

LANGLEYS' PUBLIC SECTOR UNIT - TOP TIPS

Langleys Public Sector Unit has continued to be successful in defending a wide variety of claims for its local authority clients. Here are a couple of our recent successes:-

NO ENTITLEMENT TO ADDITIONAL COSTS

In a public liability claim we handled for a local authority, the Claimant's damages were settled and costs agreed without a formal bill being served or Detailed Assessment proceedings being commenced. Following settlement of costs, the Claimant's solicitors attempted to recover the additional costs, which they had incurred in negotiations following service of the 'without prejudice' schedule of costs. The Claimant's solicitors sought to rely upon **Crosbie v Munroe (2003)**, in which it was found that where the substantive claim has been settled but the costs are

the subject of costs only proceedings, there is an entitlement to further costs of dealing with the assessment proceedings. The Claimant's solicitors also argued that they had reserved the right to raise further costs, relying upon an initial letter which stated that they would be claiming for further costs of negotiations.

We successfully disputed that the Claimant's solicitors were entitled to any further costs, distinguishing the case from **Crosbie** on the basis that no Part 8 or formal Detailed Assessment proceedings

had been issued. The District Judge agreed that Part 47.19 did not apply in this case as Detailed Assessment proceedings were never commenced and costs were dealt with within the substantive proceedings. The District Judge did not accept that the Claimant's solicitors had reserved their right to claim these additional costs, because the additional costs had not been raised when the Claimant's solicitors accepted a figure in settlement of their substantive costs.

STRICT LIABILITY – ALL IS NOT LOST !

The Claimant was employed by the local authority as a refuse worker. As the Claimant was driving a road sweeper, a hydraulic pipe burst resulting in an oil leak. A mechanic attended and undertook repairs to the sweeper out on site. Once the repairs had been completed, the Claimant was climbing back into the cab through the driver's door when his foot slipped causing him to fall backwards and suffer a back injury. The Claimant alleged he had slipped due to oil on his boots from the oil leak. Although the local authority had to accept that the work equipment had not been maintained in an efficient state, putting them in breach of Regulation 5 of the Provision and Use of Work Equipment Regulations 1998, there were real suspicions over the Claimant's credibility and the Claimant's version of events. The local authority proceeded to Trial on the basis that the faulty work equipment and subsequent oil leak had not been the cause of the Claimant's accident and injury.

that the Claimant had any cause to step in the small amount of oil which had leaked from the sweeper, finding that there was no reason why the Claimant could not have avoided it. The Claimant's credibility had been undermined by the fact that he had been less than frank as to the extent of his alleged injuries. The Claimant's medical expert and the DSS considered the Claimant capable of returning to light work,

and the local authority had done everything possible to encourage the Claimant to return to work, but the Claimant had simply refused and protested.

The case illustrates that it is still possible for Defendants to successfully defend claims even in the face of the strict liability imposed by the 1998 Regulations.



At Trial, the Claimant's claim against the local authority was unsuccessful. The Court simply did not accept the Claimant's case that it was oil which had made him slip and fall. The Court was not satisfied

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Since the last edition of our newsletter the long awaited announcement from the Ministry of Justice has finally been made! The response to the consultation was published on 21 July 2008. For most, I am sure it has meant a sigh of relief as the proposals are nowhere near as far reaching as originally anticipated.

The proposals (at this stage) envisage a streamlined claims process for RTA cases with a value of £10,000 or less, together with an increase in the fast track limit to £25,000. We still await the finer detail (and indeed the new rules) regarding these proposals, not least how these changes will sit with the predictive costs regime currently in place for RTA cases. Once we have further news we will be in touch.

You will see in our Court Spotlight that the somewhat harsh first instance decision in the case of **Harris v Perry & Perry (2008)** ('the bouncy castle case') has now been successfully appealed although not so widely reported second time round. The Court has reverted to the common sense approach we have come to expect in occupiers' liability cases. The Court of Appeal decided that the judge had imposed too high a standard of care in holding that a bouncy castle required uninterrupted supervision. There was no breach of duty of care to allow children of different sizes to play on it together. There appears no intention to appeal the case further.

Enjoy the read!

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BATTLING WITH WORK EQUIPMENT

The Provision and Use of Work Equipment Regulations 1998 have always been problematic and cases continue to come before the Courts for guidance and interpretation of the Regulations. This year has been no exception. Several cases have attracted much publicity after reaching the House of Lords and the Court of Appeal.

In July, in the Scottish case of **Spencer-Franks v Kellogg Brown (2008)**, the House of Lords considered the issue of what constitutes "work equipment". In this case, Mr Spencer-Franks was a mechanic employed on an offshore oil platform and was injured whilst repairing a malfunctioning spring closer on a door on the platform. The central issues in the case were whether the door closer was "work equipment" (in which case Mr Spencer-Franks employers could be strictly liable) and whether he had been "using" it within the meaning of the Regulations.

