

September 2006

WELCOME TO THE SEPTEMBER 2006 EDITION OF COURT CIRCULAR

Included in this issue are reports of the House of Lords' landmark rulings on Employers' Liability for harassment at work (page 3) and limitation in personal injury cases (page 4), a key Court of Appeal judgment on highway authorities' liability for drainage (page 6), examples of successful and unsuccessful stress-at-work claims (page 2) and an advance note on the new age discrimination legislation which comes into effect on 1 October 2006 (page 12).

EMPLOYERS' LIABILITY

STRESS AT WORK – FORESEEABILITY

GARROD V N. DEVON NHS PRIMARY CARE TRUST, 28.4.06,
High Court, Queen's Bench Division

The claimant was born in 1952, she trained as a nurse and initially worked for the defendant. She married in 1974 but this broke down in 1982 and she, her new partner and her three children emigrated to South Africa in 1989 for nine years. She was re-employed by the defendant in 1998 as a health visitor, working 30 hours per week.

In June 2001 she was off sick with depression following repeatedly having to cover for a colleague who frequently took time off sick on short notice. When she returned, on reduced hours at first, another colleague went on long-term sick leave and, despite her requests for help with her workload, only minimal assistance was given.

The claimant suffered another depressive illness. On her return she again fell under pressure from an excessive workload from having to cover for another colleague who was absent on maternity leave and not replaced. The claimant went on sick leave again for similar reasons as before and her employment was terminated on the grounds of ill-health in February 2003.

The claimant claimed damages from the defendant for psychiatric injury. She claimed the defendant should have taken proper steps, after her first absence, to ensure her workload was not likely to cause her further ill-health. She said the defendant had breached their duty of care to her by failing to provide sufficient staff to assist with the heavy workload and that they had not put in place or maintained her return-to-work programmes.

The court held that the defendant was, or should have been, aware of the claimant's vulnerability after she first went on sick leave due to the excessive pressures of her workload. Her second absence on sick leave was for similar reasons to the first and her employer should have been aware of her vulnerability after the first absence.

The defendant was negligent for failing to provide cover for absent staff from the available "staff bank" and for not supporting the claimant in her efforts to manage the difficulties she experienced from her excessive workload.

Other possible causes of her illness were rejected by the court as "typical incidents of life which did not in any way impact on the mental health of the claimant". Her illness was caused by the defendant's breach of duty and judgment was given for the claimant. However, damages were reduced by 20% to reflect her vulnerability to mental health issues after her first episode of depression.

NOTE: This is an example of the consequences for an employer that was or should have been aware of an employee's vulnerability to psychiatric illness from stress at work and its inadequate response to that situation.

EMPLOYERS' LIABILITY

STRESS AT WORK – FORESEEABILITY

DAW V INTEL CORPORATION (UK) LTD, 23.5.06,
High Court, Queen's Bench Division

This is an example of an employer being held liable for an employee's psychiatric injury from workplace stress.

The claimant, aged 36 at the date of trial, had worked for the defendant, Intel, since she was 19, initially as a finance assistant, progressing to senior finance analyst. She first suffered mental health problems after the birth of her children in 1995 and 1998. She received counselling through Intel's counselling service.

She had three managers and complained that her heavy workload made it difficult for her to be able to know whose demands should be prioritised. She also complained of insufficient assistance and although junior staff were hired to help her, they were of little if any assistance. She informed her managers about how the pressures of work were affecting her health.

Her claim included that Intel were in breach of the Working Time Regulations

1998. She said she worked over 60 hours each week, including from home after putting her children to bed. She was able to demonstrate this from work-related emails that she sent late in the evenings.

On one occasion her main manager found her in tears and asked her to write down what was troubling her. She did so, indicating she had previously suffered depression although this was not specifically stated. Had her manager asked her what she meant he would have established that she was suffering in a similar way as with her post-natal depression. Intel's human resources department had kept this confidential from her managers.

The claimant argued that the counselling service was of limited help to her and could not reduce her workload. The court held that she could not be criticised for not using the counselling service in the episode of depression before she left Intel.

The service would have been of little use to her and an employer cannot avoid its duty simply by saying such a service was available.

Her manager should have taken appropriate action to address the claimant's difficulties, including to reduce her workload and the defendant was negligent in failing to do so.

However, there was a 50% chance that the claimant would have suffered severe depression within the next eight years. General damages of £24,000 were reduced by a third and special damages, by a quarter, to reflect that likelihood.

NOTE: This case warns employers that providing a counselling service will not automatically discharge the duty of care to employees in work-related stress cases. Where an employer's HR department is aware of an employee's history of ill health, it should ensure, where relevant, this is made known to managers.

EMPLOYERS' LIABILITY

HARASSMENT AND STRESS AT WORK

DANIELS V COMMISSIONER OF POLICE OF THE METROPOLIS, 05.7.06,
High Court, Queen's Bench Division

This case combines a claim for damages for psychiatric injury from stress at work with a damages claim for harassment under the Protection from Harassment Act 1977 (the Act).

We have seen, from *Majrowski* on page [3], that the House of Lords upheld the Court of Appeal's decision from last year that an employer can be vicariously liable for an employee's harassment of another at work. This case was decided under the Court of Appeal's ruling of *Majrowski*, being heard before the House of Lords' decision was given a week later.

The claimant here was a police officer. She was aged 43 at the date of trial and had served with the defendant for 14 years before her medical retirement in 2002.

She claimed that, throughout her career, she was harassed and that the defendant was negligent in how it addressed her complaints

of stress, resulting in her developing a psychiatric illness.

Despite a transfer to the mounted police unit, she claimed that she was still suffering harassment and victimisation which she said led to her suffering a breakdown. She had been offered counselling but she declined.

Both medical experts agreed that the claimant had a psychiatric illness and adverse personality traits that made her a vulnerable person. The court was told that she had a personality disorder that had first manifested itself when she worked for the army, before joining the defendant. Evidence was given that she was unable to accept criticism, was the first to complain when things became tough and was generally disruptive. The judge said that, due to her condition, he would treat her evidence with reserve.

