

EMPLOYERS LIABILITY - WORKPLACE REGULATIONS

Craner v Dorset County Council - 2008 (CA)

The claimant sustained a knee injury when a trolley was wheeled along a paved area, the trolley was alleged to have come to an abrupt halt when it came into contact with a raised slab. The Court of Appeal, whilst upholding the finding of liability under the regulations, made some useful comments about the application of Regulation 12 Workplace (Health Safety and Welfare) Regulations 1992. It was felt that claims of this nature should be brought under either R12(1) or (2) (the requirement that a traffic route be suitable for its purpose and be free from holes and slopes, not be uneven or slippery) as this was more apt than the concept of obstruction under R12(3). The defendant sought to argue that this was a freak or inexplicable accident, however, the evidence before the judge was 'painfully thin'. It would have been helpful, said the Court of Appeal, to have had irrefutable measurements of the protrusion and to have carried out a controlled experiment with the trolley to see what actually caused the accident. At first instance the judge had also found that the trolley was unsuitable within the meaning to Regulation 4 Provision and Use of Work Equipment Regulations 1998. Although the trolley was not in pristine condition it had been used many times previously without incident and on the face of it there did not appear to be anything wrong or unsuitable about it.

Comment

Whilst finding that the judge was entitled to find as he did, even on painfully thin evidence, the Court of Appeal have reiterated the importance of post accident investigations and proactive gathering of evidence in support of the defence of a claim.

EMPLOYERS LIABILITY - DISPLAY SCREEN EQUIPMENT

Goodwin v Bennetts UK Ltd - 2008 (CA)

The claimant worked in an office carrying out an administrative function, she developed pain in her wrists around the same time as she had a car accident. It was unclear whether the accident and the pain were connected. Symptoms subsided when the claimant went on holiday but resurfaced on her return to work. The claimant's GP

diagnosed tenosynovitis and signed her off work. Again, on return to work, the claimant's symptoms returned. On the evidence it was found that the claimant's workstation and posture were satisfactory and that the volume of work was such that there was no excessive repetition or insufficient rest. Whilst the underlying cause of the pain was not known it had been shown that it was aggravated by her keyboard work. The employer had not planned activities to allow breaks or changes in activity to reduce workload using the keyboard, though in reality such breaks did interrupt the daily routine. Compliance with the regulations has to be deliberate rather than inadvertent, the employer was in breach but that breach was of no causative effect. The Court of Appeal found that once the claimant had been diagnosed with tenosynovitis and her employers had been alerted to this fact and that the condition appeared to be aggravated by keyboard work they should have properly reduced that type of work and have provided proper training and information such that keyboard use would have been substantially less and the claimant would not have suffered a recurrence of her symptoms.

EMPLOYERS LIABILITY - MANUAL HANDLING

Egan v Central Manchester & Manchester Children's University Hospitals NHS Trust - 2008 (CA)

In this case the claimant suffered a back injury positioning a mobile hoist to enable her to lower a patient into a bath. The hoist stopped suddenly when it struck a plinth under the bath. This plinth would not have been visible from the claimant's standing position. There was no risk assessment in place, however, the claim was dismissed at first instance because this failure was not causative of the injury. The judge found that the claimant had carried out this manoeuvre many times without incident and that even had a risk assessment been completed it would have been unlikely to have said anything about the location of the plinth or any risk of collision. Indeed the risk assessment would not have



provided the claimant with any more information than she already had. The Court of Appeal found that the judge had failed to give full consideration to the Manual Handling Operations Regulations 1992 in particular regulation 4(1)(b)(ii) which is separate from, and additional to, the requirement to risk assess. This regulation requires the employer to take appropriate steps to reduce the risk of injury from a manual handling operation to the lowest level reasonably practicable. There were a number of measures to alert an employee to the presence of the plinth that could have been taken that would have reduced the risk of injury a considerable degree, such measures involved modest cost and were reasonably practicable. The Court of Appeal did consider though that the claimant had been careless in not looking carefully to see exactly where the forks were going under the bath and found that she had been equally responsible for the accident.

