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Retail Update

October 2018

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Employers Liability

Rhys Alan Williams (1) McMurrays Haulage Ltd (2) WM Morrison Supermarkets Ltd (2018)[2018] EWHC 2079 (QB) QBD (Birmingham) (Judge David Cooke) 02/08/2018

The primary cause of the accident involving the supermarket employee was the negligence of the HGV driver. There was no breach of duty on the part of the supermarket and it was not required to contribute to the employee's damages.

The facts

The claimant was a senior employee of the Part 20 defendant, WM Morrison Supermarkets. He was responsible for receiving deliveries of equipment at stores. On the day in question, he opened a gate to the yard of a supermarket, and a heavy goods vehicle driven by an employee of the Part 20 claimant (McMurrays Haulage) drove in. The claimant stood at the end of the gate, against a wall. Shortly thereafter, the rear of the trailer of the lorry collided with that wall, trapping his right arm and causing a severe crushing injury to his forearm and hand.

The Part 20 claimant sought a contribution from the Part 20 defendant, as the claimant's employer, alleging that negligent breaches of duty owed by it to the claimant had caused or contributed to the accident. The Part 20 claimant alleged, among other things, that the claimant had received insufficient training in the procedures for opening gates and dealing with moving lorries.

The decision

- None of the alleged faults or acts of negligence on the Part 20 defendant's part were made out.
- There had been no breach of duty by the Part 20 defendant in providing the claimant with a key to the yard and permitting him to use it to open gates and admit vehicles.
- He was properly trained including the procedure for opening gates and the need to stand in a safe place when in the vicinity of moving vehicles.
- The Part 20 defendant could properly rely on him, as a senior and intelligent employee, to follow those requirements.
- The primary and overwhelming cause of the accident was the negligence of the Part 20 claimant's employee. To the extent that the claimant contributed to the accident by standing in an obviously unsafe place, he did so not because of any fault in the Part 20 defendant's procedures or training, but because he failed to follow those procedures and that training in circumstances that put him at risk.

Judgment for Part 20 defendant

Barclays Bank Plc v Various Claimants (2018)[2018] EWCA Civ 1670 CA (Civ Div) (Sir Brian Leveson PQBD, McCombe LJ, Irwin LJ) 17/07/2018

Barclays Bank unsuccessfully appealed a decision that it was vicariously liable for sexual assaults committed by a doctor during medical examinations.

The facts

As part of the bank's recruitment and employment procedures, the respondents had been required to attend a medical assessment by the doctor, who had been nominated by the bank. The unchaperoned assessments took place between 1968 and 1984 at a consulting room in the doctor's home. The sexual assaults took place during the assessments.

The doctor died in 2009. A 2013 police investigation found sufficient evidence to criminally prosecute the doctor had he been alive. The 126 respondents brought claims for damages against the bank. The bank argued that the doctor was an independent contractor and was personally liable for any assaults proved. The Judge concluded at first instance that the tort was sufficiently connected with the bank's quasi employment of the doctor, and that it was fair, just and reasonable to find the bank vicariously liable. The bank appealed.

The decision

- With regard to the first-stage test,
  - the judge rightly concluded that the bank had more means to satisfy the claims than the long-distributed estate of the doctor.
  - the judge was also right to conclude that the activity was being taken on behalf of the bank. The process was also part of the bank's business activity and the risk of the tort arose from arrangements made by the bank. The bank specified the nature of the examinations, as well as the time, place and examiner.
- With regard to the stage 2 test, the judge correctly found that the medical examinations were sufficiently closely connected with the relationship between the doctor and the bank; they were the purpose of that relationship. The judge's conclusions were just and fair.

Appeal dismissed

Janice Cockerill v (1) CXK Ltd (2) Artwise Community Partnership (2018)[2018] EWHC 1155 (QB) QBD (Rowena Collins Rice) 17/05/2018

On the 1st October 2013 s.69 of the Enterprise and Regulatory Reform Act 2013 ("ERRA") came into force. Section 69 of the ERRA removed the automatic right to compensation for a breach of health and safety regulations. Under s.69 of the ERRA, claimants are only entitled to compensation where it can be shown that the employer was at fault or negligent.

On the very same day that s. 69 ERRA was introduced, Janice Cockerill had an injury at work when she fell down a 7-inch doorstep and hurt her ankle. She brought a personal injury claim against both her employer and the occupier of the premises.

The facts

The claimant was employed by CXK Limited as a careers adviser. On the morning of the accident the claimant entered the building, a former Victorian school, in the course of her employment. It was not a building that she was familiar with. She let herself in by opening an entrance door, she walked through the premises. There was clear signage on the door warning of the step beyond but the door had been propped open so that the signage was not visible. The claimant fell down the 7-inch doorstep from the lobby down in to the kitchen area, and hurt her ankle.

