liability hearing, that the Judge should not have made separate awards for psychiatric injury and injury to feelings and that in any event the awards were manifestly excessive.

Considering *Richardson v Howie* [2004] EWCA Civ 1127 and *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871, the Court of Appeal held that there should be no hard-and-fast rule about whether separate awards should be made for psychiatric injury and injury to feelings. Much depended on the facts of the individual case, such that, for example, if the psychiatric harm was very modest and merged with injury to feelings it would be more convenient to make a single award. In other cases, however, where the psychiatric injury was not insubstantial, it was helpful to the parties if the Judge separated the two awards. The Court of Appeal observed that although the awards were on the generous side they were not outside the range of appropriate awards and therefore not susceptible to appeal. Further, the Judge could not be criticised for taking into account the effects of the Defendant's conduct after the issue of liability had been determined because her award was not based upon a separate tort. Her judgment had been essentially to assess the damage caused by the original tort albeit in doing so the Judge had taken into account facts which post-dated the liability hearing. She was fully entitled to do so.

Comment

This case helps to clarify the approach that the Court should take when asked to assess General Damages for both personal injury and injury to feelings. It is now clear that in circumstances of very modest psychiatric harm one award is likely to be made. However, in other cases, separate awards should be made and this may well serve to increase the level of damages overall. *Vento* provides further guidance on quantum in cases involving injury to feelings (specifically by reference to three bands, ranging from £25,000 downwards) and provided guidelines to assist

employment tribunals in making awards for injury to feelings in cases of discriminatory harassment on the grounds of race or sex. Clearly, however, these guidelines will be applicable in personal injury cases involving a claim for injury to feelings.

Ex-Turpi Causa – PTSD – Subsequent Commission of Manslaughter

Gray v Thames Trains Limited & Network Rail Infrastructure Limited [2007] EWHC 1558 (QB) and [2008] EWCA Civ 713

The Claimant sustained minor physical injuries but severe post traumatic stress disorder following the Ladbroke Grove rail crash. He underwent a significant personality change, became socially withdrawn and suffered from outbursts of temper. He subsequently stabbed and killed a stranger. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in hospital under the Mental Health Act 1983.

The Claimant claimed damages including loss of earnings from the date of the manslaughter to the date of trial and for future losses thereafter. The Defendant contended that although it was liable in negligence it should not be liable for damages which post-dated the manslaughter on the grounds of public policy pursuant to the doctrine of ex turpi causa non oritor actio. The Claimant contended that this doctrine should be construed narrowly and should not apply where the foundation of the Claimant's case was the initial rail crash as opposed to the unlawful act of manslaughter.

At first instance the Court held that the test to be applied was whether the Claimant's claim was so closely connected or inextricably bound with his criminal conduct that the Court could not permit him to recover damages without appearing to condone such conduct.

The Court concluded that the Claimant had to rely on the manslaughter in order to found his claim for losses suffered after the offence. Whereas the Claimant's responsibility was diminished the law still regarded him as responsible and he had the requisite intent and must have known what he was doing. In these circumstances, the Court would not lend its aid to the recovery of damages based on criminal conduct.

On appeal the Court of Appeal allowed the claim for all the losses: it was important to distinguish between a tort founded on an illegal act and loss that was so founded. *Tinsley v Milligan* [1994] 1 AC 340 HL distinguished. The manslaughter was not inextricably linked to the claim for loss of earnings. Where the manslaughter did not amount to a break in the chain of causation or where there was less than 100% contributory fault on the part of the Claimant so that the claim was not inextricably linked with the criminal conduct, public policy did not prohibit recovery. *Clunis v Camden and Islington HA* [1998] QB 978 CA and *Worral v BRB* (unreported) 29/4/1999, CA considered, *Cross v Kirkby* TLR 5/4/2000 applied.

Asbestosis – Pleural Plaques – Actionable Damage

Rothwell v Chemical & Insulating Co Limited and Others (sub nom *Johnston v NEI International Combustion Limited* [2007] UK HL 39

The House of Lords upheld the decision of the Court of Appeal at [2006] EWCA Civ 27 that pleural plaques caused by negligent exposure to asbestos, which in themselves did not amount to damage that could give rise to a cause of action, did not become actionable damage when aggregated with the risk of future disease and consequent anxiety.

The House confirmed that symptomless plaques were not damage that could found a cause of action. Save in the most exceptional case the plaques would never cause any symptoms, did increase the susceptibility of a Claimant to other diseases or shorten his expectation of life. Neither the risk of future disease nor anxiety about the possibility of that risk materialising could amount to damage for the purpose of creating a cause of action (*Gregg v Scott* [2005] UKHL 2 and *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65 HL applied). The law that allowed the risk of future disease and consequent anxiety to be taken into account in computing the loss suffered by someone who had actually suffered some compensatable physical injury could not apply where there was no such compensatable injury because there was no cause of action under which damages could be claimed. Further, pleural plaques did not amount to damage when aggregated with the risk of future disease or anxiety because it was not possible by adding together two or more components, neither of which was itself actionable, to arrive at something that was actionable.

