CASE LAW UPDATE JUNE 2016

Martin Lanchester. June 2016

Fundamental Dishonesty

James v Diamanttek Ltd, unreported 8th February 2016 (Coventry CC - HHJ Gregory)

This is one of the first QOCS cases dealing with Fundamental Dishonesty. The case was brought by Mr James, a diamond driller and plant operator who alleged that he had suffered Noise Induced Hearing loss. The period of alleged exposure was 2003-2013 and the issues to be determined at trial were whether the Defendant employer provided the Claimant with ear protection and whether the use of the protection was enforced. In response to Part 18 questions the Claimant expressly stated that he had not been provided with ear protection throughout the period, and had not received any training or warnings about damage to his hearing.

The Defendant provided evidence that the Claimant had been provided with protective equipment throughout the period of employment.

Under cross-examination at trial the Claimant eventually accepted that ear protection was in fact provided 100% of the time and furthermore that he wore the protection between 2006-2013. The Deputy District Judge found the Claimant to have been evasive and inconsistent and found that there had in fact been protection provided throughout the period of employment. The judge also found that that the Claimant had not been telling the truth on this issue. The Claimant case was dismissed.

The Defendant argued unsuccessfully for the provisions under CPR44.16(1) for QOCS to be set aside. In refusing the application the Deputy District Judge found that whilst the Claimant had not told the truth 'on the day', she did not 'form the impression that he was a dishonest person'.

On appeal HHJ Gregory overturned the decision finding that the trial judge had conflated the concept of someone being a dishonest person with somebody being dishonest in a particular regard. Whether or not the Claimant had access to ear defenders was one of the 'fundamental bases' of the claim, and on this issue the Claimant had lied. Accordingly, on the balance of probability the claim was fundamentally dishonest and the costs protection was set aside.

Surveillance

Hayden v Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 1121 (QB)

Guidance as to how to deal with late applications to admit surveillance in personal injury claims.

The Claimant worked as a cardiac physiologist at the Defendant trust and claimed to have sustained an injury at work during a lifting procedure. Liability was admitted and the Claimant sought significant damages including £850,000 for future loss of earnings and pension. The Defendant's expert in pain medicine stated in May 2015 that he thought the Claimant may have been exaggerating her physical impairment. However, no surveillance was sought until February and March 2016 with the five day trial fixed for 11 April 2016. The Claimant did not receive edited footage until 24th March. The same material was sent to the Defendant's expert at the same time. An application to rely upon the evidence was made on 30 March with the application to be determined on the morning of the first day of trial. The Defendant disclosed an addendum report from the pain expert commenting on the edited footage on 5 April.

Having heard argument from both sides on 8 April the Judge vacated the trial and allowed the Claimant an opportunity to review the position before hearing further argument.

The Defendant relied upon Douglas v O'Neill [2-11] EWHC 601 (QB) on the basis that there was no apathy or attempt to take unfair advantage and it would be wholly unjust to refuse the application to rely upon the material just because it was obtained late.

Mr Justice Foskett allowed the Defendant's application despite the fact that he found there had been unreasonable and culpable delay in obtaining the surveillance evidence. The judge was influenced by the fact that the Claimant and one of her principle experts had been able to 'answer' the surveillance evidence and the Defendant's pain expert's analysis such that the playing field remained level for a future trial. Unsurprisingly the Judge ordered the Defendant to bear the costs of the vacation of the trial, as well as the costs of the two application hearings.

The Judge also stated at para 44 that it would be for the Civil Procedure Rules Committee to consider whether the rules governing late disclosure should be reviewed. However he did observe that more liberal use of orders giving a date by which material should be served would trigger the relief from sanctions jurisdiction and this would 'focus the minds of the defendant's representatives on the need to address the issue in a timely way'.

Fatal Accidents

Knauer v MOJ [2016] UKSC 9

The Supreme Court has reviewed the method by which a dependent's financial losses are calculated in fatal accident claims and overturned the House of Lords previous decisions on this point in the cases of Cooks v Knowles [1979] AC 556 and Graham V Dodds [1983] 1 WLF 808.