The House of Lords found that as all workers using the control room door used it for the purposes of their work, the door closer was indeed work equipment. The House of Lords also found that the fact the Claimant had been repairing the door closer did not mean that he was not "using it" referring to the broad concept of "use" under Regulation 2(1) as meaning "any activity involving work equipment". Mr Spencer-Franks succeeded in his claim against his employers.

Although this case may be seen as an indicator from the House of Lords that the Regulations need to be taken less restrictively, it is worth noting that the outcome may have been different had the accident occurred on a land-based workplace. The specific regulations governing offshore oil platforms provides that the entire offshore installation is classed as work equipment. Had the accident occurred on land, the employers would presumably have argued that a door closer should be considered part of the workplace as opposed to work equipment.

Earlier in the year, the Court of Appeal had also considered the definition of "work equipment" with reference to the employer's "degree of control" over such equipment. **Smith v Northamptonshire County Council (2008)** was a case particularly relevant to local authorities and other employers whose staff visit premises and sites where they may use equipment owned or supplied by others.

This case involved Mrs Smith who was employed by the Council as a carer. She was injured as she pushed a patient in a wheelchair down a wooden ramp at the patient's home. The wooden ramp had been installed by the National Health Service during the 1990s. Although the ramp was moveable, it was permanently outside resulting in the edge of the ramp becoming rotten due to the exposure to the elements. The defect had not been evident when the ramp had been inspected and tested.

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Mrs Smith initially succeeded in March 2007 when the Trial Judge found that the ramp was “work equipment” (for the purposes of PUWER) and that the Council was in breach of Regulation 5(1) in failing to ensure that such work equipment was maintained. Liability was therefore established.

The Council successfully appealed on the basis that the ramp was not “work equipment for use at work” for the purposes of the 1998 Regulations. The Court of Appeal found that the Regulations were not intended to impose strict liability in respect of construction or maintenance of equipment in situations such as this i.e. where the Council had no right or responsibility to maintain the ramp. For an employer to have the obligation to maintain something it would normally have to be within their power and control. Such a duty to maintain would not normally apply to property belonging to someone else or to which access was limited or to which another party’s consent would be required if maintenance work was required.

The question of “control” was again the key consideration in **Adam Mason v Satelcom Limited & East Potential Limited (2008)**. Here the Court of Appeal considered a non-employer’s liability for work equipment deemed to be unsuitable.

Mr Mason suffered a spinal injury when he fell from a ladder during the course of his employment with the First Defendant. The injury had occurred in a room in a building owned by the Second Defendant. The room had been unlocked on Mr Mason’s arrival by a member of the Second Defendant’s staff and Mr Mason had used the ladder without asking permission. The Second Defendant had been aware of the ladder’s presence in the room and could have removed it at any time. At Trial the Court found both the Defendants liable for a failure to provide a safe system of work and providing unsafe work equipment, apportioning the blame at 75% to the employer and 25% on the part of the Second Defendant.

The Second Defendant appealed on the

basis that their control of the ladder did not extend to its use once Mr Mason entered the room. The Second Defendant’s Appeal was successful, with the Court of Appeal finding that although they did have some control over the ladder, it was only to the extent that they could have removed it elsewhere or placed some kind of notice on it. It would be incorrect to say that the Second Defendant had obligations in respect of a ladder that just happened to be on its premises. The Second Defendant could not have anticipated that Mr Mason would use a ladder for a purpose for which it was not designed and their control over the ladder did not extend to ensuring it was suitable for use.

It has not all been good news for Defendants however, particularly on the issue of training and what is required of employers under Regulation 9 of PUWER 1998. Regulation 9 requires employers to ensure that all those who use work equipment have received adequate training for the purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

In **Latona Allison v London Underground Limited (2008)** the Claimant appealed against a decision dismissing her claim against her employers for breach of duty under Regulation 9. Ms Allison had been employed as a tube train driver and had developed tenosynovitis due to the prolonged use of a traction brake controller. The Court of Appeal found that the duty imposed by Regulation 9 of PUWER 1998 was not an absolute duty and did not impose no-fault liability. It was mandatory for the employer to provide training, which must be adequate. The test for the adequacy of the training for the purposes of health and safety was what training was needed in light of what the employer ought to have known about the risks arising from the activities of his business. The statutory duty under the Regulations was higher than that imposed under common law and required an

employer to investigate the risks inherent to its operations, taking professional advice where necessary. In this case, Ms Allison’s employer had not sought any professional or expert advice regarding the controller in question. No specific instructions were issued to Ms Allison as to the correct way to hold the brake controller handle so as to minimise the risk of injury. Consequently the Court of Appeal found the employers liable as Ms Allison had not been adequately trained to handle the controller in such a way as to minimise her risk of injury.