Comment

Practitioners may be interested to note that the House of Lords appear to have left open the question of whether pleural plaques can amount to sufficient damage in relation to a cause of action founded upon breach of contract. The House of Lords invited the Claimants in *Rothwell* to argue this point but they declined. However, there is ongoing (positive) speculation that such a cause of action would succeed.

Dependency Claim – Fatal Accident – Section 3 Fatal Accidents Act 1976

Williams v Welsh Ambulance Services NHS Trust & Another [2008] EWCA Civ 71

The Defendant appealed against an award of damages made to the Claimant following the death of her husband. The deceased had established a successful family business in which he, his widow and the two eldest children were equal partners. The Judge found that the business had grown as a result of the husband's drive and flair and described him as a wealth creator. The Judge accepted the widow's case and adopted her proposed method of assessing the cost of replacing the services rendered by her husband and awarded just over £1.7 million.

The Defendants appealed contending that there was no dependency because the family were at least as well off after the death as before because the family business had continued to provide them with a similar or larger income. The Defendant contended that the Judge should have focused on the business and its generation of profit rather than the efforts of the deceased.

The Court of Appeal held that the Judge had assessed the case properly. The Judge had correctly found that if the deceased had lived he would have worked for a further 30 years. The sons had been working in the family business and were in receipt of profit shares far in excess of the agreed economic values of the roles they performed. They were therefore plainly dependent upon their father to the extent that those profits exceeded the value of their labour.

The fact that each of the dependents was as well off after the death as before because the sons had taken over responsibility for managing the business successfully was irrelevant. The financial benefit that the sons had brought to the family was irrelevant to the assessment of the dependency because a dependent could not by his or her own conduct after the death affect the value of the dependency at the time of the death.

Comment

This case will provide great assistance to Claimants seeking to establish a dependency where the deceased and the dependents produced income from their joint efforts via a business. The Court of Appeal were clearly not impressed with the Defendant's attempt to suggest that the ongoing profitability of the business undermined the dependency claim.

Future Loss – Periodical Payments – Indexation – Section 2(1) – Damages Act 1996 – Care Expenses

Tameside & Glossop Acute Services NHS Trust v Thompstone; South Yorkshire Strategic Health Authority v Corbitt; United Bristol Healthcare NHS Trust v RH; South West London Strategic Health Authority v De-Haas [2008] EWCA Civ 5

The various NHS trusts and health authorities appealed against decisions where the Court had made a periodical payments order and, following *Flora v Wakom* (Heathrow) Limited [2006] EWCA Civ 1103, decided that section 2(9) of the Damages Act 1996 permitted the Court to make the orders for periodical payments not simply in exceptional circumstances but whenever it appeared appropriate and fair to do so. In three of the four cases, the Court also made an order under section 2(9) modifying the effect of section 2(8) by providing for the payments to vary by reference to ASHE 6115 (an index of earnings relating to care assistants and home carers) as opposed to the RPI.

The Defendant argued that Flora had been decided per incuriam, that section 2(9) permitted only an increase or decrease in the retail price index (and not the use of an alternative index), that there should only be a departure from the RPI in exceptional circumstances, that the Claimant had to prove that there was an appropriate alternative to the RPI and that, in any event, ASHE 6115 was unsuitable as an instrument of indexation.

The Court of Appeal declined to accept any of the Defendant's submissions, describing, in particular, the submission that *Flora* had been decided per incuriam as "hopeless". Further, the Court held that it would not be appropriate to reopen the suitability of ASHE 6115 in future proceedings unless the Defendant could produce evidence and argue significantly more persuasively than had been argued in the instant cases. The Claimant's "needs" were found not to be limited only to the needs that he demonstrated for the purpose of proving the various heads of damage but also included those things that he needed to enable him to organise his life in a practical way. The Judge should apply an objective test: he had to have regard to the wishes and preferences of the parties and to all the circumstances but ultimately he had to decide what order best met the Claimant's needs.

Comment

The subsequent appeal by the Defendants to the House of Lords has been withdrawn. This case is covered in detail by an article by Peter Barrie at page 12 of the Newsletter.

Fatal Accidents Act 1976 – Disregard of Benefits

Arnup v M W White Limited [2008] EWCA Civ 447

Mrs Arnup's husband was killed in the course of his employment. She sued the employer under the Fatal Accidents Act 1976. At first instance, the Judge held that a payment she had received from the Defendant under a death-in-service benefit scheme should be deducted from her claim for damages but that a payment received under an employment benefits trust covering her husband should not be deducted. The Judge held that the section 4 of the 1976 Act did not require either payment to be disregarded because they had accrued not as a result of the death but as a result of the independent decisions of the Defendant and the trustees of the employee benefit trust. The Judge then went on to apply common-law exceptions to deductibility and held that, whilst the payment from the employee benefit trust fell within the "benevolence exception", the death-in-service benefit did not. Each side appealed.