Mrs Knauer was exposed to asbestos during her employment and died aged 46 from mesothelioma. A claim was brought by her husband for damages including a claim for his wife's daily assistance in the home. At first instance the judge, whilst expressing his discontent in doing so, followed the authorities and applied the multiplier from the date of death rather than the date of trial. This meant that the Claimant was undercompensated as the multiplier calculated from the date of death was reduced to allow for accelerated receipt of money which had not in fact been received. The trial judge gave permission to appeal and allowed the case to leapfrog direct to the Supreme Court.

The Supreme Court unanimously agreed that the correct approach should be to apply the multiplier from the date of trial. This followed the recommendation of the Law Commission in 1999 and overturned the earlier House of Lords decisions. The Court pointed to the fact that there had been a material change in the way the courts assess future losses and the previous approach was now outdated and unscientific. In the case of Mrs Knauer the different approach increased the Claimant's award by approximately £50,000 which was nearly 10% of the total value of the claim.

The Court held that past losses should be calculated as they would in non-fatal cases, but with small reducing contingencies.

This change will require both parties to re-pleaded where they do not adopt the Ogden table approach. Also existing Part 36 offers will need to be reviewed. The new method is set out at paragraph 64 of the Ogden Party Guidance within the Guidance notes of the Ogden tables.

Interim Payments

Sellar-Elliott v Howling [2016] EWHC 443 (QB) (Sweeney J)

Defendant application for permission to appeal from an order of Master Cook allowing an interim payment of £100,000.

The Claimant alleged a negligent failure to report a suspicious mass over the Claimant's liver which was shown on a CT scan. Breach of duty admitted but causation was denied on the basis that the tumour was already malignant when the CT scan was taken.

The Claimant relied upon a report from an oncologist which was supportive of causation. The Defendant had not served its own expert evidence on the causation issue save for a letter which did not refer to the Claimant's own expert report.

Master Cook allowed the Claimant's application for an interim payment of £100,00. He held that there was an evidential burden on the Defendant to adduce evidence which would justify the Court concluding that the Claimant would not succeed in recovering substantial damages. Following the case of *Smith v Bailey*[1] the court should decide the case on the evidence that exists rather than on the basis of what evidence may become available at a future date.

On refusing leave to appeal Mr Justice Sweeney endorsed Master Cook's approach reemphasising that it was for the Defendant to adduce evidence in support of its position on causation in the same way as in *Smith*, the Defendant was required to adduce evidence in support of an assertion of contributory negligence.

ZEB v Frimley Health NHS Foundation Trust [2016] EWHC 134 QB (Garnham J)

A Claimant's appeal from the decision of Master Cook who had dismissed her application for an interim payment was refused.

The Claimant alleged that the Defendant had negligently failed to admit her for further investigation after she presented at A & E despite the fact that she was suffering from TB. The Claimant was discharged home and thereafter suffered devastating neurological damage as a result of her going on to develop TB meningitis. Liability was admitted but the Defendant alleged contributory negligence and novus actus interveniens as the Claimant was aware that she had already been diagnosed with possible TB whilst in Pakistan. As a result the Claimant was aware that she had had an earlier chest x-ray which was consistent with her having TB and which led to her being treated for TB.

Master Cook refused to order the interim payment of £175,000 on the basis that the Defendant's defence if successful may provide a complete defence to the claim.

Again Master Cook's decision endorsed by Garnham J when refusing leave to appeal.

[1] [2014] EWHC 2569 (QB)

Occupier's Liability

English Heritage v Taylor (2016) EWCA Civ 448

The Claimant suffered a serious head injury when visiting Carisbrooke Castle on the Isle of Wight. He brought a claim in negligence and under s2 Occupiers Liability Act in particular for failing to warn the Claimant of a sheer 12 ft drop which was not immediately visible from the walkway.

At first instance the Recorder found that English Heritage had breached its duty by failing to warn visitors of the danger which was not obvious to the visitor. A finding of 50% contributory negligence was found against the Claimant on the basis that he should have taken more care when attempting to walk away from the path.

On appeal the Court of Appeal upheld the original decision finding that English Heritage should have provided a sign warning visitors of the sheer drop. However the court re-iterated the principle that adult visitors did not require warnings of obvious risk except where they did not have a genuine and informed choice.