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General liability newsletter

April 2020

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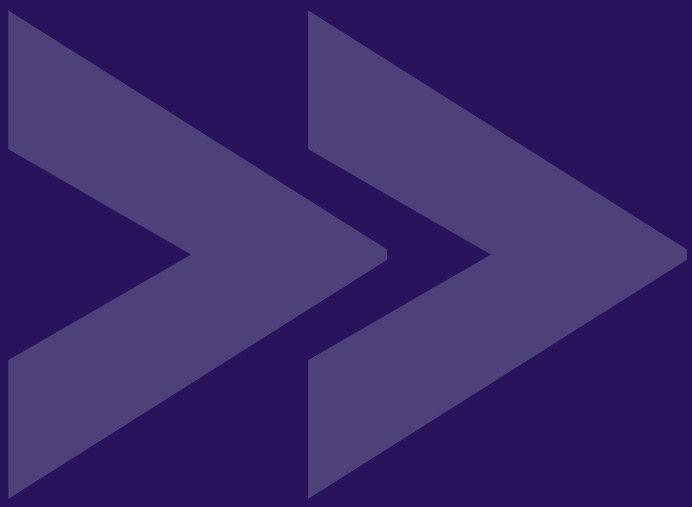

Introduction

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 involving: vicarious liability, witness statements, and fundamental dishonesty. We also consider the liability issues arising from Covid-19, and how these can be mitigated in order to reduce the risk of future claims. We also provide news about the eagerly awaited Court of Appeal hearing in *Swift v Carpenter* considering calculation of future accommodation claims.

Covid-19

The recent outbreak of Covid-19 poses a number of issues for employers and their liability insurers. We expect to see litigation arising from this in the future. Its extent will likely be dependent on steps taken now to minimise risk.

In this introductory section, we consider current issues arising from Covid-19, and how risks can be mitigated to avoid potential future liability.

Worker safety

Individuals who remain in active employment but unable to work remotely may be exposed to a higher degree of risk than the rest of the population, and therefore may be more likely to give rise to liability issues.

Steps taken by employers are expected to be reasonable. Measures to protect working environments could include facilitating social-distancing measures and providing effective sanitisers, as well as making appropriate Personal Protective Equipment (PPE) available. The position for healthcare workers will differ from, say, delivery workers so measures put in place will depend on specific circumstances.

Risk assessments for those unable to work from home should be reviewed as a priority, and any concerns by employees should be considered carefully. They should generally address:

- social distancing measures within the place of work, including the staggering of shifts
- providing sufficient sanitation, cleaning products and PPE for the workforce
- flexibility for any employees who may be vulnerable, or who have vulnerable dependants
- restrict all non-essential visits to the workplace
- ensure those with symptoms isolate from the workforce.

The HSE has assembled a specialist unit to support the UK's coronavirus response – see here.

Safety of telecoms engineers over 5G

One unforeseen consequence of the Covid-19 Pandemic has been the bizarre link between the virus and the UK's 5G network, some supplies for which have come from Chinese telecommunications company Huawei. With masts being set on fire by arsonists, there have now been reports that telecoms engineers are being harassed and physically threatened when working on masts, even when not working on 5G.

This illustrates the potential for liability issues facing employers of lone workers. Employers owe a duty of care towards their employees to ensure a safe working environment, and this extends to lone or remote workers. Steps should be taken to assess and reduce the risk of harm which may include:

- keeping careful logs of any incidents to determine any high-risk areas
- considering the use of video cameras to log incidents
- sending workers in teams.

Where incidents re-occur, either in the same individual members of staff, employers may have to consider suspending the work until it can be carried out safely. Police involvement might also be considered when necessary.

Swift v Carpenter – Court of Appeal hearing adjourned

The Covid-19 situation has caused the adjournment of this long awaited Court of Appeal hearing dealing with the calculation of future accommodation claims in the context of a negative discount rate.

Swift v Carpenter (CA case ref. B3/2018/2189) was due to be heard on 24 March 2020, with provision for it to be live-streamed. It has been adjourned to a date in the last week of June this year, and will be a remote hearing.