The Court of Appeal agreed with the statement of Harvey McGregor QC contained in the fourth supplement to the 17th edition of McGregor on Damages. Once the Judge had decided that the payments did not result from death so that section 4 of the 1976 Act did not apply, he should then have adopted the common-law position that benefits which did not result from death were equally to be disregarded because of that very lack of relationship with the death. Accordingly, on the basis of the Judge's findings about causation, he could not hold that either of the payments fell to be deducted from the loss of dependency. If the payments were not received as a result of the death, they were completely irrelevant to the whole question of assessment of damage. In any event, all benefits which came to the Claimant as a result of the death were to be disregarded because the expression "or otherwise as a result of death" in section 4 was wide enough to cover benefits in kind which accrued as a result of the death and any other kind of benefit which might not yet have been identified. The Court held that Parliament's intention in amending the 1976 Act was to ensure that all benefits coming to the dependent as a result of the death were to be left out of account.

Comment

An important decision in relation to section 4. It is now clear that even in situations where benefits fall outside "the benevolence exception", those benefits will be disregarded. In cases where an employee may benefit from a discretionary payment, it remains to be seen whether, if a dependency claim appears likely, those charged with making the discretionary payment will be influenced by this decision.

Bereavement Awards

From 1 January 2008, the level of bereavement damages awarded under section 1A of the Fatal Accidents Act 1976 was increased from £10,000 to £11,800. The increased level of the award applies to all causes of action that accrued on or after 1 January 2008. Bereavement awards remain at the old level of £10,000 for cases in which the causes of action accrued between 1 April 2002 and 31 December 2007. Up to and including 31 March 2002, the level of the award was £7,500.

Procedure

Costs – Part 36 Offers

Carver v BAA Plc [2008] EWCA Civ 412

The Claimant injured her ankle when she fell into a defective lift. The Defendant conceded liability. Having seen the Claimant's medical reports the Defendant offered £3,486 on a Part 36 basis. The Claimant then instructed further expert evidence and brought a claim for damages in excess of £5,000. The Defendant then made

a Part 36 payment into Court totalling £4,520. The Claimant made no counter offer, rejected the Defendant's payment into Court and pursued a claim in excess of £19,000. Further medical evidence then reduced the value of the Claimant's claim. The claim went to Trial where Judgment was entered for the Claimant for £4,686.26 including interest. The Judge, applying the amended CPR Part 36, found that the Claimant had not succeeded in obtaining a Judgment "more advantageous" than the Defendant's Part 36 offer.

The Court of Appeal held that the change in the language of Part 36 resulted in a change of approach. Under the old rules the Claimant would have recovered her costs once she had beaten the level of the Defendant's offer even if that was by one penny. The new rules included the words "more advantageous". This was an open-textured phrase which permitted a more wide ranging view of all the facts and circumstances of the case in deciding whether the Judgment which was the fruit of all the litigation was worth the fight. The Judge was therefore entitled to take into account the added stress caused to the Claimant as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked on that campaign for such a small gain.

Comment

This is an unsettling decision because it removes the certainty enjoyed under the old rules in respect of the effect of offers. It is now open to a Defendant who has failed to offer sufficient to cover the eventual Judgment nonetheless to argue that adverse costs consequences should apply to a Claimant. Logically this should lead to Claimants having to be slightly more cautious in judging whether to accept an offer. It remains to be seen whether the Courts will implement this decision routinely or whether exaggeration or some other feature will be required in cases where a Part 36 offer made by the Defendant is beaten narrowly.

Part 18 – Request for Insurance Status

Harcourt v S E S Griffin [2007] EWHC 1500, QBD

The Claimant suffered severe spinal injuries in a gymnastic accident at the Defendant's club. He was rendered C4 tetraplegic. The club was an unincorporated association. Judgment was given by consent for 75% of the claim. The Claimant put the value at between £8m and £10m. Both figures were disputed but it was clear that the final award would be very significant. The Claimant applied for an Order under CPR Part 18 to ascertain how the Judgment would be satisfied. The Claimant submitted that if the combination of the insured limits and any assets available to satisfy the award was bound to be exceeded by any reasonable outcome then it would be wasteful and wrong to engage in a contested quantum battle generating costs. On the other hand, if there was ample insurance cover then quantum would be pursued.

Mr Justice Erwin held that disclosure of this kind should only be ordered where a party could demonstrate that there was some real basis for concern that a realistic award in the case might not be satisfied. Accordingly, the exercise of any jurisdiction to order a disclosure of such information should be approached with caution. On the facts, the Defendant had mistakenly disclosed a certificate of insurance which indicated that there was insurance cover to £5m. This document raised the question of whether there was adequate cover. Accordingly, the application was granted.

Gabriel Farmer

Road traffic accidents abroad

Traditionally, those injured in RTAs abroad have been obliged to bring their claim in the country where the accident happened or in the country where the Defendant was domiciled. The ECJ, however, has recently ruled that Council Regulation 44 (2001) enables a Claimant injured in a member state to bring a direct action against the at-fault insurer in the state where the Claimant is domiciled.

