General liability newsletter

July 2020

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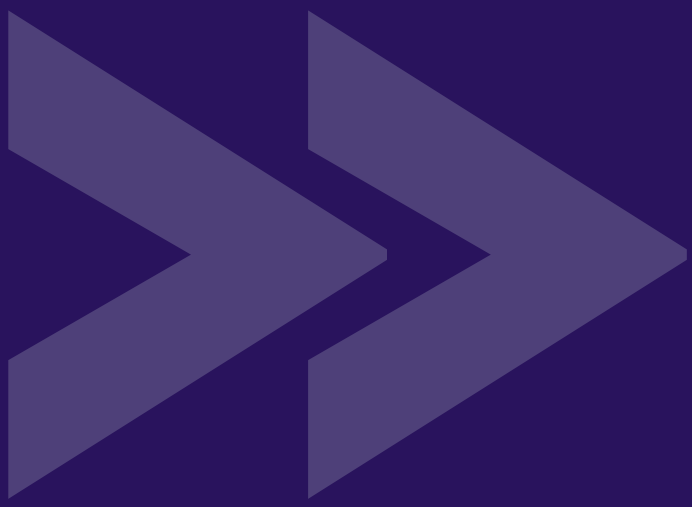
“Even if the employer had carried out more thorough induction training and carried out a risk assessment, this would not have prevented the accident happening” – no liability unless the breach caused the accident



Introduction

Welcome to the latest edition of our general liability newsletter, rounding up some the key cases from the last few months.

This month we look at recent cases and government updates regarding: Ogden tables, fraudulent or exaggerated claims, consent orders, pre action disclosure applications and the vital importance of causation as an ingredient of negligence in addition to breach of duty.

Establishing breach of duty alone is not enough to establish liability: causation is also an essential element

In *David Harris v (1) Bartrums Haulage & Storage Ltd (2) Paul Andre Rombough (trading as Par European)* (17/04/2020) EWHC 900 (QB) QBD (Sir Robert Francis QC) the Claimant was an LGV driver who worked for the First Defendant. He drove a tractor unit to pick up a trailer which had been parked by the Second Defendant. The trailer was parked on a slight slope and in the process of connecting the tractor unit to the trailer, both ran over the Claimant, causing serious injuries. Investigations showed that the brakes of neither the tractor nor the trailer had been applied at the time.

The Claimant alleged negligence against the First Defendant employer and alleged the Second Defendant driver had failed to apply the trailer's parking brake when he parked it. The judge accepted the Second Defendant's evidence that he had applied the trailer's brake before leaving the trailer at the site and that he had not been negligent.

The employer's case was that the Claimant's own failings had been the sole cause of the accident.

At trial the judge decided the employer was in breach of its duty in relation to the Claimant's induction training; the Claimant had merely been supplied with the employer's handbook and asked to sign it before reading it. The judge also considered that a formal risk assessment of the site where the accident happened should have been carried out by the employer before requiring its employees to use it, and that the employer had failed to do so.

Despite this, the judge decided that these failings had not caused the Claimant's injury.

The Claimant was a fully qualified and trained LGV driver who had demonstrated his overall competence before the accident during his time working for the employer as an agency driver. The Claimant understood from his previous training and experience that he needed to apply the brakes of the tractor and trailer. He knew that the site had a slope and that his vehicle was equipped with warnings and alarms. Applying the handbrake of the tractor was the most basic of safety measure any driver should take, and which the Claimant failed to do despite audible and visual warnings.

The employer was entitled to have regard to its knowledge of the Claimant's abilities in that regard. The Claimant had failed to implement the most basic safety measure any driver, especially the driver of an articulated lorry, had to take, namely the application of the handbrake of the tractor. The Claimant has also disengaged the parking brake on the trailer which was contrary to safe practice and something he would not normally have done.