The appeal will examine the Court of Appeal decision in *Roberts v Johnstone* [1989] Q.B. 878, which provided a formula to calculate this head of loss. The formula assumes a loss of income on capital a seriously injured claimant has had to use to purchase the property needed. The calculation of that income reflects the discount rate in place at the date of calculation. When the discount rate was varied to a negative rate in March 2017, the inevitable result of this was a nil award for this head. This has fuelled challenges on the *Roberts v Johnstone* formula.

At first instance, in 2018, Mrs Justice Lambert was asked to calculate damages in a way that was not based on the discount rate. There were four suggested alternative approaches: 1) a lump sum to cover the costs of an interest only mortgage 2) a PPO in respect of those costs 3) an award based on the discount rate, but assuming a positive figure for this head of loss 4) an award reflecting the costs of rental accommodation.

The judge considered *Roberts v Johnstone* binding, thus preventing her from considering any of the alternative formulas proposed.

The Court of Appeal have acknowledged the significance of the issue by treating this as a test case for which the Personal Injuries Bar Association has been given permission to intervene. Unusually for a Court of Appeal hearing, the parties have been given permission to call evidence, including from an Independent Financial Adviser, a chartered surveyor or property valuation expert, an economist and an actuary.

Supreme Court decision reins in the scope of employers' vicarious liability

In April 2020 the Supreme Court handed down two judgments on the issue of vicarious liability. The Court decided that Barclays Bank was not vicariously liable for the acts of its independent contractor, and Morrisons was not vicariously liable for the acts of a disgruntled employee.

In *Barclays Bank plc v Various Claimants* [2020] UKSC 13, the Supreme Court reversed the decision of the High Court that the defendant bank was vicariously liable for alleged sexual assaults by the late Dr Gordon Bates, its independent contractor, whilst carrying out pre-employment medical examinations.

The Supreme Court considered that Dr Bates was a "classic independent contractor", who carried out work for the NHS and conducted medical examinations for a range of clients. He had autonomy and could refuse to carry out any examination if he chose, and it was clear he was in business "on his own account", and not working for the bank.

WM Morrisons Supermarkets plc v Various Claimants [2020] UKSC 12 concerned an employee, Andrew Skelton, a senior internal auditor, who was asked to send payroll data to KPMG. However, he released the personal data of around 100,000 Morrisons employees online, as well as anonymously sending it to UK newspapers. Subsequently, 5,000 employees brought a group action against Morrisons.

The High Court and Court of Appeal decided that Morrisons was vicariously liable for the data disclosure. The Supreme Court reversed the decisions on the basis that disclosure of personal data was not part of Mr Skelton's "field of activities", and he had not been authorised to do so. The Supreme Court considered that although there was a close temporal link and an unbroken chain of causation, that alone did not satisfy the test of there being a sufficiently close connection between the activity of the employer and the action carried out by Andrew Skelton.

A further key consideration seemed to be that Mr Skelton was not engaged in further Morrisons' business.

The scope of employers' vicarious liability has been clarified and expanded by the courts over recent years. Although these decisions can be characterised as simply explaining existing law, they might indicate unwillingness of the Courts to extend the scope of vicarious liability any further.

Setting off costs in QOCS allowed, but the Court of Appeal urges a re-think

The contentious issue of setting-off costs against costs in cases governed by QOCS will be heard by the Supreme Court after the Court of Appeal allowed it.

Qualified one-way costs shifting (QOCS) was introduced in April 2013 as part of the Jackson Reforms. Under this regime, defendants will generally be ordered to pay the costs of successful claimants, but will not be able to recover their own costs if they are successful in defending the claim (subject to certain exceptions).

In the case of *Ho v Adelekun* [2020] EWCA Civ 517, the Claimant commenced a personal injury claim against the Defendant, which was eventually settled by way of a Part 36 offer and acceptance. Given the nature of the case, an issue arose as to whether the claimant was entitled to costs on the standard basis, or only fixed costs.