The Background

Council Regulation 44 (2001) Article 9(1)(b) provides that: *"An insurer domiciled in a member state may be sued in another member state, in the case of actions brought by the policy holder, the insured or a beneficiary, in the courts for the place where the Plaintiff is domiciled". Article 11(2) states that "Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."*

At first glance Regulation 44 appears to provide protection only to a policy holder, insured or beneficiary. The ordinary and natural meaning of the word beneficiary does not embrace an injured party. In June 2005, however, the fifth Motor Insurance Directive (2005/14/EC) came into force. Article 5 made provision for the fourth Motor Insurance Directive[1] to be amended by the insertion of an additional paragraph of reasoning into the preamble of the Directive. The new paragraph 16(a) read: *"Under article 11(2) read in conjunction with 9(1)(b) [...] injured parties may bring legal proceedings against the civil liability insurance provider in the member state in which they are domiciled."*

Despite this clarification, there remained some controversy about the status of 16(a) and the meaning of article 11(2). On what basis should a Directive implemented in June 2005 influence the interpretation of a Regulation which came into force in March 2002?

The issue was raised in 2006 in questions put to the European Parliament.[2] In its answers, the Commission expressed the view that the right of a victim to bring a direct action against a third-party insurer in the state where he is domiciled was granted by Council Regulation No 44/2001 and was not dependent on member states implementing the fifth Motor Insurance Directive. The Commission maintained that the amendment to the preamble was made to update the fourth Motor Insurance Directive in the light of subsequent developments contained in Regulation 44/2001.

The Commission's answers were, however, criticised by commentators who argued that the Commission's reasoning did not accurately reflect the wording of Regulation No 44/2001 and that it was improper to retrospectively amend the preamble to a Directive.

FBTO Schadeverzekeringen NV v Odenbreit

Mr Odenbreit decided to test the point after he was injured in an RTA in the Netherlands. Jack Odenbreit, who was domiciled in Germany, attempted to sue the Defendant's insurers, who were based in the Netherlands, directly in his local court. He argued that Council Regulation 44 (2001) permitted this. The Defendant disagreed and maintained that the German courts lacked jurisdiction to hear the claim. The issue was eventually appealed to the Federal Court of Justice which stayed proceedings and referred the point to the ECJ.

The ECJ gave a preliminary ruling on 13th December 2007. A number of interested parties made representations. The German government and the Commission submitted that Article 11(2) should be interpreted as allowing the rule in 9(1)(b) (i.e. the principle allowing a Claimant to sue in their home court) to be applied to direct actions by injured parties against insurers. Otherwise, they argued, Article 11(2) would be superfluous. The Polish Government submitted that the word "beneficiary" ought to be interpreted so as to include injured parties.

In its judgment, the ECJ noted that the provisions were designed to protect the economically weaker party in insurance contracts and ruled that 11(2) had the effect of adding injured parties to the list of plaintiffs contained in 9(1)(b). Thus, they accepted the Commission's argument and interpreted 11(2) in a way which meant it was not necessary to include an injured party in the definition of a beneficiary. 16(a) was found to be persuasive but not binding.

The decision, therefore, clarifies the law and indicates that Claimants ought to be able to recover losses arising out of RTAs which occur in other member states in their home court.

Pursuing the Claim against the Insurer

The claims procedure for this type of case is set out in The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003.[3] The Claimant can contact the Motor Insurers Information Centre in order to obtain details of the at-fault driver's UK claims representative. The claims representative must provide a reasoned response to the claim within 3 months. If he fails to do this, a claim can be submitted to the MIB. If a response is achieved but no acceptable settlement, negotiated proceedings will have to be issued. It should be noted that the claims representative may not be authorised to accept service of proceedings. If this is the case, it may be appropriate to ask the claims representative to nominate solicitors authorised to accept service in order to avoid having to serve the Claim Form on the foreign insurer outside of the jurisdiction pursuant to 6.19 of the CPR.

The English Courts will generally apply the law of the country where the tort occurred when determining matters of substantive law such

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[1] This provides for a direct of action against RTA insurers.

[2] Question E-3456/06 (8 September 2006) and E 4382/06 (23 November 2006).

[3] SI 2003 No 37.

[4] *Private International Law (Miscellaneous Provisions) Act* 1995, Section 11.

[5] *Harding v Wealands* [2006] UKHL 32.

as liability and limitation[4]. It should be noted that the courts will presume that the law applied is the same as English law unless either party wishing to rely upon any difference provides evidence to the contrary. The foreign limitation period will apply and thus specialist advice will often need to be taken about when this expires and how to protect the claim. English law will usually be applied in respect of procedure, costs and quantification of the claim.[5] Neither the predictive costs regime nor the fixed CFA uplift regime applies to RTAs which occur abroad.

