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Employers Liability

Sandra Shelbourne v Cancer Research UK (2019) [2019] EWHC 842 (QB)QBD

The High Court has considered the liability of an employer after an employee was injured at an office Christmas party by another partygoer.

The facts

In December 2012, a Christmas party was held at the Cambridge Research Institute of Cancer Research UK (CRUK), a well-known charity. The event was ticket only, and was open to staff and their guests.

One of the partygoers was Robert Beilik, a visiting scientist. He was not employed by CRUK but due to his involvement with the Institute, he was invited to attend the party. Later in the evening, the Claimant was on the dance floor when Beilik attempted to lift her off the ground. He lost his balance, dropped her, and she sustained a serious back injury as a result. Beilik had consumed alcohol throughout the evening.

The Claimant brought proceedings against CRUK. The Recorder at First Instance held that CRUK was not liable in negligence for the injury or vicariously liable for Beilik's actions.

The Claimant sought permission to appeal.

The decision

Whilst the High Court accepted that CRUK owed a duty of care to the Claimant at the party; it was found that the duty had not been breached. The party organiser had produced a risk assessment. The risk assessment had regard to the fact that alcohol would be consumed at the party; and despite criticism by the Claimant, the Judge found that there was no need to consider all eventualities stemming from all such forms of inappropriate behaviour. Mr Justice Lane commented, "context is all-important". The CRUK Christmas party was an event for adults working in the scientific community in Cambridge, held at the University. There had been no previous incidents regarding inappropriate behaviour caused or contributed to by alcohol and it was therefore reasonable for the risk assessment and the arrangements for the party to be informed by what had (or had not) happened in the past.

The Court then considered whether CRUK should be held vicariously liable for the actions of Beilik. Beilik was not acting in connection with his duties and was engaged on a "frolic" of his own. Whilst it was unfortunate that the Claimant suffered an injury, Mr Justice Lane concluded that Beilik's field of activities was his research work at CRUK, which was not sufficiently connected with what happened at the party to give rise to vicarious liability.

Appeal dismissed.

Leah Smith v (1) National Farmers Union Mutual Society Ltd (2) Robinsons Services Ltd (2019)[2019] NIQB 37 QBD (NI)

In this Scottish case, the Plaintiff's employer and a security company were found liable for an injury, which occurred as a result of slipping on snow immediately after leaving work.

The facts

The Plaintiff was employed by the First Defendant. She worked at premises which had a front and rear entrance. On the day of the accident, she found shutters preventing access to the front of the premises. She spoke to the security guard employed by the Second Defendant and requested that the shutters be raised so she could leave work via what she considered to be a safer route. She explained to the security guard that due to the snow she had seen people slipping and that she considered the route from the rear of the premises to be hazardous. The shutters had been closed following an issue with the electricity supply to the building in conjunction with the service manager employed by the First Defendant. The security guard refused to let the Claimant use this exit and as a result, she had to cross a hazardous public footpath, which resulted in her slipping on compacted snow. She fell and sustained a significant injury to her right ankle.

The decision

An employer is not ordinarily responsible for the condition of the public highway outside the area where the employee is directly employed.

However, the Plaintiff argued that by reason of the actions of the security guard, she was required to exit the premises via a route, which exposed her to an increased risk of injury, an increased risk of which the security guard was specifically made aware.

The Court found as a fact that the conversation between the Plaintiff and the security guard took place. The employee of the Second Defendant was therefore put on notice of the hazardous condition, which existed immediately outside the curtilage of the premises in which the Plaintiff was employed.

The failure to have any regard for the complaints made by the Plaintiff or to raise the shutter to enable the Plaintiff to exit via the front route was in the view of the Court a clear breach of the duty owed by the Second Defendant to the Plaintiff. The Court concluded that the Second Defendant was liable to the Plaintiff.

The Court continued to consider the liability of the Claimant's employer and found that the First Defendant owed a non- delegable duty of care to its employees to ensure that they were reasonably safe during their employment. Having regard to the First Defendant's involvement in the decision to close the shutters on the day in questions, the First Defendant was held jointly and severally liable to the plaintiff on the basis.

Judgement for the Plantiff.

WM Morrison Supermarkets PLC v Various Claimants (2018) [2018] EWCA Civ 2339 CA (Civ Div)

Morrisons supermarket has lost its appeal to the Court of Appeal. The Court upheld the decision that the supermarket should be vicariously liable for an employee who intentionally disclosed personal details of staff on a file sharing website.