That issue led to subsequent costs litigation. The claimant lost at first instance before a Deputy District Judge. This decision was subsequently reversed by His Honour Judge Wulwik, but then later reinstated by the Court of Appeal. Whilst it was common ground that the defendant, Siu Lai Ho, should be awarded her costs of her successful appeal, the issue was whether she was entitled to set-off her entitlement to costs against her own liability for the Claimant's cost of the claim.

The Claimant submitted that QOCS is a self-contained code providing costs protection, and that under CPR44.14 the Defendant could recover their costs by way of a set-off only against damages, not against costs awarded. Particularly, it was submitted that in the context of this provision, the term "enforced" should be understood as extending to the right to exercise of a right of set-off, with the result that setting-off costs orders against each other is prohibited.

The Court of Appeal accepted the argument put forward by the Counsel for the Defendant, yet would have been inclined to accept the submission that "where QOCS applies, the court has no jurisdiction to order costs liabilities to be set off against each other".

Newey J said the court was bound by the earlier decision in *Howe v Motor Insurers' Bureau* (6 July 2017), to the effect that a costs v costs set-off could be ordered. There was nothing to suggest that the Court of Appeal in Howe had made its decision in ignorance of any relevant statute, CPR provision, or court of co-ordinate or superior jurisdiction. Newey J went on to allow the requested set-off, as it was appropriate in this case. There was nothing to suggest that a set-off against costs would be unjust; the Defendant had incurred substantial costs and in any event would be left with a significant shortfall.

Perhaps most interesting about this case was the Court of Appeal's urging of the Civil Procedure Rule Committee to consider preventing setting-off costs in cases covered by QOCS.

The Court stated that there were "powerful arguments on each side of the issue as to what the law should be".

With the Court of Appeal allowing the Claimant to appeal the judgment to the Supreme Court, this issue is likely to remain contentious for some time.

Dishonesty does not need to be sustained in order to be fundamental

In a sensible decision, the High Court has determined that for a finding of fundamental dishonesty, a claimant need not be persistent with that dishonesty.

A significant consideration when defending personal injury cases can be whether a claimant is bringing a claim that is fundamentally dishonest. This is where a claimant's dishonesty goes to the root of the whole or a substantial part of his claim. Where fundamental dishonesty is proved, pursuant to CPR 44.16 a defendant is entitled to argue that the QOCS protection should be removed from the claimant (this will be considered on the balance of probabilities). Furthermore, pursuant to section 57(2) Criminal Justice and Courts Act 2015, where fundamental dishonesty has been proved, the court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

Whether a Claimant's dishonesty is significant enough to persuade the Court that the claim is fundamentally dishonest is an important consideration for those defending such claims.

In *Roberts v Kesson* [2020] EWHC 521 (QB), the road traffic accident alleged was not disputed, and the Claimant had successfully been awarded general damages amounting to £4,400. However, he was undone by the claim in his first witness statement that his Mercedes was a write-off, entitling him to £10,400. The underwriters of the Defendant, Tesco Insurance, investigated this and found that in fact the vehicle had not been sold for salvage. The Claimant had then made a second witness statement, which said the first statement had been accurate save for this "one small detail".

The recorder decided that there was no fundamental dishonesty in the Claimant's actions. He had accepted that he was dishonest in part when making his first statement, but the fact that he had not persisted with that dishonesty meant that he could not be found to be fundamentally dishonest, so escaped the consequences of that.

The Defendant disagreed. On appeal the High Court held that the recorder was wrong; there had been fundamental dishonesty. The Court emphasised the importance of the language in section 57 – the real question was whether the Claimant has been fundamentally dishonest, not whether he persisted in that dishonesty.

This is a welcome decision for Insurers and Defendants alike, and makes clear that Claimants cannot start out with a dishonest claim and be allowed to continue after being forced to own up.

Witness statements

Two recent cases highlight to all litigators the importance of getting the content of witness statements right.

Statements by solicitors on behalf of clients

The importance of solicitors' witness statements was highlighted in *Punjab National Bank (International) Ltd v Techtrek India Ltd* [2020] EWHC 539 (Ch), a decision with ramifications for all litigators.

The Third Defendant had allegedly provided a personal guarantee for a £6.9m loan provided to a company of which he was a director.