The case on liability was as follows:

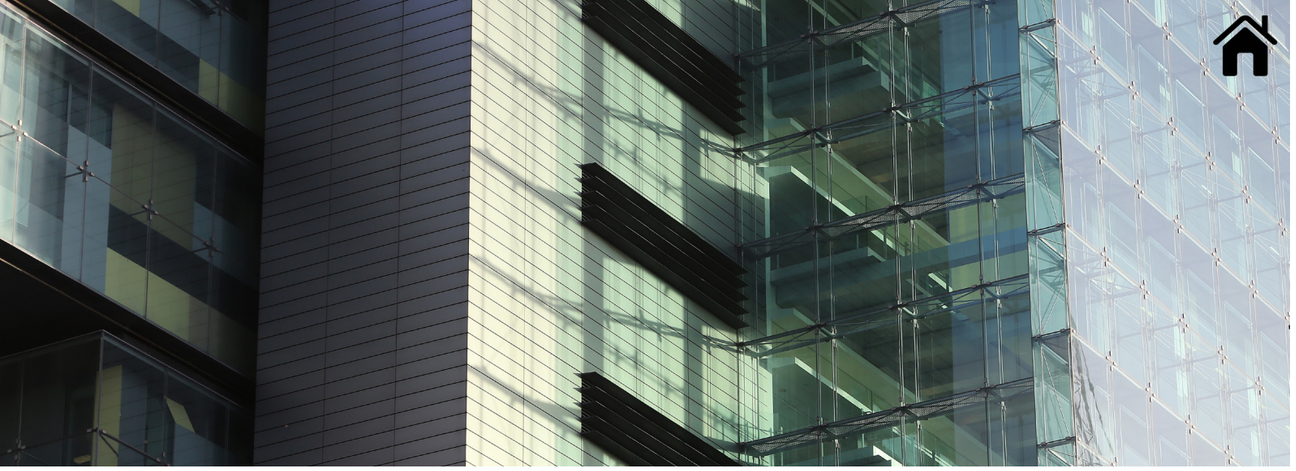
- the open door was a breach of the duties of care owed to the claimant, and caused her accident;
- more should have been done by way of signage, lighting or extra strips of hazard tape to warn of the step's existence and a failure to do so was a breach of the duties of care owed to her.

The decision

- The Judge dismissed the claim against the occupier and the employer.
- She concluded that the step had been competently risk assessed, it stood in plain view and was marked out with hazard warning tape. It was reasonably lit and was unimpeded.
- The judge concurred that there was no more the occupier could reasonably have done to keep visitors reasonably alerted to the presence of the step. It was an ordinary sort of feature.
- She could not find that the occupier should be fixed with liability for not having done more.
- In all the circumstances of the case, they took such care as was reasonable by warning of the step with signs when the door immediately before the step was closed, and ensuring that it was clearly marked with hazard tape when the door was open.

The Judge then specifically considered whether the claimant's employer should have done more?

- The judge deemed it was appropriate for the employer to have relied on the occupiers' risk assessment.
- The Judge referred to the ERRA noting that claimants must now prove that their accident was someone else's fault.
- The step was an unremarkable feature, marked with hazard warning tape.
- The Judge was not convinced that it was unreasonable of either the occupier or the employer not to have done more to help ensure that the claimant could traverse the step safely and without falling down.



Rod James-Bowen & Ors v Commissioner of Police of the Metropolis (2018)[2018] UKSC 40 SC (Lady Hale PSC, Lord Mance DPSC, Lord Kerr JSC, Lord Wilson JSC, Lord Lloyd-Jones JSC) 25/07/2018

The Supreme Court considered whether the employer owed a duty to protect the economic and reputational interests of officers whose alleged misconduct formed the subject of a civil claim.

The facts

The officers had been involved in the arrest of a suspect who complained that he had been seriously assaulted and injured during the course of his arrest. The suspect brought proceedings against the Commissioner on the basis of vicarious liability for the officers' actions. The Commissioner settled the claim during the trial, with an admission of liability and an apology for "gratuitous violence" by the officers.

After the civil claim, the officers were prosecuted in the Crown Court and acquitted. They brought claims against the Commissioner alleging breach of contract, negligence and misfeasance in public office. They sought compensation for reputational, economic and psychiatric damage. The Commissioner successfully applied for the claims to be struck out. However, the Court of Appeal allowed the officers' appeals on the issue of the Commissioner's duty of care to safeguard their economic and reputational interests and its extension to the conduct of litigation by the Commissioner.