The facts

In 2014, a file containing the personal details of 99,998 Morrisons' employees was posted on a file sharing website. Following a police investigation, an employee, Andrew Skelton, was charged and sentenced to a term of 8 years imprisonment. Skelton was a senior IT internal auditor and was described by colleagues as reliable and trustworthy. He ran a side-line business dealing a legal slimming drug. He did not use Morrisons' facilities, except on occasions when he would put a package through the post room. In May 2013, an envelope came open in the post room at Morrisons'. It contained white powder and caused immediate alarm. Skelton was arrested and escorted from the premises. He was suspended from work, pending a definitive laboratory analysis of the powder. Results showed that the drug was not illegal and Skelton who had been on suspension for a month was permitted to return to work. Morrisons disciplined him, and he was given a formal verbal warning. Skelton thought that Morrisons had acted excessively and held a serious grudge against his employer. In retaliation, he resolved to disclose the personal details of staff to damage the supermarket.

First Instance

The 5000 co-workers whose data had been disclosed brought a group civil claim against their employer, Morrisons. The Court concluded that neither primary liability for misuse of private information nor breach of confidentiality could be established. The Defendant did not directly misuse any information personal to the data subjects, they did not authorise its misuse, and it was not disclosed due to any carelessness on their part. It was a criminal act, which was not its doing, and was not facilitated or authorised by Morrisons. However, the Court did find that Morrisons was vicariously liable for the unlawful acts carried out by Skelton as he had acted in the course of his employment.

The Appeal

Morrisons appealed the decision that they were vicariously liable to the claimants for the actions of Skelton. They argued that:

- the Data Protection Act 1998 excludes the application of vicarious liability for misuse of private information and breach of confidence; and
- the Judge was wrong to conclude that the wrongful acts of Mr Skelton occurred during the course of his employment and, accordingly, that Morrisons was vicariously liable for those wrongful acts.

The Court of Appeal dismissed the appeal. They held that the common law remedy of vicarious liability of the employer for Skelton's misuse of private information and breach of confidence was not expressly or impliedly excluded by the Act. Furthermore, they agreed that the judge had correctly concluded that Skelton's actions at work and the disclosure on the web was a seamless and continuous sequence of events. Morrisons deliberately entrusted Skelton with the payroll data, his role in respect of the payroll data was to receive and store it, and to disclose it to a third party. It was in his 'field of activities'. His decision to disclose it to others was not authorised, but it was nonetheless closely related to what he was tasked to do.

Appeal dismissed.

Please note that Morrisons appealed the decision that it should be held vicariously liable for the actions of its employee. The appeal case was heard by the Supreme Court in November 2019 and a judgment is currently awaited.

The Supreme Court has also heard an appeal made by Barclays Bank PLC following the decision in Barclays Bank plc v Various Claimants [2018] EWCA Civ 1670 in November 2019. This is another vicarious liability case. Barclays Bank (the defendant employer) appealed the Court of Appeal's decision that it was liable for sexual assaults committed by a medical practitioner in the course of medical examinations carried out at its request. The judgment is currently awaited.

Fundamental Dishonesty

Sudhirkumar Patel v (1) Arriva Midlands Ltd (2) Zurich Insurance PLC (2019)[2019] EWHC 1216 (QB) QBD

A Claimant who alleged that he was unable to move or communicate has been found fundamentally dishonest, after surveillance evidence revealed he was able to talk and walk without assistance.

The facts
The Claimant was involved in a RTA in January 2013. A bus owned by the First Defendant hit the Claimant. He had a cardiac arrest at the scene of the accident and was diagnosed with a brain haemorrhage. The Claimant's case was that, despite an initial recovery, he began to deteriorate within a week of the collision and at the time of filing the claim, he was significantly disabled.

When the expert examined the Claimant, he found him to be in bed, mute, unresponsive and without movement in his hands, arms or legs. The expert could find no neurological reason for the Claimant's condition. He considered whether the Claimant's unusual presentation was feigned, but on balance, he diagnosed the Claimant as having a severe conversion disorder arising from the collision. The Defendant's expert also found the Claimant in bed, mute and unresponsive. The Claimant's son reported that this was a typical day for the Claimant.

The Defendant instructed surveillance operatives to observe the Claimant over several days in May 2016. They recorded the Claimant and his son make a number of visits to several tyre and vehicle shops over a period of a number of hours. The Claimant walked, talked and acted unaided and without difficulty.

As a result, the Defendant successfully applied before the liability trial, to amend the Defence to plead that the claim should be struck out pursuant to s57 of the Criminal Justice Act 2015 on the basis of fundamental dishonesty.

The claim proceeded to a trial on liability at the end of October 2017. In a reserved judgment, the Judge found in favour of the Claimant on primary liability but made a finding of 40% contributory negligence.