The court will, however, displace the presumption that liability should be determined in accordance with the law of the country where the loss occurred where it is *"substantially more appropriate"* for the matter to be dealt with in accordance with English law. The circumstances in which this presumption should be displaced have been discussed in a few recent cases. For example, in France failure to wear a seatbelt does not result in a reduction of damages on the basis of contributory negligence. In *Dawson v Broughton*[6] the court held, that the parties had stronger connections with England than France and that *"it [was] inherently inequitable for the Claimant to submit to the English jurisdiction, but then to seek to avoid the disadvantage of the consequences which may flow, if it [was] established that the deceased was not wearing a seatbelt."* In *Prince v Prince*[7] the Claimant was injured in a rear-end shunt in France. She sued her husband, the driver of the car in which she was travelling, in England and sought to rely upon French law which enables passengers to bring proceedings against the driver of the car regardless of fault. The court rejected the Defendant's arguments that the presumption ought to be displaced, noting that the accident occurred abroad and the "at fault" driver of the car behind (albeit not a party) was French.

Conclusion

The ruling in *FBTO Schadeverzekeringen NV v Odenbreit*, indicates that a Claimant can pursue a claim in the country where he is domiciled following an RTA in another member state. This places Claimants in a much better position. Hitherto, those injured in accidents abroad had been faced with the prospect of pursuing their claim in a foreign jurisdiction (unless the Defendant happened to be English) where the procedure and language were unfamiliar. Costs may have been irrecoverable and the damages received may have been less than those awarded by the English courts. It should, however, be noted that the Claimant still has the option to pursue the case in the jurisdiction where the accident occurred or where the Defendant is domiciled, and in some cases this may pose an advantage.

Abigail Stamp

[6] Dawson v. Broughton (County Court, 31/7/07). This claim arose out of an RTA in France, where the failure to wear a seatbelt was an issue and where both the Claimant and the at fault party were English

[7] Unreported but referred to in The Applicable Law in Cases Involving the Loi Badinter [2007] J.P.I.L. @ 338.

The "trigger" litigation

What is it?

1 For those with their finger on the pulse of asbestos litigation, please turn away now. For those who think it is something to do with `Only Fools and Horses`, please read on.

2 The "Trigger Litigation" or, to give it its full title, *Durham (PR of Screach, deceased) v Thorpe Campbells Holdings Ltd* and Others: Employers' Liability Policy Trigger Issues, is a group of consolidated cases being case managed and tried together in the QBD in London. It concerns the problem of which (if any) insurer is liable to indemnify an employer whose employee or ex-employee has developed mesothelioma (or other industrial disease) after the period of insurance cover.

3 The context of the litigation is the case of *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492. In that case, the Court of Appeal construed a *Public Liability* policy as meaning that it was the insurer on risk at the time that the Claimant developed the disease that was liable to indemnify the Defendant in respect of the Claimant's claim, not the insurer(s) on risk at the time of culpable exposure to asbestos. Although the Court of Appeal in Bolton laid ample ground for the application of a different rule in *Employer's Liability* cases, it was certain that some EL insurers would, sooner or later, take the point. They now have.

Why does it matter to me?

4 If you are or represent one of a number of EL insurers of a Defendant who is liable to a Claimant in respect of mesothelioma suffered by an employee, then the question is self-answering. Why does it matter to everyone else?

5 It can matter to Claimants/their lawyers in a number of ways:

- Suppose the insurer who was on risk when your client developed mesothelioma cannot be traced/is insolvent. Can you get your client's judgment paid by the other insurer(s) on risk during the period of exposure?
- What if the employer had ceased trading at the time of developing the disease and had no insurer on risk at that time?
- What can the Claimant do to get their money when the last (of several) insurers on risk at the time of exposure will only pay the judgment on a time-weighted pro rata basis but all earlier insurers refuse to pay at all, citing Bolton?

6 It could affect those advising someone who used to trade as a self-employed sub-contractor (and who had EL insurance at the time) but who is now employed and has no continuing EL cover at the time that his ex-employee develops mesothelioma. Is he personally liable to meet the Claimant's claim?

OK, so what is happening in the Trigger Litigation?

7 A Practice Direction was made on 26 July 2007[1] requiring all claims where the issue arises to be issued in the Central Registry of the QBD, there to be case managed centrally. Existing claims where the issues arise are to be transferred there (where they are likely to be stayed, unless selected to become further lead cases). At the time of going to press, the lead cases are being tried in an 8-week trial that commenced on 3 June 2008. We should, therefore, have an answer (subject to appeal) by late Summer 2008.

What will the outcome be?

8 Never let it be said that barristers are conservative fence-sitters. My track record of predicting the outcome of asbestos-disease test cases is 2:1. (I called Fairchild and Grieves but got Barker wrong.) I make the following (radical) predictions. The outcome will be such that:

- Claimants will be able to recover all of their judgment sum against a party/insurer with means to pay.
- Insured employers will be indemnified in respect of judgments against them by an insurer with means to pay.