Comment

This case, and that of Goodwin, serves to demonstrate just how onerous a duty an employer has under these regulations. It is encouraging though to see the Court of Appeal place a significant onus on claimants to take responsibility for their own safety when undertaking tasks they are familiar with and have completed safely many times before.

MITIGATION OF LOSS - CREDIT HIRE

Copley v Lawn : Maden v Haller - 2008 (CC)

This was a conjoined appeal of two cases concerning prompt offers of replacement vehicles being made by defendant insurers following road traffic accidents. The claimants had not taken up the offers and then proceeded to hire vehicles on credit. In Madden the offer arrived before the claimant had entered into a credit hire agreement. In Copley the offer came a few days after the claimant had entered into the hire agreement. At first instance it was held that the claimants in both cases had failed to mitigate by not accepting the offers and accordingly the credit hire charges fell to be dismissed or reduced so that the claimant only recovered in respect of the period before which the claimant should have accepted the offer. The questions raised on appeal were whether the fact that neither claimant had known what the cost of supplying the alternative vehicles was going to be whether they could be said to have failed to mitigate and what the correct measure of damages was even if the claimants had failed to mitigate. The court upheld the findings that the claimants had failed to mitigate. The cost of supplying the vehicles was of no concern to the claimants and was irrelevant to the issue of mitigation on the basis that mitigation related to the loss which could have been avoided. As to the measure of damages it was held that acceptance of the offer would have resulted in no loss being incurred and therefore the offer of a vehicle was to be equated to an offer of restitution rather than of cash.

LIMITATION - DATE OF KNOWLEDGE

White v Eon & Others - 2008 (CA)

The claimant had worked for the defendants from 1962 to 1996 and alleged that he had developed vibration white finger and carpal tunnel syndrome as a result of excessive levels of vibration from tools used in his work. The claimant sought to argue that the date of his knowledge was when he saw an advertisement for a claims company. The Court of Appeal though upheld the first instance decision that it would have been reasonable to have expected the claimant to have sought medical attention by the time he had left his final employment in 1996 which would have made the necessary connection between his symptoms and his use of tools. The claimant therefore had constructive knowledge pursuant to s14(3) Limitation Act 1980, further the court refused to exercise discretion under s33 of the same act.

CONTRIBUTORY NEGLIGENCE - ASSESSMENT OF DAMAGES

Palmer v Kitley - 2008 (QBD)

The claimant was injured in a road traffic accident whilst travelling, unrestrained, as a passenger in a car. The claimant sought to argue that had she been wearing a seatbelt her injuries would have been worse. The court found no evidence for this assertion which was felt to be nothing more than speculation. Contributory negligence was applied as per *Froom v Butcher*. Perhaps of more interest is the way that the court dealt with quantum. A significant claim for future loss of earnings was made on the basis that but for the accident the claimant would have qualified as a midwife. Whilst the schedule was accompanied by considerable evidence this was not sufficient for the judge to form any real view as to the claimant's prospects but for the accident. As such the evidence did not enable the claimant to satisfy the burden of proof, the judge was persuaded to consider as a matter of impression rather than precise calculation and reduced the award to less than 10% of that claimed. Further the court rejected a claim for care given the lack of any proper witness evidence from the claimant or her purported carer.

Comment

This case is a useful illustration of the way a court can look at a damages claim. It reasserts the need to look carefully behind a pleaded schedule for evidence that the losses are real and quantifiable rather than speculative and imponderable.