The Commissioner appealed against a decision that it was arguable that she had failed in her duty of care to the respondent police officers.

The decision

- It would not be fair, just or reasonable to impose on the Police Commissioner a duty of care to protect police officers from economic or reputational harm when conducting litigation founded on alleged vicarious liability for their actions.
- The imposition of such a duty was inconsistent with the Commissioner's freedom to act in accordance with her public duty.

Appeal allowed

Personal Injury

(1) Saira Faisal (2) Ayman Faisal (Claimants) v Younis (T/A Safa Superstore) (First defendant/Appellant) & Active Brands Concept LTD (Second defendant/Respondent) (2018)[2018] EWHC 1111 (QB) QBD (Yip J) 10/05/2018

A shopkeeper appealed against a decision apportioning liability in contribution proceedings after a child had opened a bottle of caustic soda and ingested it whilst shopping in a convenience store.

The facts

A two-year-old child, who was in a pushchair, accompanying his mother to a convenience store, was able to get hold of a bottle of caustic soda, remove the cap and put some of the contents into his mouth causing him serious injury.

The product was manufactured by the respondent and the bottle was defective: it required a child-resistant cap complying with ISO 8317; however, the cap it had did not comply and could easily be removed by a toddler.

The labelling on the bottle contained a warning that the contents could cause severe burns and that the bottle should be kept out of the reach of children. It was a product to which the Poisons Act 1972 applied. Although it was unlawful to sell it without a licence, the shopkeeper did not have a licence.

In contribution proceedings, the recorder concluded that the shopkeeper was jointly liable with the manufacturer. He apportioned responsibility on the basis that the manufacturer should bear two-thirds and the shopkeeper one-third. He also ordered that the shopkeeper should pay the manufacturer's costs of the contribution proceedings on the basis that the manufacturer was the true "winner".

The shopkeeper argued that the recorder should have found the manufacturer solely liable for the accident and appealed.

The decision

- Apportionment of liability - The grounds of appeal were, in reality, an attempt to reopen the issues and to invite the court to substitute a different judgment for the recorder's. That was impermissible.
- The recorder had been entitled to conclude that the risk was one which should have occurred to a reasonable shopkeeper, and that although what happened was an unlikely occurrence, the risk of exposure to the product was more than negligible. In the circumstances, there was no proper basis for overturning his decision that the shopkeeper was liable to contribute.

Appeal dismissed

Philip James Clay v TUI UK Ltd (2018)[2018] EWCA Civ 1177 CA (Civ Div) (Kitchin LJ, Hamblen LJ, Moylan LJ) 23/05/2018

The Court of Appeal have for the first time in a number of years considered when the actions of a claimant might break the chain of causation.

The facts

Mr Clay had been on a package holiday in Tenerife with his wife, their two children and his parents. He and his wife and children were staying in one room and his parents were staying next door. One evening, whilst the children were asleep in their room, Mr Clay, his wife and parents were having a drink on his parents' balcony. Mr Clay went to use the toilet, but upon returning to the balcony he closed the sliding door which inadvertently locked, trapping the family on the balcony.

For 30 minutes the family attempted to attract attention, after which Mr Clay decided to step across from his parents' balcony to the balcony of his room. In doing so, he stood on a ledge which gave way. He fell to the terrace below and fractured his skull. He brought a claim against the holiday operator.

At first instance the judge found that the lock on the sliding door was defective and a breach of local standards for which the holiday company was liable. However, he concluded that the claimant's act, in trying to step across to his own balcony, was so 'unexpected' and/or 'foolhardy' as to be a novus actus interveniens (i.e. an intervening unforeseeable event that occurs after the defendant's negligent act). The claimant appealed the decision.

The decision

- The Court of Appeal found that although the holidaymaker and his family had been trapped on the balcony as a result of a defect in the locking mechanism of the balcony door for which the company was liable, the holidaymaker's attempt to climb onto the neighbouring balcony was so unreasonable in the circumstances that it broke the chain of causation.
- The great and obvious danger involved in standing on the ledge so far outweighed the inconvenience faced by the family that voluntarily running into that danger was a new and independent act which eclipsed the prior breach of duty.
- There was no necessity for the appellant to take any risk, but he nevertheless chose to expose himself to real danger and to an obvious risk of death or serious personal injury. A finding that there was a novus actus interveniens was justified

Appeal dismissed

Fundamental Dishonesty

Wright v Satellite Information Services Ltd (2018)[2018] EWHC 812 (QB)

A claimant was awarded damages of £119,165 after bringing a personal injury claim against his employer. The defendant appealed arguing that the claim should have been dismissed pursuant to section 57 of the CJCA 2015 on the basis that the claimant had been fundamentally dishonest.