Beyond that, I am saying nothing at this stage (but watch this space).

Anthony Reddiford

[1] http://www.hmcourts-service.gov.uk/cms/files/Practice_direction_-_Employers_liability_policy_trigger_issues_-_60707.pdf

Periodical Payments: Time to take off the L plates

In four joint appeals reported as *Thameside & Glosop Acute Services NHS Trust v Thompstone* [2008] EWCA Civ 5, the Court of Appeal has given the green light to the use of periodical payments for future loss by resolving the dispute about the choice of index for future inflation adjustment of the level of payment in favour of a flexible approach and a willingness to replace RPI with a more appropriate index. Future care costs are to be indexed by reference to statistical information about the earnings of carers. There may be an appeal to the House of Lords, but this was such a resounding and unanimous decision of all the first instance judges and all the members of the Court of Appeal that it seems reasonably safe to expect that courts will now implement *Thompstone* without further reservation.

Section 2(9) of the amended Damages Act 1996 provides that the court may disapply or modify subsection (8), which provides for indexation in accordance with RPI.

In relation to lump sum awards, the Court of Appeal has previously held that a likely future rate of increase in care costs above RPI it is not a sufficient reason to depart from the Lord Chancellor's 2.5% prescribed rate of return (*Warriner v Warriner* [2002] 1 WLR 1703 and *Cooke v UBHT* [2004] 1 WLR 251) and this was held not to depart from the principle of awarding 100% compensation.

In *Thompstone* the Court of Appeal highlights the very different character of a periodical payments order, where the Claimant is deprived of the flexibility to mange his damages to meet his personal priorities, preferences and attitude to investment risk. In order to provide 100% compensation, the periodical payments must match the needs of the Claimant into the future without many of the uncertainties which justify taking a rough-and-ready approach to the discount rate for a lump sum award.

All four appeals concerned clinical negligence claims on behalf of young Claimants with significant lifetime care needs, where the Claimants sought PPs for the damages awarded for future care and case management, but lump sum awards for other heads of damage. The Court of Appeal upheld the indexation of these PPs for care by reference to the 'care assistants and home carers' category 6115 of ASHE (the Annual Survey of Hours and Earnings, produced by the Office of National Statistics, the successor to the New Earnings Survey) instead of RPI. The court recognised that, if future PPs for care were fixed to RPI, and if it was widely believed that care costs would increase by more that RPI, then no well-advised Claimant would ever prefer a PP over a lump sum award. The advantages of PPs would be lost.

The most important issues answered by the Court of Appeal were that:

- the power to modify s. 2(8) of the 1996 Act is not restricted to exceptional circumstances, and the judge should consider what is the appropriate index to achieve 100% compensation. The Court of Appeal has already made a binding decision to this effect in *Flora v Wakon* [2006] EWCA Civ 1103;
- modifying the effect of s. 2(8) is not limited to making a modification on RPI, and the court is free to provide for any alternative;
- the Claimant does not have a legal burden of proving the suitability of one alternative to RPI but can put a range of possibilities before the court. The court has a duty to consider whether RPI should be replaced and that will always require a comparative exercise looking at the range of alternatives;
- the use of ASHE 6115 needs some work to identify a weighted average wage that can be used as an index (described at paragraph [71] of the judgment), but when this has been done it provides a sufficiently accurate and reliable match to the growth in the cost of the carers whom the Claimants would employ to be the appropriate basis for the indexation of future care costs;
- the power of the court to order PPs under s. 2(1) of the 1996 Act, CPR 41.7 and CPR 41 BPD.1 involves deciding whether, and for what parts of an award, PPs rather than a lump sum should be ordered, and deciding on indexation. The aim is to make the order which best meets the Claimant's needs including, for example, a need to spend capital to buy a home or a need to have a fund for contingencies; and

Defendants are discouraged from calling expert evidence in order to argue general points about the suitability of a PP to meet the Claimant's needs or the proportion of an award that should be in the form of a PP.

It seems likely that practitioners and the courts should now take more seriously their obligation under s.2(1)(b) to consider whether to make a PP order in every case where an award of damages for future pecuniary loss is made. There is no lower limit of value. In any case, where the future loss is of significance in a claim, and particularly where there are continuing care needs, Claimants' solicitors will now have to consider with renewed enthusiasm obtaining expert financial advice, so that they and their clients can make well-informed decisions.

Peter Barrie

Spencer-Franks v Kellog Brown & Root Ltd [2008] UKHL 46

"Is it all work equipment now?"

Introduction

Some readers may recall when, in the 1980s, it became fashionable for businessmen to read Sun Tzu's *Art of War* and to apply the teachings of this ancient Chinese general to the marketplace. (Sadly, if therein lay a suitable analogy for avoiding sub-prime mortgages, it appears that they did not find it.)

One of Sun Tzu's stratagems was always to leave a surrounded enemy with an escape route. The general knew that if defenders have no way out, they fight harder.

