General liability newsletter

April 2018

Employees' liabilities to their employers arising from their own negligent acts

Employees owe a duty to their employers to carry out their work with reasonable care so as to avoid accident and injury. Employers are vicariously liable for the negligence of their employees but are entitled to claim a contribution or indemnity from their negligent employee in appropriate circumstances.

In non-clinical cases, the extent of that duty has only occasionally been considered by the Courts, largely because the circumstances where an employer will want to pursue such a claim against its employee are limited. However some circumstances can justify this.

Such claims need to be distinguished from contributory negligence arguments.

In *William Percy Anderson v Newham College of Further Education* (25 March 2002) the Court of Appeal decided that where a Defendant was found to have been negligent or in breach of a statutory duty, then the Claimant could not be found to have contributed 100% to the accident. Either the Claimant was wholly to blame or the Defendant was to blame subject to a degree of contributory negligence by the Claimant. The decision confirmed the existing Court of Appeal authority, *Pitts v Hunt* (4 April 1990).

An example of this, in which an employee was found to have been entirely responsible for his own accident, even though his employer was in breach of an absolute statutory duty, is the Northern Irish case of *Melvin Fulton v Vion Group Limited* (13 March 2015). That case involved the Personal Protective Equipment Regulations (Northern Ireland) 1993. The Claimant worked in a meat factory and was cut by the knife he was using through a hole in his protective glove. Although the employer was at the time of the accident under an absolute duty to provide equipment adequate to prevent injury, the employee was also under a duty to report any defect in the equipment, which he did not do until after the accident. The Court of Appeal decided that on the facts of the case the employer had taken every practical step to ensure the health and safety of its employee. His case in negligence therefore failed. Although a breach of the employer's absolute duty had been established by reason of the presence of the hole in the glove alone, the facts showed that implementation of its safety system was impeccable. As the employer's evidence proved that it was the Claimant's failure to report the hole in his glove that alone caused the non-compliance with the Regulations, the Court of Appeal (Northern Ireland) decided that his claim had been correctly dismissed by the trial judge.

Any comments or queries?

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But what about the situation where an employer is defending a claim arising from the negligence of its own employee and wants to hold its employee to account for the employer's loss?

In *Lister v Romford Ice and Cold Storage Company Limited* (20 December 1956) the House of Lords upheld the decision of the Court of Appeal that an employee owed a duty in contract to his employer to take reasonable care in the use of a vehicle at work. In the event that the employer was liable to pay damages arising from the employee's negligence the employer could bring a claim to recover that loss from his employee.

This decision was examined by a committee appointed by the Minister of Labour in 1957. The Committee reported in 1959 and advised against legislation to reverse the decision because it felt that insurers would not abuse it, on the basis that doing so would endanger good industrial relations. Following that, a "gentleman's agreement" between Employers' Liability Insurers provided that they would not institute a claim against the employee of an insured employer in connection with the death of, or injury to, a fellow-employee unless the weight of evidence indicated collusion or wilful misconduct by the employee against whom a claim is made.

This exception is quite narrow. A Court of Appeal led by Lord Denning sought to widen the exception in *Morris v Ford Motor Company Limited* (1973). In *Morris*, a cleaning company was trying to recover damages from Ford's employee who had caused an accident that had injured the Claimant (Mr Morris, the cleaning company's employee). The cleaning company had entered into an agreement to indemnify Ford Motor Company for injury caused to either of the company's employees. Ford paid the claim and relied upon the contractual indemnity with the cleaning company which in turn sought to use the principle in *Lister* to bring a subrogated claim in the name of Ford against Ford's employee. The Court of Appeal decided by a majority that it would be inequitable to allow the cleaning company to rely upon *Lister*. Notably, Lord Denning was the dissenting judge in *Lister* when it was heard in the Court of Appeal on 26 October 1955 before the case reached the House of Lords.

This decision has not deterred the courts from following *Lister* where this has been considered appropriate.

For example, in *Jones v BBC and others* (22 June 2007) the High Court considered the complex contractual arrangements between several parties and decided that although the BBC was vicariously liable for the negligence of its Health and Safety representative through his failing to warn freelance workers from walking under a mast, part of which fell and severely injured the Claimant, the BBC could claim a contribution from another freelance worker who was also deemed to be the BBC's employee but who had contributed to the accident circumstances.