The facts

The claimant injured his leg in an accident at work and was unable to return to work. The employer admitted liability, but quantum remained in issue. The employer argued that the claimant was far less disabled than he claimed and that he had dishonestly exaggerated his claim. The claim for future care was in excess of £73,000. The judge allowed just £2,100 to cover the provision of some care following future surgery and concluded that there was no true continuing care need. The judge rejected the appellant's submission that, for the purposes of the CJCA 2015 s.57, the respondent had been fundamentally dishonest in relation to his claim and refused to dismiss the claim.

The appeal

- The employer argued that the judge, having found that the respondent's claim for the cost of care was not established, had been wrong not to find that the respondent had been dishonest in his presentation of that element of the claim and that such dishonesty was "fundamental" to the integrity of the claim within the meaning of s.57.
- In finding that the care claim was not established, the judge was not bound to find the claimant dishonest in presenting the claim.
- The judge rejected the care claim was not because he found the claimant's evidence untruthful but because a proper interpretation of the evidence did not support the assessment of the care claim.
- He drew a distinction to the case of LOCOG v Sinfield (2018) where the claimant had fabricated invoices to support the claim and where there were specific findings in relation to the facts in the schedule of loss.

Appeal dismissed

Paul Johnson v (1) Joseph Qainoo (2) CIS GENERAL INSURANCE (2017)CC (Croydon) (District Judge Bishop) 29/06/2017

The claimant who exaggerated his claim was found to be fundamental dishonest and forfeited the right recover damages to which he would otherwise have been entitled.

The facts

An accident had taken place in September 2012 when the claimant was riding a bike. The first defendant, who was insured by the second defendant, opened his car door, causing the claimant to be knocked off his bike and to sustain facial injuries. Negligence was admitted.

The claimant sought lost earnings of £85,000. He claimed to be a computer engineer and software developer and that, as a result of the accident, he had been prevented from earning £85,000 under an eight-week contract.

The defendants sought the dismissal of the claimant's personal injury claim on the basis that he had been fundamentally dishonest for the purposes of the Criminal Justice and Courts Act 2015 s.57.

The decision

- The claimant had lied to the court. For example, he claimed to have a BSc in computer engineering from York University. That was not true: he had low-level qualifications which he had gained in prison.
- He fabricated documents purporting to evidence the contract he claimed to have lost.
- He did suffer an unfortunate and a painful accident which was not his fault. However, his claim for loss of earnings was fabricated.
- His dishonesty was so substantial and so fundamental to his claim that by it he had forfeited the right to recover damages to which he would otherwise have been entitled. Section 57 applied and the claim would be dismissed.

Claim dismissed

Civil Procedure

Phoenix Healthcare Distribution Ltd v Woodward and another [2018] EWHC 2152 (Ch) (26 July 2018)

The overriding objective did not require defendant to alert claimant to service defect. Neither CPR 1.3 nor the culture introduced by the CPR require a solicitor, who has in no way contributed to a mistake by an opponent or an opponent's solicitor, to draw attention to that mistake, and such conduct does not amount to "technical game playing".

Costs

Mercel Hislop v Laura Perde : Kundan Kaur v Committee (For the time being) of Ramgarhia Board Leicester (2018)[2018] EWCA Civ 1726 CA (Civ Div) (Longmore LJ, King LJ, Coulson LJ) 23/07/2018

In cases falling under the fixed costs regime in CPR Pt 45 IIIA, a claimant was not entitled to standard or indemnity costs where a defendant accepted a Part 36 offer out of time but before trial. The fixed costs regime continued to apply until the eventual date of acceptance.

Arkadiusz Bratek v Clark-Drain Ltd (2018)CC (Cambridge) (Judge Yelton) 30/04/2018