Since *Stark v Post Office* [2000] PIQR P105, PI Defendants have had no way out once an accident has been found to have been caused by defective work equipment. Strict liability under the Provision and Use of Work Equipment Regulations 1992 (now 1998) applies from the moment of defectiveness, irrespective of cause or fault.

Accordingly, canny Defendants have fought hard to avoid the trap in the first place. Some of the fiercest fighting has taken place over whether the Regulations apply at all: what actually is *"work equipment"*?

There has never been any doubt over the tools of the trade. Similarly, the broad definition contained in the Regulations (to which we will come) has forestalled any argument over machinery generally. Such things must be *"maintained in an efficient state, in efficient working order and in good repair"*. But what about items which are actually in the process of being maintained when they injure the worker who is maintaining them? If a worker is using a tool to work on some equipment in order to repair it, can it really be said that both the tool and the thing he is working on are his work equipment?

Hammond v Commissioner of Police

In *Hammond v Commissioner of Police of the Metropolis* [2004] EWCA Civ 830, the Claimant was a mechanic employed by the Commissioner of Police. He was working on the wheel of a police dog van when a wheel bolt sheared, causing injury. He brought a claim under the 1992 Regs, which applied at the time. Dismissing the claim, May LJ held that:

"the Regulations are concerned with what may loosely be described as the tools of the trade provided by an employer to an employee to enable the employee to carry out his work [...] The van might well be work equipment of a policeman driving it, but not of the police mechanic repairing it"

and accordingly that:

"[the PUWE Regs] do not extend to that which the employee is working on as distinct from the equipment which he is using to undertake his work."

Lawyers who particularly enjoy confounding lay people's expectations of justice will enjoy the next bit. The CA went on to hold that because the Claimant mechanic was employed by the Commissioner of Police and the van was owned by the Metropolitan Police Authority, the van was not his employer's work equipment and that (even though he was a police mechanic, in a police garage, working on a police van) the Claimant's argument would create the absurd result of the owner of a commercial garage having to treat customers' cars as his own work equipment. For all these reasons, the claim failed.

I have written a number of Opinions on this question post-*Hammond* and in each one I have sounded a note of caution in relation to the reliability of the Court of Appeal's decision. Two points seemed to me to be significant. Firstly, the Court of Appeal were not referred to *Knowles v Liverpool City Council* [1993] 1 WLR 1428. This is the case in which the House of Lords held that a council employee who was paving with flagstones, and was injured when one broke, could sue for the defective flagstone under the Employers' Liability (Defective Equipment) Act 1969. The HL refused to draw a distinction between tools and materials. It is particularly surprising that no reference was made to Knowles, given that the Claimant in *Hammond* had indeed pleaded the 1969 Act in addition to the 1992 Regulations. In any event, there is no obvious reason to suppose that a different definition of "work equipment" could logically apply to the one but not the other. The ratio of Knowles was clearly inconsistent with the decision in *Hammond* and, had the Court of Appeal been aware of it, they might have considered themselves bound by it or, at least, considered it to be powerfully persuasive as to the construction of the 1992 Regs.

Furthermore, the reasoning of the Court of Appeal in *Hammond* appeared to me to be seriously at odds with the obvious starting point – the definition of work equipment given in the 1992 Regs themselves, which was at Reg 2(1):

"use" in relation to work equipment means any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning, and related expressions shall be construed accordingly;

It should be noted that the definition provided in the succeeding 1998 Regulations is (practically) identical.

Spencer-Franks v KBR

Hammond has now been unanimously overruled by the House of Lords in *Spencer-Franks v KBR*. The Claimant was working on an oil

rig as a mechanical technician. He had to maintain a self-closing mechanism, of the typical spring and linkage-arm type, at the top of a door. While he was using a screwdriver on it, the linkage arm sprung out and struck him in the face, causing injuries. The accident was caused because the mechanism was defective/unsuitable, in that turning of the screw in question should not normally have caused the arm to spring out in this way.

The House of Lords considered first the question of whether, absent the type of work being conducted, the thing in question met the definition of "work equipment" in the 1998 Regs. Lord Hoffmann approached the question in simple, back-to-basics, terms.

The door, with closer, was an apparatus or installation. Everyone using it used it for the purposes of their work. Every time someone used the door they also used the closer. Therefore the closer was work equipment.

Fellow citers of *Knowles v Liverpool City Council* [1993] 1 WLR 1428 may be pleased to know that it did warrant one mention. Lord Mance noted that May LJ's distinction between tools of the trade and other items of work equipment was:

"a difficult distinction to draw in this connection in the light of, inter alia, the decision and reasoning of the House in Knowles v Liverpool City Council *[1993] 1 WLR 1428 where a flagstone being laid by a council employee was held to be "equipment provided by his employer for the purposes of the employer's business" under the Employer's Liability (Defective Equipment) Act 1969."*

Lord Hoffmann then considered whether any implied exclusion could be found because the apparatus formed part of the premises themselves – meaning, for example, that they were covered by the Workplace (Health, Safety and Welfare) Regulations 1992 but not by the 1998 Regs. He stated that:

"In the case of ordinary work premises on land, this might be a good argument."