The accident had been investigated by the Health and Safety Executive (HSE) which had served a notice of contravention of the Health and Safety at Work Act 1974 on the employer. The notice alleged that the employer's risk assessment was insufficient and provided a list of measures it was said should be included in the risk assessment.

The judge considered, however, that the fact that there may have been a contravention of a safety at work regulation did not mean that there had been negligence at common law and that the

issue was whether what the employer did was reasonable taking account of all the circumstances.

The judge decided that, whilst the attitude of the employer towards induction and risk assessment left a lot to be desired, the employer was not in breach of its duty to provide a safe system of work and equipment. A more thorough induction process and better assessment of the site as recommended by the HSE would not have led to additional measures being introduced in addition to those already taken.

The judge decided the accident had been caused by the Claimant who had ignored his training, and dismissed the claim.

As an aside, the judge commented that, if his analysis and decision on primary liability was wrong, the appropriate deduction for contributory negligence would have been 80%.

Taking into account the adverse HSE report and the judge's comments on the employer's approach to health and safety issues, a liability decision against the employer might have been anticipated.

The crucial finding by the judge in this case was that even if the employer had carried out more thorough induction training and carried out a risk assessment of the area where the trailer had been parked, this would not have prevented the accident happening. There was nothing in the handbook regarding the activity carried out by the Claimant that he did not already know. A more thorough risk assessment would not have required the introduction of measures over and above those already in place. The employer's breach of duty regarding these issues accordingly had no causative effect in connection with the accident.

The Claimant's training and experience had already been adequate to prevent the accident. If the Claimant had applied his training (and the brakes) and acted on the warning signals being given by the tractor unit then this would have been enough to prevent an accident. The judge decided that on this basis, although the employer's training and risk assessment could have been better, the existing arrangements did not amount to negligence by the employer in this case.

Claiming against dissolved Companies – applications to restore to the Register are now more likely in historic low value claims

The Court encourages the parties in litigation to engage with each other with a view to resolving differences. Those supposed to be engaging and cooperating sometimes do not. This might be because engagement requires an openness that a party fears will reveal an apparently weak position, or will surrender an apparently strong position. *Kevin Cowley v LW Carlisle & Co Ltd* [2020] EWCA Civ 227 is an example of how a departure from pragmatism had far-reaching consequences for both parties.

LW Carlisle & Co Ltd ("the Company") was the third of four Defendants in a noise induced hearing loss claim with an estimated value of £5,000. The Company had been dissolved in 2000. Proceedings were issued on 1 September 2017 and purportedly served on the Company by letter dated 13 December 2017 which was sent to its "last known place of business". The letter stated that the Claimant's solicitors were aware that the Company no longer existed and that they would be applying for the Company to be restored to the Company Register, which would have the effect of retrospectively validating the proceedings. The letter suggested a stay of proceedings pending restoration to the Company Register and threatened that if an application to strike out the claim was made then the Claimant's solicitors would bring the letter to the attention of the court in relation to conduct.

The initial response from the Insurer for the Company was that service of the claim at the Company's last known address was a nullity. It then instructed solicitors to file an Acknowledgement of Service challenging the validity of the proceedings. The Insurer's solicitors did do and then made an application to strike out the claim against the Company.

The application was heard on 31 May 2018. The judge rejected the Claimant's argument that proceedings had been properly served. He said that the court will only allow process against a company that exists and will only correct errors in procedure where there is imminent restoration of a Company. Upon hearing this, the

Claimant's solicitor asked for the proceedings to be stayed. The judge refused because the oral request was not supported by evidence. The judge thought that the situation would have been different if the written statement supporting the Claimant's position had said something like "We issued this, we did not apply our mind. Insurers usually let this go, this one hasn't. We're now underway with an application to restore. We are going to need another three or four weeks". The judge was critical that the Claimant's solicitors had instead presented technical arguments which amounted to nothing and that they had done nothing practical to have the Company restored. The judge struck out the claim and ordered the Claimant's solicitors to pay the Insurer £555 costs.