The judge held that the claimant had not demonstrated that she had been harassed

under the terms of the Act as the court was not convinced that she had been subjected to a course of conduct that amounted to harassment.

With regard to the negligence claim, there was nothing that could have warned the defendant that she was at risk of suffering harm to her health. The court referred to the well-known case of *Hatton v Sutherland [2002]*, in which the Court of Appeal gave guidance on dealing with claims of psychiatric injury from stress at work. Bearing that guidance in mind in this case, the court held that the defendant had not breached its duty to the claimant and the claim was dismissed.

NOTE: This is another example of how a claimant must persuade a court that their claim of negligence satisfies the guidance given by the Court of Appeal in *Hatton* and that, for a harassment claim under the Act to succeed, a course of conduct accepted as harassment by the courts must be proven.

EMPLOYERS' LIABILITY

HARASSMENT AT WORK – VICARIOUS LIABILITY

MAJROWSKI V GUY'S & ST THOMAS'S NHS TRUST, 12.7.06,
House of Lords

We last reported this case in our June 2005 edition, after the Court of Appeal ruled that an employer can be vicariously liable for the harassment by one of its employees of another. The Trust appealed to the House of Lords, who have now given their decision.

In a nutshell, the Lords have ruled that, in exceptional circumstances, an employer can be held vicariously liable for an employee's harassment of another employee, under S.3 of the Protection from Harassment Act 1997 (the Act).

Under S.1 of the Act, a person is prohibited from acting in a way which he knows or should know would amount to harassment of another person. The victim does not need to prove that he has developed a recognised psychiatric illness from the harassment but must show that more than one act of harassment has taken place or he fears more. He must also prove the behaviour amounts to what the courts accept is harassment. There is no specific definition but the behaviour must be oppressive and unacceptable and must be serious enough to lead a person to be potentially criminally liable.

Employers can defend these types of claim if they can show that the behaviour was necessary to detect or thwart a crime or that it was reasonable to allow the conduct to take place.

Under S.3 of the Act, damages can be awarded at the court's discretion where a person is found guilty of harassing another. The Act was originally introduced to deal with cases such as stalking and the Trust argued that it was not introduced to apply to workplace situations.

The Lords considered the basic principle of vicarious liability of employers. They ruled that employers can be held liable for any wrongs or breaches of statutory obligations committed by its employees, not only common law breaches such as negligence. Unless it was specifically ruled out, an employer could be vicariously liable for any breach by one of its employees, at work, of

a statutory obligation where damages may be awarded.

The breach would, though, have to have been closely connected with the employee's work and be able to be regarded as being done in the course of that employment.

There was nothing in the Act, the Lords ruled, that indicated vicarious liability of employers should be excluded from it. Harassment was, under the Act, wrongful behaviour for which a person may be awarded damages.

In Scotland, an employer could be liable to pay damages to an employee who had been harassed by another employee at work and the Lords ruled that Parliament could not have intended the position to be different in England and Wales.

Although the appeal was dismissed, a number of Lords deciding this case voiced concern about why employers should not, for policy reasons, be capable of being found vicariously liable for their employees' harassment of other employees. These included that:

- the decision moves the requirement for prohibiting harassment away from the person responsible to the employer;
- there might be a flurry of claims because a claimant now no longer needs to demonstrate they have been caused to suffer psychiatric injury;
- there is no need to prove the harassment was foreseeable.

However, only cases of serious harassment will succeed; claims from trivial disputes and grievances at work should not. In this case, the claimant's case will now be referred back to the county court for the judge to decide whether his manager's conduct, as alleged, amounted to harassment.

NOTE: An employer can be vicariously liable for the harassment by an employee of another, although claims for damages under the Act are likely to succeed in only the most serious cases of harassment.

EMPLOYERS' LIABILITY

DISABILITY DISCRIMINATION – REASONABLE ADJUSTMENTS

HAY V SURREY COUNTY COUNCIL,
28.4.06, Employment Appeal Tribunal

The claimant had undergone surgery to her knee, resulting in a degenerative condition. She was employed as a mobile library manager and this involved her driving the library lorry. It had a heavy clutch and she had to carry books. After the operation, the council considered alternative work for the claimant and the option of modifying both the vehicle and her duties.

The claimant, however, brought a claim against the council under the Disability Discrimination Act 1995, alleging it had failed to make reasonable adjustments in the light of what had become her disability. The employment tribunal ruled that the council had failed to carry out a formal risk assessment and it was liable to the claimant.

The council appealed, arguing that a formal risk assessment should not have been required and that the tribunal had not given proper reasons for its decision. It also argued that the tribunal had not considered all the evidence properly that demonstrated the council had considered other options to accommodate the claimant's needs.

The Employment Appeal Tribunal agreed with the council that a formal risk assessment was not necessary. A risk assessment should take place but one that addresses the facts of each particular situation.

In this case, the council had considered employing an assistant but rejected this on the grounds of expense. It had also considered modifying the claimant's vehicle from manual to automatic but this was also ruled out on the grounds of cost and the delay that would ensue. The council had also considered the possibility of the claimant and a library assistant swapping roles but this was not appropriate. In addition, the claimant had been involved in discussions about her situation over many months.

The council was not liable for failing to carry out a proper risk assessment and the appeal was allowed.

NOTE: In a claim alleging failure to carry out a formal risk assessment for reasonable adjustments to be made to accommodate a person's disability, the legal liability is only to carry out an assessment that sufficiently meets the facts of the particular situation.

EMPLOYERS' LIABILITY

DEFECTIVE EQUIPMENT – COMPUTERS

MASSEY V CONGLETON BOROUGH COUNCIL,

24.5.06, Crewe County Court

The claimant alleged that she fractured her finger after it was caught in the on/off button of her computer at work. The button was already broken.

The hospital records indicated that she stubbed her finger into a wall and that she had a history of hitting her hand against a wall. The defendant disputed liability on the ground of causation, relying on the hospital records of the claimant's account of the accident.