The Claimant Company applied for summary judgment against the Third Defendant, supported by a witness statement from the

Claimant's solicitor. The Third Defendant disputed the facts alleged in the statement.

The form and content of witness statements is governed by CPR32. Paragraph 18.2 of the Practice Direction to Part 32 requires the maker of a statement to state the source for any matters of information or belief and if the source of the evidence is a person or persons, to identify and name them.

The statement from the Claimant's solicitor said that the source of information that the Third Defendant had signed a guarantee was the Claimant, but did not provide information about the circumstances in which the guarantee had been provided or to explain the method of implementation of the guarantee.

Although the Court considered that the Third Defendant's objections were unlikely to be sustained, it decided that the evidence supporting the application was insufficient to justify making an order for summary judgment. The absence of specific detail was fatal to the application.

Also, the solicitor's statement failed to identify those people who had provided the information to the solicitor. The court decided that simply referring to unnamed officers or employees of a Company was insufficient to meet the requirement of the Practice Direction, and the application was dismissed.

Parties' beliefs

In an order made at a pre-trial review in *PCP Capital Partners LLP and another v Barclays Bank plc* [2020] EWHC 646 (Comm) Mr Justice Waksman reviewed the parties' witness statements and gave guidance on what a witness statement should and should not include.

The judge said that statements should not:

- contain passages that are no more than arguments
- refer to the content of documents to which the witness was not a party
- "note" anything, as this amounts to making a comment on something.

And that the witness should essentially state:

- what happened
- what was said or done
- what the witness knew, thought, believed or intended
- an explanation of the meaning or content of documents to which the witness was a party, if this has been challenged.

It appears that the statements in this case fell far short of this guidance, as the judge ordered removal of certain parts of statements.

Both of the above cases highlight the importance of conforming to the rules of preparing witness statements. It is crucial for professionals and lay witnesses alike to ensure that statements are drafted properly.

Costs disputes procedure following a Part 36 acceptance depends upon whether a claim proceeds under the low value personal injury protocol

In *Panayo Ivanov v Steven Lubb* (County Court at Central London 17 January 2020) the District Judge determined that the procedure for resolving costs disputes following a Defendant's acceptance of the Claimant's Part 36 offer depends upon whether the claim was subject to fixed costs.

CPR 36.13(1) states that in matters not subject to fixed costs, upon accepting an offer made under CPR Part 36 the Claimant will be entitled to costs up to the date when the offer was accepted. This rule says what the costs consequences of accepting the offer will be; it does not make an order for costs. However, a deemed costs order is then automatically triggered through CPR44.9 (1) which says

" where a right to costs arises under... rule 36.13(1) or (2)... a costs order will be deemed to have been made on the standard basis". The Claimant is then entitled to commence detailed assessment proceedings under CPR 47(6).

Because CPR36.13(1) is entirely displaced by CPR36(20), the Court determined that a different approach to settlement of costs disputes applies to fixed costs cases.

The Court held that CPR36.20 created a regime where costs were quantified by tables with prescribed costs, with no need for a deemed order for costs leading to potential costs assessment. Instead, CPR36.20(2) states that where a Part 36 offer is accepted within the time allowed, then the Claimant is entitled to the specified fixed costs.

To cater for potential disputes about how much should be paid in a fixed costs claim, CPR36.20(11) says that the Court must make an order for costs, but does not explain the mechanism for getting the dispute in front of a judge.

The Court decided that where an unresolved costs dispute arises in a claim subject to fixed costs, an application should be made under CPR Part 23 (ie the usual way of asking the Court to rule on a disputed issue arising during a claim) seeking a costs order and asking for the disputed sum to be assessed. The court suggested that the application should exhibit statement of costs form N260 and that if the court decided to make an order for costs then the disputed costs should then be either summarily assessed or referred for detailed assessment.

Although this case is a County Court decision, the judgment is well reasoned and likely to be followed. It provides clarity that the entitlement to commence a detailed assessment of costs arises only in claims not subject to fixed costs, and that costs disputes in fixed costs claims must be resolved through an application to the court.

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- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
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- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
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- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
- Winner – Claims Legal Services Provider of the Year – Claims Club Asia Awards 2016

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