The District Judge's decision was upheld on initial appeal on 14 November 2018 on the basis that the judge had been exercising the Court's case management discretion under CPR 3.4 to strike out a claim rather than making an order pursuant to CPR 11, which governs the procedure to be followed when a Defendant challenges the jurisdiction of the Court in its Acknowledgement of Service. That procedure is governed by strict time limits which had not been followed in this case.

On further appeal, the Court of Appeal upheld the decisions of the District Judge and the first appeal judge. The view of the Court of Appeal was that whether or not the application by the Company's insurers had been properly brought, the judge was entitled to consider how best to progress the claim in the exercise of his case management powers and that he did not err in principle in making the strike out order.

The Court of Appeal also suggested an approach to be taken in the future where a claim is pursued against a Company that no longer exists. The Court suggested that upon being notified of such a claim an Insurer should notify the Claimant of the dissolution of the Company (if not known already) and invite or require the Claimant to make an application for restoration of the Company to the register, applying to the Court for a stay of the substantive proceedings in the meantime. If the Claimant fails to cooperate the Court suggested the Insurer should write to the Court, explain the situation and suggest that the Court makes an order for a stay of its own motion until notified of any order for restoration. If there is no progress with restoration of the Company, the Court suggested the Insurer could invite the Court to strike out the proceedings of its own motion.

The Court of Appeal was highly critical of the Claimant's solicitors who had incurred substantial legal costs in connection with these issues for a claim worth only £5,000. It considered the costs were caused by the misguided commencement of proceedings against the Company when the Claimant's solicitors knew that it had been dissolved, and then did not take prompt steps to seek restoration to the Company Register. It considered that all the costs incurred should be borne by the Claimant's solicitors.

This is an important decision with potentially adverse financial consequences for Insurers. As indicated by the District Judge at the hearing of the initial application, Insurers have often taken the view that requiring a Claimant to restore a dissolved Company to the Register is a relatively expensive exercise (and one to be avoided if possible) particularly when the sums in issue are usually very small. This decision requires Claimants to apply to have a dissolved Company restored to the register if the Company is pursued as a Defendant in proceedings.

Although the Court of Appeal suggested actions the parties could take where a claim is being pursued against a dissolved Company, the Court prefaced its suggestions by saying they were made without being prescriptive, and the Court did not explore other available options.

This case addresses procedural considerations where the Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act") does not apply. The 2010 Act allows a claim to be brought directly against a Company's Insurer if the Company entered liquidation or ceased to exist on or after 1 August 2016 (when the 2010 Act came into force) or if the liability was incurred on or after 1 August 2016, or both. Paragraph 3 of schedule 3 of the 2010 Act states that the Third Parties (Rights against Insurers) Act 1930 continues to apply if the Company was dissolved and the liability was incurred before 1 August 2016. Because the 1930 Act requires a Company to be restored to the Register, a direct claim against the Insurer was not available to the Claimant in this case.

A pragmatic approach for Insurers where the 1930 Act applies and where there is no coverage issue would be to inform the Claimant's solicitors that there is no need to restore the Company to the Register because Insurers accept they covered the Insured and will not take the procedural point. As mentioned in the judgment, Insurers have usually taken this approach, and the Court's comment that its guidance is not intended to be prescriptive keeps open the possibility of other solutions, perhaps such as agreement between the parties.

However, this decision might persuade Claimants' solicitors that a Defendant Company must be restored to the Register before issuing proceedings.

Court of Appeal considers whether to revise the method used to calculate an award for the cost of purchase of alternative accommodation

The Government actuary's use of negative multipliers for future loss has proved not to be good news for all Claimants.

The Court of Appeal's decision in *Roberts v Johnstone* (17/03/1988) set out a formula for the additional cost to the Claimant of purchasing alternative accommodation to accommodate the consequences of the injury sustained. The full cost of purchase was not used because real property has historically been an appreciating asset and awarding the full cost would lead to the Claimant's Estate being over-compensated.