At trial, the claimant maintained that she had suffered the injury when her finger was caught as stated in her claim and there were no other direct witnesses to the incident.

The judge regarded the claimant as a convincing witness and gave judgment in her favour, awarding her just over £8,000. The council is now considering its right of recovery against the computer manufacturers.

NOTE: Even where there are some inconsistencies in a claimant's written evidence, including medical evidence, a court might prefer a claimant's live evidence at trial. Where appropriate, recovery action should be taken against any responsible third parties sooner rather than later.

EMPLOYERS' LIABILITY

PERSONAL INJURY – ANTICIPATING ASSAULT

DARWISH V EGYPTAIR LTD., 16.6.06, High Court, Queen's Bench Division

The claimant had worked for the defendant since 1980 when he was aged 23. In 1988 he came to work in one of its London offices as ticketing supervisor. The role of manager was the preserve only of those on secondment from the Cairo headquarters.

In 2002 his employment was terminated and he brought a claim for wrongful dismissal and disability discrimination which the defendant settled for £7,500. A few months later, the claimant sought damages for Post-Traumatic Stress Disorder which he claimed was caused by the behaviour of the defendant's manager during a meeting in January 2002 when the claimant was still employed by the defendant.

At the meeting, which the claimant secretly recorded, the claimant's manager and his superior were present and the claimant's job was discussed. The parties were speaking in Arabic. Tensions developed and the manager said to the claimant, "I will wipe the floor with you." The claimant asked him to repeat this, which he did. The claimant said the manager then moved as though to get up and he thought the manager was going to attack him. The meeting ended soon after.

At trial, the judge held that the meaning of that phrase was similar in English as in Arabic but it depends on the circumstances in which it is used. The judge regarded the manager as a man who could become angry quite easily and that he had probably used the phrase in a "flash of temper", a "moment of bravado", restrained probably by the presence of his own superior.

He ruled that the claimant had no reason to anticipate being attacked by the manager; his claim that he had done so was more likely the product of his own "over-wrought" state. In addition, the judge ruled the manager had neither intended an attack nor intended to cause the claimant to believe he was about to attack him. The claim failed.

NOTE: In a meeting at work to discuss an employee's performance, provocative words spoken in the heat of the moment, with agitated body language, would not necessarily amount to a real likelihood of an imminent assault on a claimant.

EMPLOYERS' LIABILITY

PROTECTIVE EQUIPMENT – SCALDING INJURY

ROBY V HALTON

BOROUGH COUNCIL,
8.6.06, Birkenhead
County Court

The claimant was a catering assistant at a high school. In November 2004 she suffered scalding to her left wrist and hand after losing grip of a large pan of gravy, some of which spilled on to her.

Her claim for damages against the defendant alleged that the gloves and cloths provided were inadequate under the Personal Protective Equipment at Work Regulations 1992. She said they were old and frayed.

The defendant argued that the claimant had failed to comply with set procedures regarding notifying senior staff of the condition of the cloths and gloves and that she had filled the pan with too much gravy.

The judge heard the claimant's evidence that she had used the cloths in question earlier that same day but when using it to carry the gravy pan from a hob to a trolley, some of the gravy spilled. She had initially said in her statement that the cloth was frayed but in court alleged there was a hole in its hem. The judge rejected the claim that it was frayed before the accident. After considering the evidence, he also rejected the claim that the cloth had been caught on the hob, causing a tear or hole.

The judge ruled that the claimant had failed to prove the cloth was defective and dismissed the claim.

NOTE: For a claim of defective personal protective equipment at work to have a chance of succeeding, a claimant must first satisfy the court that the equipment complained of was actually defective.

EMPLOYERS' LIABILITY

DEFECTIVE EQUIPMENT – LIFTS

REID V PRP ARCHITECTS, 28.7.06, Court of Appeal

The claimant was employed by the defendant as a receptionist in their second floor premises in the City of London. Access to the offices was possible by use of a lift which other tenants of the building were entitled to use. Tenants paid maintenance and service charges under the terms of their occupation of the offices.

One evening in November 2000, when leaving work, the claimant took the lift to the ground floor exit but, on leaving the lift, she dropped her handbag. She reached to pick it up but the lift door closed on her right hand. She suffered a crushing injury to her wrist and thumb. The claimant claimed damages alleging a breach of the Provision and Use of Work Equipment Regulations 1998 (PUWER).

At trial, the judge held that the lift was work equipment under PUWER, it was defective and, while the claimant had been injured in the course of her employment, it was not necessary for a person to be injured for an employer to be in breach of PUWER.

The defendant appealed, arguing that the lift was not an installation or work equipment for the purposes of PUWER as it was not used by an employee at work, it was outside their premises and neither owned nor maintained by them.

The Court of Appeal held that the concept of work equipment should be given a broad interpretation. An installation, as referred to in PUWER, could be a lift as it was "a large piece of equipment installed for use".

The point to consider was whether the lift was used at work. Although the defendant did not own the lift, it was a facility available to its employees in the course of their work, which was different from something that

was worked on. The Court contrasted the case of *Hammond v Commissioner of Police for the Metropolis*, reported in the September 2004 issue of Court Circular, where the Court of Appeal held there was no liability of the defendant when the claimant was injured while working on one of their vans, an object provided by someone other than the claimant's employer.

In this case, the claimant was leaving work and using the lift to exit the building. She was therefore "at work" for the purposes of PUWER. The appeal was dismissed.

NOTE: A lift that is neither owned nor maintained by an employer, but which is in a building for which the employer pays maintenance and service charges, and is available to work employees for access to their work premises, is work equipment for the purposes of PUWER.

PUBLIC LIABILITY

EDUCATION NEGLIGENCE – INADEQUATE TEACHING

MARR V LAMBETH LONDON BOROUGH COUNCIL, 25.5.06, High Court, Queen's Bench Division

The claimant, aged 23 at the date of trial, alleged that the three schools he had attended since the age of eight were negligent in failing to recognise or properly address his literacy difficulties.