This principle of recovery of damages from employees can apply equally to more straightforward employer/employee claims. Consider the situation where an appropriately-trained employee is injured at work through his own fault and then claims compensation from his employer for his injury and loss. Under the principle in *Fulton v Vion Group Limited* the

claim would fail if the employee was wholly responsible. However, the claim process means that a Claimant will inevitably base his claim upon some kind of alleged negligence by his employer such as inadequate training or inadequate risk assessment or method of working. The economics of litigation mean that parties would rather have the claim determined one way or the other without having to proceed to trial.

If the accident involves damage to the employer's property then the employer is entitled to claim the cost of the damage to property from the negligent Claimant employee. It is not necessary for the Claimant to be wholly responsible for the accident. In *Jones v BBC* the BBC was held to be largely responsible for the accident but was still permitted to recover a contribution from one of its negligent employees. Thus if the Claimant has caused damage to his employer's vehicle, or carried out some act that damages the employer's product or goods, then the cost of this damage can be claimed from the negligent employee according to his responsibility for the accident.

This is an approach that ought to be used only in appropriate circumstances. The concerns addressed by the Ministry of Labour Committee in 1959 apply equally today as they did then. Maintaining good labour relations is important and appropriate circumstances are likely to be limited to cases where a Claimant decides that his employer is going to be an easy target but where the accident has been caused overwhelmingly by the Claimant who has done something contrary to his training. However, in appropriate circumstances, counterclaiming the cost to the employer of its employee's negligence can lead to early settlement, or even withdrawal of the claim, without harming the employer/employee relationship.

Pre-action disclosure – who pays and how much?

Pre-action disclosure ("PAD") costs have long been a contentious topic, regarding who should pay and how much. The Court of Appeal has brought some clarity by deciding that claims likely to be allocated to the Fast Track will fall under the fixed costs regime; therefore, Claimants cannot normally expect to recover assessed costs.

In *Sharp v Leeds City Council* [2017] EWCA Civ 33 the Court of Appeal decided that fixed costs apply to PAD applications made in connection with claims which started but no longer continue under the EL/PL protocol. The decision also applies to low value claims under the RTA protocol.

Facts

The Claimant tripped on a footpath injuring her wrist. She brought a claim against the Defendant Council through the Portal under the EL/PL Protocol. The claim exited the Portal. The Defendant failed to give pre-action disclosure and the Claimant made a PAD application. By the time of the hearing the Defendant had given the necessary disclosure. Nevertheless the Claimant was awarded her costs of the application which were assessed at £1,250. The Defendant appealed to a judge who reduced the Claimant's costs to £300 on the basis that they were governed by the fixed costs regime applicable to the EL/PL Protocol. The Claimant appealed to the Court of Appeal.

Court of Appeal

In a unanimous decision the Court of Appeal held that fixed costs apply to PAD applications even in cases which had left the EL/PL Portal. It said that from the moment of entry into the Portal, recovery of costs for pursuing or defending the claim is intended to be limited to fixed rates so as to ensure proportionality in the conduct of small or relatively modest claims.

The Court considered a PAD application to be an interim application to which CPR 45.29H applied, and that permitting assessed costs would risk giving rise to an undesirable form of satellite litigation involving disproportionate expense.

The Court suggested that it was possible to apply for fixed costs to be disapplied in exceptional circumstances using the provisions of CPR45.29, but rather ironically indicated that it might be difficult for a Claimant to prove exceptional circumstances because Defendants frequently failed to comply with protocol obligations. It suggested that if there was evidence that the limit of fixed costs under the current rules was preventing effective disclosure, this was something that could be reviewed the Rule Committee with the possibility of higher, but still fixed costs, being allowed.

Subsequent developments

This approach was applied in *Katie Gregory v Wilko Retail Limited* (County Court at Manchester 7 September 2017) where the District Judge decided that where a PAD application was complied with before any hearing took place, the only applicable costs recoverable under CPR 45.29H were half the Type A solicitor's costs specified in Table 6A, that is £125 plus VAT and the Court fee. The Type B advocate's costs specified in the rules would be allowed only if there was a court hearing.

Impact

The Court of Appeal recognised that applying fixed costs at their current level to PAD applications might potentially have the consequence of preventing effective pre-action disclosure. However, the need to conduct litigation at proportional cost and the need to avoid satellite litigation were factors which currently carry greater weight. The reference to satellite litigation indicates that the Court might also have had in mind that permitting assessed costs for PAD applications would lead to PAD applications being used as a means for Claimant solicitors to generate income before issuing claims likely to succeed but to which fixed costs will apply, or before abandoning speculative claims.

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