LIABILITY - INDEPENDENT CONTRACTORS

Biffa Waste Services Ltd & others v Maschinenfabrik Ernst Hese GMBH & others - 2008 (CA)

The appellant contractor appealed against a decision that it was vicariously liable for the negligence of an independent contractor which had caused, or materially contributed, to a fire at a recycling plant whilst the plant was under construction. The fire started during welding work and at first instance it was found that the fire was caused by the negligence of personnel carrying out the welding and



those supervising the work on site. However, these companies were insolvent and the claimants sought to pursue their employers arguing an exception to the general rule that an employer is not liable for the actions of an independent contractor. For the exception to apply the claimants would have to show that the contractors had been ‘borrowed’ and had become employees, and that their activities were controlled by the employer. Alternatively the claimants would have to show that the contractor’s activity (welding) was classed as ultra-hazardous. On the facts there was insufficient evidence that the contractors had been borrowed. The exception for ultra hazardous activities was said to be fraught with difficulties because of the difficulty in distinguishing between activities which are over and above simply hazardous. The Court of Appeal found that this was a very narrow exception and should only be considered where the activity is exceptionally dangerous, whatever precautions are taken.

LIABILITY - PEDESTRIAN RTA

Qamili v Holt - 2008 (CA)

The claimant was crossing a road when he was involved in collision with a van. As a result, the claimant suffered serious injuries. The road the claimant had been crossing was a busy main thoroughfare where there were shops and pedestrians. The road was described as having an ample carriageway, which was not separated by partitions. The amplitude of carriageway was narrowed for traffic because of the insertion of a bus lane on each side of the road. The judge found that in those circumstances there was very little room between the traffic that passed in either direction. The judge found that the claimant had crossed to the middle of the road where he was beckoned by a car driver to cross in front of him. The claimant then walked straight out into the other carriageway without looking and walked into the side of van. The defendant’s evidence was that he had not seen the claimant before the collision and that in order to have seen the claimant he would have had to look out for the possibility of pedestrians emerging from his offside. The judge found that the defendant had no duty to look out for the possibility of pedestrians emerging from his offside, and concluded that the accident had happened in such a short period of time as to leave the defendant no time to do anything or to see the claimant. The claimant appealed. It was held that the judge had been entitled to find that the first defendant had not failed in his duty of care and had not caused the accident.

Comment

The full judgement in this case is not yet available and a further report will follow in due course. In the meantime it is a useful case to bear in mind in pedestrian cases where the pedestrian has emerged from the drivers off side. As in all of these cases decisions on liability are very much based on their facts.

PROCEDURAL - PERIODICAL PAYMENTS

Thompstone v Tameside Hospital NHS Foundation Trust and related cases - 2008 (QBD)

The Court has approved model orders for periodical payments as useful precedents, departure from which in other cases would need to be justified to secure Court approval. The Court approved the provision made in the model orders for the indexation of both immediate and deferred periodical payments, as well as for increases in the multiplicand at specified dates. The approach adopted in the drafts to anticipate reclassification and revision of ASHE 6115 was praised by the Judge as likely to increase the prospect of the parties agreeing a new formula when that event occurred.

PROCEDURAL - ROME II

Rome II comes into force on 11 January with important implications for personal injury cases which involve European cross-border accident litigation. EU member states will have to apply the same set of rules to determine the law applicable to non-contractual obligations arising between parties in most civil and commercial matters. The general rule is that the law applicable for the resolution of a non-contractual dispute should be the law where the damage occurred. The parties may agree to deal with the claim under the law of their choice. Previously, the assessment of damages and any limitation issues have often been subjected to English law, even where the accident occurred in a different country, on the ground that they are procedural issues. Under Rome II the applicable law to a non-contractual obligation will now include not only the extent of a party’s liability, but also the assessment of damages, and any limitation issue. However, Rome II states that when quantifying damages for personal injury cases in which the accident takes place in a country other than that of the normal residence of the victim, then all the circumstances of the victim including actual losses and costs of aftercare and medical attention should be taken into account. There will, therefore, remain some room for debate.

List of abbreviations used:

CC	County Court
HC	High Court
QBD	Queens Bench Division of the High Court
Ch D	Chancery Division of the High Court
CA	Court of Appeal
HL	House of Lords
SCCO	Supreme Court Costs Office
ECJ	European Court of Justice
TCC	Technology and Construction Court

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