In addition, he was permanently excluded from school in early 1996 and claimed that the defendant local education authority were negligent in removing him from their pupil referral unit waiting list. It was not until June 1997 that he obtained a place at the unit. He alleged that, had his difficulties been properly dealt with, he would have been able to pursue further education or employment.

The defendant denied liability, arguing that the claim was, in reality, an attempt to claim damages for breach of a statutory duty.

The judge accepted that the claimant had probably attended poorly performing schools and that some errors were made in his

education. The claimant should have been kept on the pupil referral unit waiting list and was not attending school for 18 months after being excluded. But these were issues of statutory duty not negligence. There is, of course, no right to claim damages for breach of statutory duty; the appropriate course would have been an application for judicial review.

The claimant's disruptive behaviour created an obstacle to his educational progress. It was not unusual for pupils to have difficulties as severe as the claimant's but the teachers were used to these problems and had experience of dealing with them.

The court held the defendant was not liable in negligence and agreed that the claim amounted to a general claim of inadequate teaching or a claim of breach of statutory duty.

The claim was dismissed but the judge gave some views as to damages, had the

claim succeeded. He dismissed most of the claim to special damages save for the cost of remedial adult literacy teaching and other general education courses. He said general damages would have been very low. It was thought total damages would be unlikely to exceed £15,000.

The claimant's public funding (legal aid) was withdrawn several days before trial and he continued the claim under a conditional fee agreement without insurance. The claimant's financial resources are believed to be very limited.

NOTE: A claimant will not succeed in a claim for damages alleging a negligent failure to educate if the court accepts that it is, in reality, a claim of breach of statutory duty where damages are not awarded. It is therefore vital, in investigating and defending such claims, that the true basis of the claim is established.

PUBLIC LIABILITY

HIGHWAYS – LIABILITY FOR MAINTENANCE FOR DRAINAGE

DETR V (1) MOTT MACDONALD LTD., (2) AMEY MOUCHEL LTD., (3) CORNWALL COUNTY COUNCIL, 27.7.06, Court of Appeal

This case was first heard by the High Court in April this year and reported in the July 2006 edition of Court Circular. The appeal has been heard sooner than expected and we are now able to report its outcome.

In essence, the Court of Appeal has reversed the High Court decision and held that a highway authority's duty to maintain highways, under S.41(1) Highways Act 1980 (the Act), includes the maintenance and repair of drains on the highway.

The Department of Environment, Transport and the Regions (DETR) had settled three claims, at a cost of some £1.5million, after the claimants were injured in similar circumstances involving floodwater on the highway. It had believed it had a duty to maintain drainage on the highway under the 1968 ruling by the Court of Appeal in *Burnside v Emerson*. It sought an indemnity from its maintaining agents, the respondents. The respondents denied liability for the maintenance of drains, arguing that the duty was only to maintain the surface of the highway. The High Court initially agreed with them.

The Court of Appeal, however, disagreed and interpreted the case of *Burnside* and the duty under the Act differently. It held that "an effective drainage system is an intrinsic part of the design of a modern road" and must be maintained properly. In the case of *Burnside*, failure by the highway authority to maintain a drainage system resulted in water collecting on the highway, resulting in an accident. That judgment confirmed that a highway authority's duty to maintain the highway, which includes repair, also includes in respect of drainage. This case has, the Court emphasised, stood without criticism for nearly 40 years and was relied on by the Court of Appeal in the 1999 case of *Thoburn v Northumberland County Council*.

The Court held that cases relied on by the respondents did not support their

argument that the duty to maintain is limited to the surface of the road. There was never any intention of the Court of Appeal, in the cases the respondents relied on, to overrule *Burnside*. In addition, Parliament has never shown an intention to amend the law, in the way the respondents argued, since that 1968 case although it could have done, especially since *Goodes v East Sussex* in 2000.

If the respondents were correct and there was no duty to maintain or repair drains on the highway, that argument would not sit squarely with S.41(1) of the Act, which requires a highway authority to ensure, as far as is reasonably practicable, that safe passage on the highway of those who use it is not endangered by snow and ice. It cannot then be said that there is no duty in respect of floodwater. Furthermore, it is, for example, accepted in law that a retaining wall might fall within the duty to maintain if it supports a highway. It cannot logically, then, be the case that the duty is only regarding the actual traffic surface of the road.

The Court of Appeal upheld the decision in *Burnside* and reaffirmed how a highway authority would be liable if it failed to maintain a drainage system. Liability would arise if an accident were caused by a build up of water that created a dangerous condition on the highway and if the authority's failure to maintain the highway caused that dangerous condition.

The Court held the respondents liable for failing to maintain the drains in a good state of repair and the appeal was allowed.

This case may be subject of an appeal to the House of Lords. We will update you of any future developments.

NOTE: Highway authorities' duty to maintain the highway includes a duty to keep drains clear and in a good state of repair and the case of *Burnside v Emerson* has not been overruled.

PUBLIC LIABILITY

HIGHWAYS – STATUTORY LIABILITY FOR STREET FURNITURE

SHINE (BY HIS FATHER M SHINE) V TOWER HAMLETS LBC, 9.6.06, Court of Appeal

The claimant, a child, was injured while attempting to leapfrog over a bollard on a pavement. The bollard was not properly secured into the ground and it wobbled as he leapt on to it.

The claimant's father sued the council on his behalf, alleging both its breach of the Highways Act 1980 (the Act) and negligence. The trial judge held the council liable under the Act for failing to maintain it properly but made no ruling on the allegation of negligence.

The council appealed on the ground that the Act did not create a duty for highway authorities to avoid injury to people from street furniture. The claimant cross-appealed, maintaining the council should be held liable in negligence but the council argued that it should not be liable in negligence for the claimant's injuries from using street furniture for a purpose for which it was not designed.

The Court of Appeal accepted the council's argument on the point of statutory liability, ruling it could not be held liable under the Act for the complaint was about street furniture, not its failure to maintain the highway. In addition, the council was not liable under the Act for incorrect installation of what effectively constituted a barrier. The council's appeal was allowed.

However, the council was liable in negligence as it was foreseeable that a child might leapfrog over a bollard. The bollard was not securely fixed in the pavement as the council was aware.