However, due to specialist regulations and case law applying to offshore oil rigs, the argument could not succeed in this case.

Hammond was then summarily dispensed with:

" I cannot accept that something can be work equipment in relation to one person but not to another. If the dog van was "machinery, appliance [or] apparatus" (which I should have thought it was) under the 1992 definition and "for use at work" under the 1998 definition (which I also think it was), then in my opinion it was work equipment."

Lord Hoffmann excluded customers' cars from the duty owed, in the garage example, by reference to whether they had been "made available" or "selected" as work equipment, which they had not. They might be work equipment of another party, but they would not be work equipment of the repairing garage. In the Hammond case, the distinction between the Metropolitan Police Authority and the Commissioner of Police was wrong; it was all a single undertaking – the Metropolitan Police. Mr Hammond was a worker in the undertaking and both his tools and the van he was working on were work equipment. However, if an employer supplied vans to its employees but had them repaired by an independent garage, the mechanics of the independent garage would not be workers in the van owner's undertaking and the vans would not have been supplied to them as work equipment. It might be that the van owner would be liable for injury caused to the independent mechanic – but the independent mechanic's employer would not be.

I should pause to point out that, under reg 3(2), the requirements of the 1998 Regs are supposed to apply to the employer if the equipment is:

"provided for use or used by an employee of his at work"

which could be argued to be inconsistent with a distinction based upon who precisely provided or selected the equipment that is being used. However, none of the other four Law Lords disagreed with Lord Hoffmann's discussion of the point.

The only question which was not decided was whether liability could have been separately established against both the Claimant's employer (KBR, who had supplied him as labour) and the occupier/operator of the platform and the door (Talisman). Because of an indemnity, the point was not argued. The Lords found that the occupier of the platform was certainly liable but left open the question of whether the employer was as well.

Returning to Lord Hoffmann's discussion of van repair, the door was provided by Talisman and there was no doubt that they had control of the door closer as part of the platform. Lord Hoffmann stated that whether KBR, the employer, could also be liable would depend upon the arrangements between KBR and Talisman as to whether it could be said that the platform was the site of an undertaking by KBR as well as Talisman. The question was not decided.

Lord Mance pointed out that the liability of the platform operator to workers injured by defective work equipment should not depend upon whether the operator employed them or used outside contractors. Hence, it follows that the liability of the owner/controller of work equipment should be strict in relation to any injured person, provided that they are, at least, a worker. (This of course mirrors the approach that the courts have taken in relation to the application of Workplace Regulations.)

Lord Neuberger took perhaps the most expansive view of the application of the 1998 Regs:

"The limits of the scope of the duty imposed by the 1998 Regulations so far as third parties are concerned need not be decided in this case. There is much to be said for the view that there is no limit to the class of persons to whom the duty is owed"

For the Future

The question of whether it is a defence in itself to say that the defective equipment in question was being repaired at the time may now be considered closed: it is not.

Other questions remain open: applying *Spencer-Franks*, there certainly appear to be strong arguments in favour of the employer whose employee is injured when he is maintaining another party's work equipment. Conversely, a customer who provides a defective piece of equipment for repair by another may be very surprised to find that he is strictly liable if an employee of the repairer is injured during the course of the repair – perhaps due to a known defect. Pro-actively, there must surely be strong arguments in favour of including a repairer-to-customer indemnity clause in contracts for repair, in consideration for the customer providing the business.

Also, it will be recalled that any implied exclusion of apparatus forming part of the premises in which the work took place did not apply to equipment **attached to an offshore platform**. Accordingly, in a future case it might be possible to consider whether *Spencer-Franks* would still apply to equipment which

forms part of the premises of an ordinary, onshore, workplace.

Such an argument would be interesting, but bold. Lord Rodger specifically stated:

"The rival view might be that the door to the control room was not work equipment because it formed part of the fabric of the structure. But I doubt whether it would be wise to draw too sharp a division between work equipment and fabric."

In the opinion of the author, the following points may now be regarded as decided:

i an employer is strictly liable for injury caused to his employees by his defective work equipment – it is irrelevant whether the work equipment is being worked with, or worked on, or repaired, at the time;

ii the employer is so liable to any injured worker within the undertaking, whether employed by him or not; and

iii in the case of offshore platforms, it makes no difference whether the work equipment forms part of the installation or not.

Meanwhile, the following points may be taken, at least, as pointers towards the possible approach of the higher Courts in future cases:

iv it may be that in the case of premises generally, whether work equipment forms part of the premises is irrelevant;

v the employer may be liable to any injured person at all – it is possible that the class of persons is unlimited; and

vi the employer may be able to avoid liability for work equipment provided to his employees by others, which he has not selected and over which he has no control – particularly in the circumstances of his employees repairing that equipment.

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