The formula applied was based upon the notional loss to the Claimant of being unable to invest the money needed to buy the more expensive alternative accommodation in risk-free investments.

In *Roberts v Johnstone* the difference between the sale price of the existing accommodating and the purchase price of the new accommodation was £68,500. The assessed rate obtainable at that time for a risk-free investment was 2% and the annual loss to the Claimant was therefore £1,370. The period of loss was determined by the Claimant's life expectancy of 16 years. The Court applied a multiplier of 16 to the annual loss of £1,370 and awarded the Claimant £21,920 for the loss arising from the need to purchase alternative accommodation.

This calculation leads to the Claimant being awarded a sum to cover the cost of buying alternative accommodation only if a risk-free investment produces a return.

The government actuary's current assessment is that the value of a risk-free investment will in real terms produce a loss of 0.25% each year (minus 0.25% being the current discount rate for future loss). Applying the formula specified in *Roberts v Johnstone* leads to the Claimant sustaining no loss.

When this issue came to be considered in *Swift v Carpenter* [2018] EWHC 2060 (QB) the judge was bound by the decision in *Roberts v Johnstone* and made no award to the Claimant on the basis that the application of a negative discount rate for risk-free investments led to the Claimant sustaining no loss.

The decision was appealed to the Court of Appeal which recently finished hearing detailed submissions and (unusually for the Court of Appeal) expert evidence. The Court has not indicated when it will deliver its decision. The issues are complex and difficult. We might have to wait a while.

Not quite the whole story...not quite all the costs

The issue of how to deal with fraudulent or exaggerated claims continues to exercise the courts.

In *Brian Morrow v Shrewsbury Rugby Union Football Club Limited* (30 April 2020) [2020] EWHC 999 the Claimant had been watching his son play rugby at Shrewsbury Rugby Union Football Club. It was a junior match, and the game was being played across the width of the normal field. Spectators were watching from what would normally be the try line close to the rugby posts. During the match one of the upright rugby posts fell away from the crossbar, hitting the Claimant who sustained head and facial injuries.

The Claimant claimed that as well as his physical injuries, the accident had triggered psychological symptoms which prevented him from returning to work as a financial adviser. He claimed £946,097.28 for future loss of earnings. The Defendant maintained that the Claimant's post-accident psychological symptoms were similar to those he had experienced before the accident and that the Claimant's evidence minimised his pre-accident symptoms and exaggerated his post-accident symptoms.

Liability was not disputed, but the parties were a long way apart in their assessment of the claim value.

The Defendant offered £110,000 on 8 June 2018. The Claimant offered to settle at £800,000 on 8 October 2019. After a long hearing to assess damages, the judge awarded the Claimant £285,658.08.

The judge considered representations from the parties following the assessment of damages hearing. The Defendant argued that the Court should depart from the usual order that the Defendant pay the whole of the Claimant's costs, on the basis that the claim was exaggerated and conducted in an unrealistic way. The Defendant proposed that the Claimant's costs should be reduced by one third, or by some other amount the judge thought appropriate. The Claimant applied for all his costs of the claim.

The judge's assessment was that exaggeration and an inflated claim for damages had been built into the structure of the Claimant's presentation of his claim by the Claimant's witnesses as well as the Claimant, and that the Claimant had also exaggerated his account of symptoms he had given to his medical experts.

The judge gave considerable weight to exaggeration in a case where exaggeration was ingrained, but only some weight to the fact that the Claimant's Part 36 offer was significantly higher than the award of damages. The judge's assessment was that the Claimant's conduct had caused unnecessary expense that justified reducing an award for costs.

The judge thought that a reduction of 15% broadly reflected the additional costs caused by the claimant's exaggerated case. The judge thought that whilst the Claimant had overstated his case, the Defendant had also overstated the Defence case, and in doing so had also contributed to the time needed to deal with the claim. She considered that making a reduction greater than 15% would stray into areas where both parties were responsible because each had overstated their respective cases.