The claimant's cross-appeal was allowed.

NOTE: Highway authorities that are aware of street furniture requiring repair must ensure repairs are carried out as swiftly as reasonably practicable, particularly when it is foreseeable that children might suffer injury while playing on the defective fixtures.

PUBLIC LIABILITY

EDUCATIONAL NEEDS –
DISABILITY

OLCHFA COMPREHENSIVE
SCHOOL V (1) IE & EE; (2)
RIMINGTON (CHAIR OF SENDIST),
22.6.06, High Court,
Queen's Bench Division

The first respondents, IE and EE, are the parents of a 17 year old boy who was excluded from school, the appellant in this case, in 2003 when he was aged 13. The school is in Swansea. The boy's exclusion was for disruptive and abusive behaviour.

His parents brought a claim alleging that, due to his disability, he should not have been excluded. They complained to the Special Educational Needs and Disability Tribunal, SENDIST, who ruled against the school that the boy had been unlawfully excluded. When he was excluded, his parents were trying to establish whether their son suffered from Attention Deficit Hyperactivity Disorder, ADHD.

SENDIST had to decide whether there was evidence that, at the time of the exclusion, the boy was disabled for the purposes of the Disability Discrimination Act 1995 (the Act) and whether they had justifiably treated him less favourably if at all. SENDIST ruled that there was sufficient evidence to show the boy was disabled when he was excluded, the school had not taken reasonable steps to allow for the disability and the exclusion was not justified. The school appealed.

The High Court ruled that relevant matters had to be balanced when considering obligations under the Act. The interests of the school had to be taken into account as well as those of the excluded pupil and SENDIST should have given greater consideration to whether the school had been justified in its decision. The appeal was allowed.

NOTE: This is an example of the court undertaking the often difficult exercise of balancing the interests of a school, that had excluded a pupil, with the interests of the pupil who was alleged to be under a disability at the time of the exclusion.

PUBLIC LIABILITY

POLICE – MALICIOUS PROSECUTION

MANLEY V COMMISSIONER OF POLICE
FOR THE METROPOLIS,
28.6.06, Court of Appeal

The claimant appealed the level of damages awarded for malicious prosecution and against the decision not to award him aggravated damages.

The claimant was in a car with others that had been driven at about 80mph in a residential area in the early hours of Christmas morning, 1998. The police intercepted the car and, when the occupants got out, allegedly struck the claimant on his head with a baton. They had mistakenly believed the claimant was the driver and alleged the claimant had threatened to shoot the officer concerned. The claimant was sprayed in his face with CS gas, struck on his back while he was held down and struck on his thigh. He was then taken first to hospital for treatment of his injuries and then to the police station. The police alleged he had failed to agree a breath test.

The claimant was remanded in custody until his acquittal at trial the following May, on counts of dangerous driving and threats to kill. The charge of failing to take a breath test was discontinued in September 1999.

The claimant claimed damages for assault, false imprisonment and malicious prosecution. After guidance from the judge on appropriate levels of award, the jury awarded him £1,000 for assault, £7,500 for false imprisonment but only £1,500 for malicious prosecution, despite the trial judge's guidance that this could be up to £4,000. There was no award for aggravated damages.

The claimant appealed. He had a serious criminal record and an important issue in his appeal was whether the fact of his bad character had influenced the jury in the amount

they awarded for malicious prosecution and the fact that they did not award him aggravated damages.

The Court of Appeal confirmed that damages for malicious prosecution were to compensate for injury to reputation, risk of losing one's liberty or property and the financial cost of defending the case. In addition, a trial judge should point out to a jury that in a case brought by a person of bad character, whilst his reputation might not be greatly damaged, he would have faced an increased risk, from the original criminal prosecution, of being convicted and of heavier punishment.

In this case, the trial judge had given the jury little guidance as to for what they were compensating the claimant. The minimum the claimant should have been awarded for malicious prosecution was £4,000 and this figure was substituted for the original £1,500.

In addition, the Court of Appeal held that the police had given false evidence throughout and the claimant had been treated in an insulting, malicious and oppressive manner. A substantial sum should therefore be awarded for aggravated damages and the claimant was awarded £10,000 for this part of his claim.

NOTE: The Court of Appeal has given a reminder of the issues that should be taken into account when considering a claim by a person of "bad character" for malicious prosecution by a police force.

PUBLIC LIABILITY

HIGHWAYS – EVIDENCE OF INJURY

DUCKETT V HALTON BOROUGH COUNCIL, 4.6.06, Warrington County Court

The claimant alleged that she injured her hands and knees after falling in a pothole in July 2001 when she was nearly 17. She said that she was walking home with her friend at about 10pm, had not been drinking alcohol and did not notice a defect in the pavement. She sought damages from the defendant council under the 1980 Highways Act, alleging failure to maintain the highway.

The claim was defended primarily on the basis that her alleged injuries were not accepted to have been caused by a defect in the street. There were no notes in her medical records that referred to the accident before a personal injury claims company became involved, nor of her having received medical treatment for her alleged injuries before then. The claimant said that she had seen her GP four days after the fall but this was not apparent from the GP's notes. She had, though, seen a nurse for her asthma but there was no mention of an accident. She went to her GP several times throughout the remainder of 2001 but there was no record of any accident.

She also saw an orthopaedic specialist in December that year but relating to her hip. Nothing was recorded about an alleged accident earlier that year.

The court heard that, in the autumn of 2002, one of the claimant's friends had received damages for a tripping injury similar to that of the claimant. The friend had instructed The Accident Group (TAG) and the claimant was introduced to TAG after the company visited her friend. The claimant was present at this visit and was asked if she had suffered any similar accidents to that of her friend. The claimant said that she had and this claim resulted.

The first mention of any problems with the claimant's knees was to her GP in March 2003, after TAG had photographed the alleged site of the defect a few weeks earlier. The claimant was referred to another specialist in July 2003 but there was still no mention, in his letter following that examination, of a fall.

In the light of the absence of supporting medical evidence, the claim was dismissed.