In the subsequent hearing, witness evidence from the Claimant's family described the Claimant's condition as variable. The Judge did not accept that was the case and agreed with the post-surveillance opinion from the Defendant's expert that the diagnosis of a severe conversion disorder was not tenable, and that the Claimant's disability was feigned with no medical condition to account for it.

HHJ Clarke proceeded to find that the Claimant had capacity and concluded that on the balance of probabilities, the Claimant had been fundamentally dishonest, and his litigation friend had participated in the dishonesty. The entirety of the claim was dismissed, the court being satisfied that no substantial injustice would be caused in so doing.

Application granted

Civil Procedure

Jet 2 Holidays Ltd v (1) K Hughes (2) L Hughes (2019)[2019] EWCA Civ 1858

The issue for the Court of Appeal was whether a false statement (verified by a statement of truth) served before proceedings were commenced, and made with the purpose of eliciting an admission of liability could give rise to contempt.

The Court of Appeal overturned the first instance decision and held that the test at common law was whether the conduct in question involved an interference with the administration of justice. The Court of Appeal held it was well established that an act might be a contempt of court even though it was carried out before the commencement of proceedings. The Court stressed that Pre-Action Protocols ("PAPs") are now an 'integral and highly important part of litigation architecture' and therefore any dishonest witness statement served in compliance with a PAP is capable of interfering with the due administration of justice.

Samantha Mustard v (1) Jamie Flower (2) Stephen Flower (3) Direct Line Insurance [2019] EWHC 2623 (QB)

A Defendant applied to exclude the Claimant's covert recordings of medical examinations with the Defendant's experts. The Judge agreed to admit the evidence. The Claimant argued that given her vulnerabilities resulting from the accident she wished to record the examinations to protect her interests. The Judge concluded that whilst the covert recordings "lacked courtesy and transparency" they were not unlawful. He also rejected the proposition that the recordings were a breach of the Data Protection Act or the GPDR. The relevant data related to the patient (the Claimant) not the doctor.

The recording of medical examinations, especially covertly is of significant concern to defendants. Master Davison refused the application to refer this case to a High Court judge for determination and general guidance ruling that although "covert recording is a thorny topic, it falls to be decided on a case by case basis". He instead called upon FOIL and APIL to work together to draft an agreed protocol to govern such recordings.

Barry Cable v Liverpool Victoria Insurance Company Limited - Case number D34BI037

On Appeal, the Court has endorsed a decision striking out a claim worth £2.6 million for abuse of process after the claim was incubated in the portal. At first instance, District Judge Campbell held that the portal process had clearly been abused and the claim was struck out. It was remarked "... in a case that never, ever at the time they issued the claim form could it be said would have a value of £25,000 or less. That to me is an abuse of process and the abuse comes from using the procedure that is available to portal claims in a case that could not be said, on any stretch of the imagination, to be a portal claim...."

On appeal, HHJ Wood upheld DJ Campbell's decision noting that the Claimant had acted unfairly. They had bypassed the requirements of the personal injury protocol and had avoided the operation of the Limitation Act.

Woodward & Anor v Phoenix Healthcare Distribution Ltd (2019) [2019] EWCA Civ 985

The Appellants, through their solicitors, purported to serve the Claim Form and Particulars of Claim on the Respondent's solicitors, Mills & Reeve, by letter and email before the expiry of the issue of the claim form. However, the Claimant solicitors had not confirmed that Mills & Reeve were authorised to accept service. After taking instructions from their client, Mills & Reeve deliberately did not inform the Claimant solicitors until after expiry of the deadline for service that they were not authorised to accept service.

On appeal, HHJ Hodge QC set aside the claim form and dismissed the action. He found that the master had been wrong to validate service of a claim form retrospectively under CPR r.6.15 (2). A solicitor's professional duty did not require him to draw attention to mistakes made by the other party in circumstances where the mistake was not of his making and arose in a situation not calling for a response.

Wickes Building Supplies Ltd v Blair (2019)[2019] EWCA Civ 1934

The Court of Appeal has provided guidance on the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims procedure to be followed if a claimant serves evidence for the purpose of the Stage 3 Procedure out of time. The court stressed that a defendant served with a late statement which had not been included in the material served under Stage 2 had the choice of either opposing the claim proceeding under the Protocol or continuing with the process but objecting to the evidence being considered by the court.

Costs

Dr Carol Beardmore v Lancashire County Council (2019) CC (Liverpool)

The Court confirmed that CPR r.45.29I allows for the recovery of medical agency fees as a disbursement in low value personal injury public liability cases. The appropriate measure for the disbursement recovery ought to be the reasonable and proportionate cost of obtaining the medical records.