Similarly, liability attached to the local authority employers in the case of **Anthony Edward Gower-Smith v Hampshire County Council (2008)** due to inadequate training. Mr Gower-Smith was employed by the Defendant Local Authority as a School Caretaker and was using a step ladder to take down a display from a notice board, when the step ladder overturned causing him to fall and suffer serious injuries. Mr Gower-Smith alleged the accident was due to inadequate training, arguing he had not been given sufficient training or instruction on the use of step ladders.

The Court found the incident was a classic step ladder accident in which a sideways force had been exerted causing the step ladder to overturn because the step ladder had been placed parallel to the wall, rather than at right angles. The Court found the case turned on the duty to train for an identified risk, with reference to the case of **Allison**. The risk posed by parallel positioning of step ladders was not obvious, and the Local Authority should have focused Mr Gower-Smith’s training properly to find solutions to the risk. The Local Authority simply had to get the message across to Mr Gower-Smith so he understood the risk and could take the precautions required. The Local Authority were found in breach of Regulation 9, with the Court finding the training provided to be deficient and ultimately responsible for Mr Gower-Smith positioning the ladder as he had done. The Local Authority were however successful in securing a 25% reduction upon Mr

COURT SPOTLIGHT

Gower-Smith’s damages for contributory negligence as he had climbed up to the top platform of the ladder, rendering his position more vulnerable and the ladder less stable.

In contrast to the House of Lords in **Spencer-Franks**, the Court of Appeal’s findings in **Smith** and **Mason** have prompted sighs of relief, with the two decisions representing much more even-

handed interpretations of the Regulations, preventing unrealistic obligations being imposed upon employers and non-employers in relation to matters beyond their control. It is plain from the cases of **Allison** and **Gower-Smith** that where it is accepted the employee was using work equipment within the ambit of the Regulations, the standard of care required by employers to train in order to fulfil the statutory duties remains incredibly high.

COURT SPOTLIGHT

Recent cases of interest include the following:-

Carol Harrison v Derby City Council (2008)
Court of Appeal – 21 April 2008

The Claimant sought damages for injuries sustained when she placed her foot in a depression measuring in excess of 25mm deep which had been caused by the collapse of a cellar roof around a grating under the highway. Whilst the Local Authority accepted the depression amounted to an actionable defect for the purposes of section 41 of the Highways Act 1980, they sought to rely upon the statutory section 58 defence arguing they had a competent system of inspections carried out at appropriate intervals. The Local Authority inspected the footway in question every 6 months. The last safety inspection had been completed 3 months prior to the accident during which the defect in question was not present. Due to the risk of sudden collapse over cellar voids, the Claimant argued however that those parts of the footway over cellar voids ought to be inspected more frequently. Despite the Local Authority’s evidence that only 5 defects out of over 4,000 actionable defects arising each year occurred over a cellar void, at first instance the Trial Judge found that having known of the risk, the Local Authority should have inspected such areas more frequently i.e. at 1 or 2 monthly intervals. The Trial Judge found the Local Authority to be in breach of its duty and awarded damages to the Claimant.

Upon Appeal, the Local Authority was successful. The Court of Appeal accepted the unchallenged evidence that over 4,000 actionable defects arose each year from causes other than collapsed cellar voids and concluded that it was unreasonable and disproportionate to expect the Local Authority to implement a more frequent inspection system for areas over cellar voids where defects arose only occasionally. The Court of Appeal found that the statutory section 58 defence had been established, accepting that the Local Authority had taken such care in all the circumstances as was reasonably required to ensure the footway was not dangerous to pedestrians.



Timothy & Catherine Perry v Samuel Harris (A Minor) (2008)
Court of Appeal – 31 July 2008

The Claimant, Samuel Harris was an 11 year old child who had suffered serious head injuries following an accident on a bouncy castle, during which an older and taller child somersaulted and struck his heel on the Claimant’s forehead. The Defendants, Mr and Mrs Perry had hired the bouncy castle for their children’s party and had given permission for the Claimant to play on the bouncy castle. At first instance, the Defendants were found liable to the Claimant with the Court finding that Mrs Perry owed a duty of care to maintain uninterrupted supervision of the bouncy castle and had she not been attending to another child on another piece of equipment, the incident could have been prevented. Mr Perry was also found negligent for permitting older and larger children to play on the bouncy castle.

Mr and Mrs Perry successfully appealed the decision. The Court of Appeal overturned the decision finding that the Trial Judge had imposed too high a standard of care on both Mr and Mrs Perry. The Court of Appeal found that it was impossible to preclude all risks that children may be injured when playing together and that it was quite impractical for parents to keep children under constant supervision, commenting that it would not be in the public interest for the law to impose such a duty upon parents. It was doubted as to whether Mrs Perry could have prevented the incident even with constant supervision. Whilst a reasonable parent could foresee that boisterous behaviour might lead to injury, it was not reasonably foreseeable that such injury would be serious, let alone as serious as that sustained by the Claimant.