NOTE: This is another example of the importance of carefully exploring a claimant's medical history relating to their alleged injury, to ensure the evidence supports the claim.

OCCUPIERS' LIABILITY

COMMUNAL STAIRWAYS – DEFECTIVE SURFACE

RYDER V ELLESMERE PORT & NESTON BOROUGH COUNCIL, 26.6.06, Liverpool County Court

The claimant was a postal worker, aged 30 at the date of trial. In September 2002, she was delivering post to a block of flats to where she had delivered before and was familiar with the area. She delivered there six days a week.

There is a communal door to the block, accessed via a concrete step. The claimant alleged that, when opening the door, she slipped on leaves, causing her to fall and twist her knee and back. She claimed damages under the Occupiers' Liability Act 1957.

The judge considered the defendant's evidence, noting they have a reactive system of inspection. The judge regarded this system as confusing and complex and saw that complaints could fall by the wayside. He also found the claimant's evidence confusing because she couldn't recall whether the leaves were wet or dry, if there was water on the step or whether she had simply slipped. He held that she had not given a satisfactory recollection of the accident and had not sufficiently proved her case. The claim was dismissed.

NOTE: Despite a defendant's confusing and less than effective system of inspection of communal areas to a block of flats, a claim for damages under the Occupiers' Liability Act 1957 still needs to be supported by sufficient evidence as to the circumstances of the accident to prove, on balance, that the defendant is in breach of its duty.

MOTOR

CHILD PEDESTRIANS – CONTRIBUTORY NEGLIGENCE

EHRARI (A CHILD) V (1) CURRY, (2) INDUSTRIAL CLADDING & ROOFING LTD., 9.6.06, High Court, Queen's Bench Division

In September 2001, the claimant, then nearly 14, suffered severe brain injury after being struck by a truck when attempting to cross Brentford High Street in West London.

The claimant apparently stepped quickly out into the road in front of a Volvo estate car that had two armchairs on its roof. She was trying to catch a bus on the other side of the road. She did not, according to witnesses, look in the direction of oncoming traffic on her side of the road and witnesses said the first defendant truck driver, D1, had no chance of avoiding colliding with her.

D1 had been travelling at about 20 mph. His line of vision of the claimant was partially obscured by the chairs on the Volvo and the judge held that he could not have seen her until she was directly in front of him. At that point, the judge held, D1 could have seen the claimant and

taken evasive action but he was probably looking elsewhere at that moment. For that reason and despite acknowledging that a driver was not obliged to be looking ahead at every moment, D1 was held to be negligent. However, the first and main cause of the accident was the claimant walking into the road without looking properly. He held her 70% responsible and D1, 30%.

NOTE: A 14 year old girl was held 70% liable for her severe injuries after attempting to cross the road without looking properly. However the driver of the vehicle that struck her was held to be partly responsible, despite the court accepting that drivers sometimes briefly take their eyes off the road.

PLANNING

COMMUNITY – EDUCATION

NEEDS HUGHES V (1) FIRST SECRETARY OF STATE; (2) S. BEDFORDSHIRE DISTRICT COUNCIL, 23.6.06, Court of Appeal

The first defendant was appealing a ruling that the claimant should be given planning permission to use land as a Gypsy caravan site. The claimant had bought land for his families to live on in their caravans and mobile homes. He had retrospectively applied for planning permission to use it as a caravan site.

Planning permission was initially refused. The claimant appealed and, as there were few suitable alternative sites, the planning inspector had recommended that, in these “special circumstances”, they should be given permission on a temporary basis, taking into account family health issues and the education requirements of the children.

The first defendant disputed the education requirements amounted to “special circumstances” and dismissed the appeal. The claimant successfully appealed to the court and the first defendant appealed to the Court of Appeal.

The Court held that the judge had misunderstood the first defendant’s decision which was that he had accepted the importance of the children being settled at school and that it would not be beneficial to them to return to roadside camping. In addition, it was never in dispute that the local authority was under a duty to provide school places for children in its area but how parents took these up for their children was a different matter.

The first defendant had to reach a balance between the rights of the whole community in the area and planning issues, while taking account of relevant points such as the education of children of the claimant’s families. In this case, the first defendant had decided that planning permission should not be granted, despite the effect this would have on the children’s schooling. He had been entitled to reach this decision and the appeal was allowed.

NOTE: Planning permission may be refused for a Gypsy caravan site where the interests of the local community outweigh the needs of the Gypsy families and despite the refusal being likely to cause disruption to the Gypsy families’ children’s schooling.

DAMAGES

FUTURE LOSS OF EARNINGS – MITIGATION

RONAN V J SAINSBURY PLC, 06.7.06, Court of Appeal

The claimant suffered injuries in an accident at work, including a broken femur (thigh bone). He was aged 19 at the time and had to undergo several operations. He went on to try a career in banking but although he did well, he later had to have further surgery on his leg which caused him continuing problems.

The claimant became depressed and lost self-confidence. He embarked on a degree course in sports science with the aim of qualifying as a teacher. He brought a claim for damages against the defendant, his employer at the time of his accident. The trial judge ruled that the claimant’s decision to leave the banking job and take a degree course was directly attributable to the accident. On this basis, he awarded the claimant three years’ loss of earnings with that employer. For future loss of earnings, he awarded £50,000, taking a “broad brush” approach.

The defendant appealed the ruling that the claimant’s decision both to take the degree course and his change in career were directly caused by the accident. They also argued that he had voluntarily decided to take the sports course and his loss of three years’ earnings should not be something for which they were responsible. They argued that the claimant had failed to mitigate his losses, as he was bound to do, for failing to return to his job in banking when he could have done so after making

some recovery from his injuries. They also argued that the claimant’s decision to become a teacher was made of his own free choice and not due to the accident. Therefore, the award for future loss was made on the wrong basis.

The Court of Appeal held that it was not unreasonable for the claimant to have decided to pursue the degree course and that did not amount to his failing to have mitigated his losses. The award for past loss of earnings was upheld.