The judge appears to have taken several particular factors into account. The Claimant relied upon 18 witnesses regarding the consequences of his injury. Six days were needed to hear all the evidence and then a further day was taken up with submissions. The Defendant had made an early settlement offer, whereas the Claimant had instructed his solicitors to make an unrealistically high offer only shortly before the assessment of damages hearing. The judge considered that the Claimant was not presenting his claim in a dishonest way (and indeed dishonesty was not alleged by the Defendant), but the decision implied criticism of the Claimant and his solicitors for pursuing the claim in such an exaggerated way. In the circumstances of the case the judge considered that it was not disproportionate for the Defendant to seek a costs reduction, and accordingly a costs reduction was justified.

The relatively modest costs reduction appears to have been influenced by the judge's assessment that the Defendant's approach (for example offering very little indeed for loss of earnings) did not adequately take into account the likely effect of the Claimant's actual injuries and their likely consequences, and that a more realistic approach could have led to the issues being addressed more efficiently.

Further court guidance on pre-action disclosure applications

The use of the pre-action disclosure procedure under Part 31 of the Civil Procedure rules is sometimes used as a method for trying to obtain information that might bolster a weak claim, and occasionally cynics have suggested it is sometimes merely used as a means to generate income for the applicant's solicitors. Two recent cases have been considered by the court and further guidance has been issued as to the scope of pre-action disclosure.

In *Zenith Insurance Plc v LPS Solicitors Ltd* (19 May 2020) [2020] EWHC 1260 (QB) the applicant insurance company had settled three road traffic accident injury claims brought by three Claimants who had been introduced to the Respondent firm of solicitors by a claims management agency. However, the three Claimants named in the claims later indicated that they had not brought claims, and had not been involved in any accident or received compensation. The insurance company believed the claims to have been made fraudulently. It did not allege the respondent solicitors were involved in the fraud, but obtained a pre-action disclosure order requiring the firm to disclose

all documents which it held in respect of the claims. The firm disclosed 500 pages of documents, whilst not accepting that the claims were fraudulent.

The insurer submitted that the solicitors' disclosure was incomplete because it included only limited communications between the firm and the claims management agency. The wide-ranging scope of documents sought by the insurer included all communications between the solicitors' firm and the claims management agency regarding the insurer's applications for disclosure; copies of the firm's electronic case management system and metadata for all the documents already disclosed; documents relating to two other allegedly fraudulent claims; and investigations carried out by the firm into the agency.

The court dismissed the application.

Whilst the court proceeded on the basis that there was a good arguable case that fraudulent claims had been made, and that a negligence claim against the solicitors' firm was potentially possible, there were significant obstacles to such a claim being made. There was no evidence that the firm failed to check its clients' identity or was aware of a fraud or was otherwise negligent. In addition, a solicitor did not generally owe a duty of care to the other party in adversarial litigation. Accordingly, the Insurer had not demonstrated to the Court that the firm was likely to be a party to subsequent proceedings commenced by the Applicant, which was one of the preconditions to obtaining an order for pre-action disclosure.

Further preconditions specified by CPR 31 are that the documents sought in the application for pre-action disclosure must be the documents or classes of documents that the Respondent would be obliged to disclose as part of standard disclosure, and that disclosure of such documents before proceedings have started is desirable.

The court applied the decision of the Court of Appeal in *Black v Sumitomo Corp* [2001] EWCA Civ 1819 which decided that an Applicant must identify his cause of action and demonstrate real prospects of success, together with subsequent case law which prohibited attempts to obtain pre-action disclosure of documents that would not eventually be subject to standard disclosure by seeking documents of a certain class or category. An Applicant also had to show that it was more likely than not that the documents being sought would fall within the scope of standard disclosure and that disclosure before commencement of any action was desirable to dispose fairly of the anticipated proceedings.