Hammond v SIG plc & Subsidiary Companies [2019] EWHC B7 (Costs)

The Claimant attempted to argue that fixed costs should not apply to her claim. The Claimant sent a letter of claim to the Defendant indicating that she would not be submitting the claim via the Portal (which is limited to claims up to £25,000) due to its potential value. However, at the Defendant's request, the Claimant submitted a CNF to the portal, with the caveat that the notification date was the date of the letter of claim. Liability was not admitted and the claim exited the Portal. The Claimant issued proceedings, and after filing a Defence, the Claimant accepted the Defendant's Part 36 offer of £36,500 (which referred to the costs consequences in r.36.20 concerning claims started under the portal).

The Claimant argued that her costs were recoverable on the standard basis as her claim was not started under the portal, or, alternatively, that it should be excluded from the usual cost consequences under the "exceptional circumstances" provision in CPR 45.29J.

The Master disagreed, and noted that otherwise Claimants could avoid the provisions of section IIIA by sending a letter of claim before following the Protocol procedure. The Claimant was limited to fixed costs under section IIIA of CPR 45.

Stoney v Allianz Insurance PLC – Case No: E14LV817, Liverpool CC

The Court was asked to determine whether a court fee of £455, paid by the Claimant to issue the claim was recoverable from the Defendant following the successful outcome of the claim. The Court concluded that the Claimant was entitled to a full remission of the court fee of £455, as he was unemployed. The Judge was not persuaded that the court fee was a disbursement, which had been reasonably incurred and was not recoverable by reference to CPR 44.3.

Philip Aldred v Master Tyreese Sulay Alieu Cham (2019) [2019] EWCA Civ 1780 CA (Civ Div)

The Court of Appeal held that counsel's fee claimed in the sum of £150 for advice on the merits of a proposed settlement was not recoverable as a disbursement, in addition to the sums due under the fixed costs regime in CPR Pt 45 IIIA. Although, instructing counsel to advise on settlement terms in RTA claims involving children is a mandatory requirement under CPR r.21.10(1) and CPR PD 21 para.5.2, it is not a disbursement "reasonably incurred due to a particular feature of the dispute" within the meaning of r.45.29I(2)(h). Being a child was a characteristic of the claimant, not a characteristic of the dispute, and counsel's fee was not therefore recoverable under the fixed costs regime.

News

New JC Guidelines Published

The 15th edition of the JC Guidelines was published on 26 November 2019. The JC Guidelines provide guidance from the Judicial College on the appropriate level of general damages that should be awarded for pain, suffering and loss of amenity in personal injury cases. The Guidelines are usually the first point of reference for any claims handler or legal practitioner seeking to value general damages.

The updated guidelines are based on cases reported over the past two years, although it is noted in the introduction to the 15th edition that there have been remarkably few cases. This is attributed to the success of the previous editions.

The figures in the 15th edition have been adjusted in most cases to reflect the general increase in RPI of 7% over the period from May 2017 to June 2019.

New Discount Rate

From the 5th August 2019, the new Discount Rate at minus 0.25% became effective. The announcement followed a comprehensive review of the rate as provided for in the Civil Liability Act 2018. It is disappointing news for Compensators. Although damages claims will be reduced, the savings fall far below those that would have been achieved had a change back to a positive rate been effected.

Horizon Scanning

Extension of fixed recoverable costs	In March 2019 the MoJ launched a consultation on extending Fixed Recoverable Costs in civil cases in England and Wales. The government is consulting on: • Extending FRC to all other cases valued up to £25,000 in • damages in the fast track • A new process and FRC for noise induced hearing loss claims • Expanding the fast track to include the simple "intermediate" cases valued £25,000–£100,000 in damages The Government is also seeking views on "Part 36 offers and unreasonable litigation conduct (including, but not limited to, the proposals for an uplift on FRC (35% for the purposes of Part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement". Consultation ended on 6th June 2019 and the government will publish a response to the consultation in "due course".	TBC
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.	April 2020?
Bereavement damages to be extended to co-habiting couples	The Government is to amend the Fatal Accident Act 1976 to make two key changes: • to make bereavement damages available to claimants who cohabited with the deceased person for a period of at least two years immediately prior to the death; and • where both a qualifying cohabitant and a spouse is eligible (e.g. separated but not divorced), the award would be divided equally. In May 2019, the Government laid a proposed draft Remedial Order before Parliament to remedy the discrimination.	TBC
Part 2 of the consultation paper Reforming the Soft Tissue Injury (whiplash) Claims Process	The Government is considering the issues raised in Part 2 of the consultation paper Reforming the Soft Tissue Injury (whiplash) Claims Process and intends to publish its response 'in due course'.	TBC
Brexit	Still unclear what form Brexit is going to take and how it will impact the retail sector and litigation generally	TBC