However, the trial judge had been wrong to assess future loss on the basis that he had and he should have calculated this award under the principles in *Smith v Manchester*, looking at the claimant’s handicap on the open labour market. In this case, the award for future loss of earnings was reduced to £28,800.

NOTE: It would not necessarily be a failure, on a claimant’s part, to mitigate his losses if he were to change his pre-accident career path and embark on a further education course, but this would be taken into account in assessing future earning capacity and future loss of earnings should be assessed with this in mind.

DAMAGES

KNEE – LOSS OF EARNINGS

CONTI V (1) ST MARY’S HOSPITAL NHS TRUST AND (2) SODEXHO LTD, July 2006, High Court, Queen’s Bench Division

The claimant was a doctor employed by a hospital, the first defendant. He suffered an injury to his left knee after slipping on custard on the floor at the hospital in October 2000. He was aged 36 at the date of trial.

This injury caused a delay of 4 years to his promotion as consultant and his earnings were affected. The judge held that, but for the injury, the claimant, a high-flier, would have progressed well through the ranks and would probably have become a consultant by 2010. He is now a registrar general surgeon with a hospital in the Isle of Wight.

Liability was agreed to be split between the claimant and the defendants, 60/40% in favour of the claimant because he had failed to keep a proper lookout. He was awarded just under £39,000 and his loss of earnings were assessed at one year.

NOTE: This slipping case is an example of both the relatively expensive consequences of failing to keep a floor surface free from hazards, but also of how a claimant can be held significantly responsible for not looking where he was going.

DAMAGES

HAND

LEUNG V UNIVERSITY COLLEGE LONDON HOSPITALS NHS FOUNDATION TRUST, 12.5.06, Settlement

In February 2003, the claimant, then aged 69, fell and injured her arm at home. She already suffered from diabetes and renal failure and was due to attend hospital the following day for dialysis. When she attended, the hospital x-rayed her arm to ensure there was no fracture. During the x-ray, the claimant fainted and cut the middle finger of her right, dominant, hand.

She sought damages from the hospital, alleging it was negligent in failing to take into account her medical condition, saying she should have been able to sit during the x-ray. Liability was not in dispute.

The wound became infected and the claimant developed a deformity in two of her fingers including the one that was cut. Before this incident, the claimant had lived independently at home and relied heavily on the use of her right arm due to her left arm being affected by the regular treatment for her other medical conditions. She could not now use her right hand to grip ordinary household objects or carry out everyday tasks.

Her condition was expected to be permanent. She accepted £105,000. There was no strict breakdown but it was estimated that £40,000 was for pain, suffering and loss of amenity with the balance of £65,000 being for past and future care and equipment.

NOTE: Although a clinical negligence case, this illustrates how a minor injury can become a serious, permanent injury to a claimant and expensive to compensate, due to negligent care.

LANDLORD AND TENANT

DEFECTIVE STEPS

CORNS V HALTON BOROUGH COUNCIL, 05.7.06, Warrington County Court

The claimant, a lady aged 85, fell and injured herself in October 2004 when returning home from church. She said she fell on defective steps, alleging they were too narrow and that they were also obstructed by debris which made it difficult to negotiate her way down them. She claimed damages from the council, who were responsible for the steps, alleging negligence and nuisance.

The defendant said the steps were inspected every 3-4 months. They were considered to be solid and secure although not perfect. There had not been any similar incidents in the preceding 7 years. There were robust handrails either side but the claimant was only holding on to one, carrying her handbag in the other hand, when she fell.

The judge held that the claimant had not fallen on the step that had been defective, or on the narrowest one, and there were no obvious defects at the point where the claimant fell. The steps did not present a foreseeable danger. However, he commented that there was room for improvement with the inspection system. The claim was dismissed.

NOTE: This is an example of a tripping claim that has failed due to the court being unconvinced that the site of the fall was dangerous, although the defendant's inspection system was criticized.

LANDLORD AND TENANT

DEFECTIVE PREMISES – FOOTPATH

WALKER (PR OF THE LATE MARGARET DALY) V BIRMINGHAM CITY COUNCIL, 07.7.06, Walsall County Court

The claimant brought this claim on behalf of her late mother who was injured after a fall in April 2002. She died three years later from an unrelated cause.

Mrs Daly was the tenant of a house in Hockley, Birmingham, the defendant council being her landlord. As she was closing the gate to the path leading to her doorway, she tripped on a paving slab that formed a step near the gate. The stone slab had a chipped area across it with a dip of up to 1.75 inches / c.0.5cms. The gate caught on this as it was opened but the slab did not rock or move.

She brought a claim against the council in 2004, alleging breach of the Defective Premises Act 1972 (the Act). She said the council had failed in its duty of maintenance and repair and that the defective stone was dangerous. She alleged that the council owed her a duty, under the Act, to take such care as was reasonable in all the circumstances to see that she was reasonably safe.

The court considered whose responsibility it was to look after the condition of the path, whether it was in fact dangerous as the law would see it, whether the council knew about it and whether it did in fact cause the claimant to fall.

The judge held that the council was responsible for the path. Works had been carried out to it in 1995 probably by the council rather than an independent contractor although there were no records about it. The work had resulted in a defect at the area and it was alleged that many complaints about it had been made to the council and there were a few records of these.

The council argued that there was no danger when entering on to the path via the gate as the gate shielded the defect. Approaching the other way, although it could not be said that there is no danger, the judge held that there was no breach of duty as there is nothing that would cause a trip or stumble. There were also some inconsistencies in the claimant's evidence that gave the court doubt as to the cause of the fall. The claim failed.

NOTE: This is another example of the need for a claimant, or a claimant's representative, to satisfy the court, in a tripping claim, that the area in question was dangerous and for a defendant to investigate the evidence as to the circumstances of the accident for any inconsistencies.

CIVIL PROCEDURE

LIMITATION

HORTON V SADLER AND ANOTHER, 14.6.06, House of Lords

The claimant had been injured in a road traffic accident for which the defendant was responsible but had not been insured. The Motor Insurers' Bureau's (MIB's) insurers made an interim payment to the claimant.