The judge pointed out that the Insurer had stated only that the existing disclosure was incomplete without saying in what way it was incomplete or deficient. It had also failed to show that the solicitors' firm was likely to be a defendant in subsequent proceedings or show that further disclosure was desirable in order to dispose fairly of the anticipated proceedings. Also, the documents being sought would not be subject to standard disclosure if an action were brought.

Consent orders – the devil is in the detail

Surprisingly often, consent orders become the subject of later dispute. This probably happens because each party makes assumptions about what is being agreed, and those assumptions do not always coincide. In this case, the parties agreed to a delay in service of a claim but had different ideas about what needed to be done to effect service.

Rule 7.5 of the Civil Procedure Rules states that a Claimant has taken sufficient steps to serve a Claim Form if one of the actions described in the rule has been completed by midnight of a deadline date. For example, posting the Claim Form by first class post or by other method securing delivery the following day is sufficient.

For the purposes of subsequent procedural deadlines, the date of service of the Claim on the Defendant is deemed to be two business days later.

In *Oran Environmental Solutions Limited & another v QBE Insurance (Europe) Limited* (11 May 2020) the parties agreed several extensions of time in consent orders to extend the time for the Claimant to serve the Claim Form until 4pm on 6 January

2020. The Claimant's solicitor attempted to effect service on the Defendant's solicitors on that day before 4pm by fax, email, and special delivery. She also attempted to effect service on the Defendant directly by special delivery and by email.

It was accepted by the Claimant that because the Defendant's solicitors had never given notice that they were nominated to accept service on behalf of the Defendant, none of the methods of attempted service on the Defendant's solicitors was valid service and that any attempted service by email on the Defendant was ineffective. That left service upon the Defendant by special delivery as the only potential valid method of service.

The Defendant maintained that the deadline for service of the claim by 4pm on 6 January 2020 in the consent order was a deadline for actual service, and that the Claim Form had not been in the possession of the Defendant by the deadline provided for in the consent order.

The Claimant maintained that the meaning of service in the consent order was service under CPR7.5 and that accordingly service of the Claim Form had been effected in time.

The matter came before Mr Justice Cockerill. He considered that because the court was construing the meaning of an order agreed between the parties, there was an element of contractual construction that had to be analysed to determine what the parties had intended.

The Defendant argued that if the intention had been to require the Claimant to take the relevant step under CPR7.5 to serve the claim the consent order would have used these words rather than to refer to "service" of the claim in connection with the deadline.

The Claimant argued that the reference to 4pm simply limited the temporal extension of the validity of the Claim Form and that the intention was for CPR 7.5 to apply to give certainty as to service.

The judge was guided by a previous High Court decision in *T&L Sugars Ltd v Tate & Lyle Industries Ltd* [2014] EWHC 1066 (Comm), another case addressing service of a claim. The judge in that case decided that the natural meaning of the word "served" in that context is 'served in accordance with the procedural rules in force in England at the relevant time'. As the background to the consent order in this case involved the deemed service provisions of the Civil Procedure Rules, the judge decided that the intention was to extend the time for service, with such service being determined according to CPR7.5. Thus, the claim had been served just in time.

It is doubtful that the parties actually had a meeting of minds when considering the wording of the consent order extending the time for service, as indicated by their disagreement of the interpretation of the consent order. Most likely the service point had not been considered until the issue of alleged late service arose.

Where there is ambiguity in the intended meaning of consent orders, the court might interpret the parties' intentions in a different way to at least one of them.

Revised Ogden tables published

On 17 July 2020 the Government Actuary Department published a new edition of the Ogden tables, the 8th.

These are used to derive multipliers, which are the figures by which annual losses are multiplied in order to calculate a capitalised lump sum. They take account of mortality and other risks and are calculated by reference to an annual discount rate.

The explanatory notes in the new edition have been rewritten and expanded to cover pension loss claims and periodical payment orders.

The actuarial tables have been revised with updated mortality assumptions and cover a wider range of retirement ages. There are additional tables in Excel format.

The new tables can be downloaded from the government website here.

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