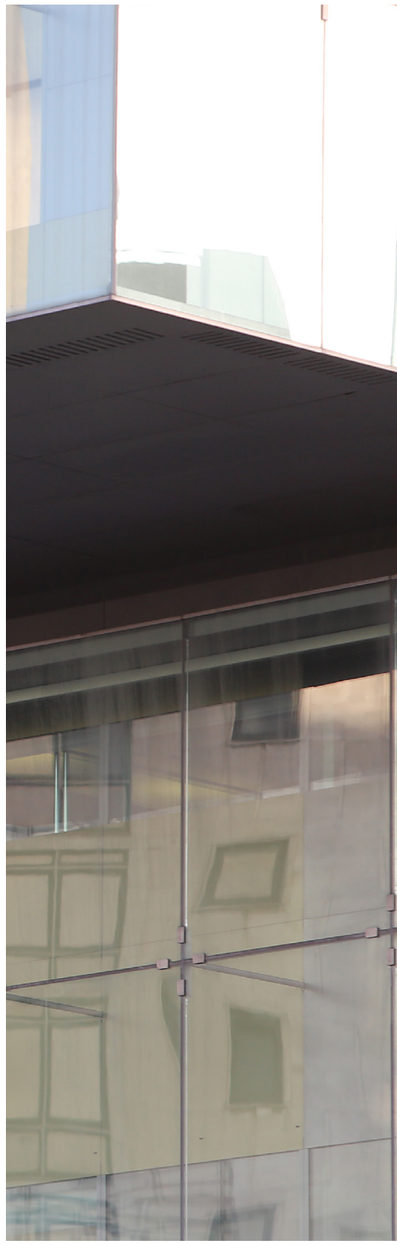
Where a claim was covered by the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims until liability was disputed and it was moved to the fast track, costs were limited to fixed costs. A consent order, by which the proceedings were settled on terms including provision for costs to be paid on the standard basis, could not overcome the mandatory provisions of CPR r.45.29D.

Jeffrey Cartwright v Venduct Engineering Ltd (2018)[2018] EWCA Civ 1654 CA (Civ Div) (Arden LJ, Henderson LJ, Coulson LJ) 17/07/2018

Under the QOCS regime in CPR r.44.14(1) a defendant can enforce an order for costs out of damages payable to the claimant by another defendant. However, where the damages were payable to the claimant under the schedule to a Tomlin order, r.44.14(1) could not apply, as the schedule was not part of the court's order but merely reflected agreement reached between the parties.

Anna Louise Tuson v Debbie Murphy (2018)[2018] EWCA Civ 1461 CA (Civ Div) (Underhill LJ, Bean LJ, Sales LJ) 22/06/2018

In a personal injury claim where the claimant had accepted a Part 36 offer after expiry of the 21-day period, her dishonest and misleading conduct regarding her ability to work did not make her liable for costs incurred prior to the date of expiry of the offer. The Part 36 offer was unconditional and made by the defendant with knowledge of the claimant's material non-disclosure.



Civil Liability Bill	The Bill aims to reform the claims process for whiplash claims and to amend the way the personal injury discount rate is set.	After its Second Reading it is currently at the Committee Stage at the House of Commons
Small Claims Track	The government intends to increase the small claims limit for personal injury (PI) claims to £5,000 for road traffic accident related PI claims and to £2000 for all other PI claims. Any increase can be implemented without the approval of parliament via an amendment to the Civil Procedure Rules.	After April 2020
Litigation Funding and Costs: Ministry of Justice survey	The Ministry of Justice is currently undertaking a post-implementation review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The Ministry of Justice is undertaking the review to obtain evidence as to the impacts of those reforms.	End of 2018
CMCs	Responsibility for claims management regulation will pass from the Claims Management Regulator to the FCA on 1 April 2019.In anticipation, the FCA has published a consultation setting out the draft rules and guidance they propose to make in relation to claims management activities and the standards they think CMCs regulated by the FCA should have to meet. They have identified a number of harms in the sector which the proposals are aimed at addressing.	1 April 2019
Government Consultation - New measures to beat nuisance calls	New Government proposals being consulted on will provide the Information Commissioner's Office with powers to hold company directors directly responsible with further fines of up to £500,000.	TBC
Court fees	In July the MoJ announced legislation aimed at reducing court fees for certain proceedings. The reductions follow a review carried out by the MoJ which identified a number of cases where the fees charged were above full cost recovery levels. In addition, the MoJ is establishing a refund scheme to reimburse people the amounts they have been over-charged, and it is taking action to refund those who have been overcharged fees to commence certain low value personal injury claims, known as "stage 3" claims.	TBC
Cases		
Bellman v Northampton Recruitment Ltd [2016] EWHC 3104 (QB)	The High Court held that a company was not vicariously liable for a violent assault by its managing director on a colleague at an "impromptu" drinking session straight after the company's Christmas party.	Heard by Court of Appeal on 19 July 2018. Judgment is awaited
Woodward v Phoenix Healthcare Distribution Ltd [2018] EWHC 334 (Ch)	Solicitors' failure to warn opponents of defective service breached duty to further overriding objective and justified retrospective validation order under CPR 6.15(2) (High Court)	Appeal to Court of Appeal granted