Two days before the three year limitation period would have expired, as set by the Limitation Act 1980 (the Act), the claimant issued court proceedings, including against the MIB. However, he did not give the MIB notice of this and had therefore not complied with the condition precedent of the MIB's liability, that they have notice of proceedings.

The MIB defended on the grounds that the claimant had not complied with that condition. They also claimed a return of the interim payment. The claim was struck out.

The claimant then issued fresh proceedings, giving the MIB the necessary notice but this case was issued outside the three year limitation period. The MIB defended on this ground and the claimant asked the court to exercise its discretion under the Act to allow the claim to proceed. The claimant failed in his original application and in the Court of Appeal. The House of Lords then considered it, the main point being whether the court had the discretion to allow the claimant's claim to proceed beyond the limitation period.

The Lords held that the claim should be allowed to proceed because, if not, that would deprive claimants of the right which the Act intended them to have, ie the court's wide discretion to allow certain claims to proceed

beyond the three year limitation period. The Lords overruled their decision in 1979 in *Walkley v Precision Forgings Ltd*, which gave fine distinctions as to when the court's discretion regarding limitation can be exercised. That was no longer the right way to look at the law and was not what the Act intended. The appeal was allowed.

NOTE: This House of Lords case refines a court's discretion in waiving the three-year limitation rule so that a court may, in certain circumstances in personal injury claims, allow a claimant to issue court proceedings after the three-year limit has expired.

CIVIL PROCEDURE

ADMISSIONS OF LIABILITY

WALLEY V STOKE ON TRENT CITY COUNCIL, 31.7.06, Court of Appeal

This case re-visits the law on withdrawing admissions of liability made before court proceedings have begun.

The claimant, a refuse collector employed by the council, injured his knee in 2001 when climbing out of a refuse vehicle. His solicitors informed the council that he intended to make a claim for damages and the council referred the matter to their loss adjusters. In June 2003, an employee of the loss adjusters wrote to the solicitors to say that liability would not be disputed. Some months later, the employee was dismissed on the grounds of incompetence and his files were reviewed. The claimant's solicitors were told that the admission of liability made earlier was now withdrawn.

The claimant issued proceedings and the council denied liability in their defence. The claimant applied for the defence to be struck out on the basis of the original admission of liability. The council also applied, but unsuccessfully, for the court to permit it to withdraw from the original admission. It appealed, arguing that it had the right to withdraw an admission made before a court action had begun and the effect on the claimant, to allow the withdrawal, would only be one of disappointment rather than of any real detriment.

The Court of Appeal held that Rule 14.1(5) of the Civil Procedure Rules 1998 (the Rules) did not give a judge any discretion whether to allow the withdrawal of a pre-action

admission. The Rules on withdrawal only applied to admissions made in actual court cases that had begun and a defendant did not need a court's permission to withdraw an admission made pre-action. Furthermore, the claimant would not suffer any detriment by the council withdrawing the admission wrongly made on its behalf nor had it acted in bad faith.

The appeal was allowed and the case was referred back to the county court for trial.

NOTE: The Court of Appeal has confirmed that a defendant does not need the court's permission to withdraw an admission of liability made before court proceedings have begun.

ENVIRONMENT

CONTROLLED WASTE – ESCAPE

CAMDEN LBC V MORTGAGE TIMES GROUP LTD,
03.7.06, High Court, Queen’s Bench Division

The respondent, M, through a cleaning contractor, had deposited black plastic bags of shredded paper on the public highway about two hours before they were due to be collected. The council alleged that this constituted an “escape” under the Environmental Protection Act 1990 (the Act) and the matter was brought before magistrates who dismissed the summons. They held that “escape” was not appropriate for the act of depositing waste material on the highway. The council argued that M had failed to take

reasonable steps to deal with the waste and that an actual escape was not necessary for M to be liable under the Act. They argued that M had materially increased the risk of an escape taking place by putting the bags out for a significant length of time before collection was due. For this reason, M were, said the council, liable for failing to take reasonable steps to prevent an escape. The court agreed with the council but also accepted the magistrates’ ruling that deliberately depositing waste on the highway did not constitute an

“escape” for the purposes of the Act. On that basis the appeal was dismissed.

NOTE:

The act of depositing waste material in containers for collection does not itself amount to causing an “escape” of the material under environmental law, although a failure to take reasonable steps to deal with waste can amount to an escape even if no actual escape has occurred.

NEWS ITEM

AGE DISCRIMINATION LEGISLATION

EMPLOYMENT EQUALITY (AGE) REGULATIONS 2006

From 1st October 2006, the above-named Regulations will come into force. They cover both employment and vocational training and apply to private and public sectors and all organisations that employ people, irrespective of the number employed.

The Regulations outlaw discrimination against people on the basis of their age, whether actual or perceived. They prohibit unjustified direct and indirect age discrimination and all harassment and victimisation on grounds of age, whether young or old. Amongst other provisions, they remove the upper age limit for unfair dismissal and redundancy rights.

The Regulations are likely to force employers to undergo a culture change and look at people in terms of their skills, experience and ability, rather than their age. The following are examples of how employers could find they are in breach of the new Regulations:

- asking job applicants their age at interview;
- offer training only to younger staff;
- promote or reward staff on the basis of length of service;
- advertise for staff to join a “young, dynamic team”.

It is believed that benefits of the Regulations include the reduction of recruitment and training costs, improvement in staff

retention, productivity and morale and employment of the best person for the job.

Further information is available from the Department of Trade and Industry or via their website: www.dti.gov.uk/employment/discrimination/age-discrimination .

NOTE: All employers will need to be aware of and comply with the new age discrimination law that is effective from 1st October 2006.

While every effort has been made to ensure the accuracy of these reports, this publication is intended as a general overview and is not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Neither Zurich Municipal, nor any member of the Zurich group of companies, will accept any responsibility for any actions taken or not taken on the basis of this publication.

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UK branch registered in England. No. BR105

UK Registered Office: Zurich House, Stanhope Road, Portsmouth, Hampshire PO1 1DU

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