DOLMANS INSURANCE BULLETIN

Welcome to the March 2022 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

REPORT ON

Kerb Lines and Dangerousness

NB v Dorset Council

Local Authorities will be aware that Courts must determine several issues when faced with highways tripping claims. The Claimant must firstly establish the happening and circumstances of the alleged accident/circumstances and readers are reminded of the decision in *James v Preseli (1992) PIQR 114*, which was referred to in a previous edition of this bulletin (Report On – February 2022 edition).

The Claimant then needs to establish that the alleged defect posed a real source of danger to ordinary users of the highway and that this was caused by a failure to maintain or repair. Only if the Claimant can establish the above will the Court then consider whether the Defendant has a reasonable system of inspection and maintenance necessary for a Section 58 Defence.

Alleged defects on/within kerbs lines, which usually form the threshold between adopted footways and carriageways, can raise specific issues and arguments when considering dangerousness in particular. Such issues and arguments were considered by the Court in the recent case of *NB v Dorset Council*, in which Dolmans represented the Defendant Local Authority.

Background/Allegations

The Claimant alleged that she was walking along a footway, when she caught her foot in a drainage channel along the kerb line, causing her to fall and sustain personal injuries. The footway was part of the adopted highway and the Claimant alleged that the drainage channel had dropped, causing a difference in levels between the channel and the surrounding kerbstones by approximately 30mm to 40mm.

The Claimant alleged that the Defendant Authority was negligent and/or in breach of Section 41 of the Highways Act 1980.

Issues

The Claimant was put to strict proof as to the circumstances of the alleged accident, although it was accepted that she was likely to prove the same, as indeed she did at trial. The Defendant Local Authority maintained from the outset that the alleged defect was not dangerous and, as such, the case would effectively stand or fall upon Section 41 of the Highways Act 1980. Indeed, the alleged defect was not repaired after the Claimant's alleged accident. It was accepted, therefore, that any Section 58 Defence was likely to fail if the Claimant proved at trial that there had been a breach of Section 41 of the Highways Act 1980 and that the Defendant Local Authority had thereby failed in its duty to maintain/repair the highway.

Dangerousness Generally - Caselaw

It is worth reminding readers of the relevant caselaw dealing with dangerousness generally in highways matters.

Lord Steyn held in *Mills v Barnsley (1992) PIQR 291* that the Claimant must prove that *"the highway was in such a condition that it was dangerous to traffic or pedestrians in the same sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public"*.

Lord Steyn also emphasised that *"in the same way as the public must expect minor obstructions on roads, such as cobblestones, cats eyes and pedestrian crossing studs, and so forth, the public must expect minor depressions"* and that *"it is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed"*.

Lord Dillon went further, stating that *"liability is not to ensure a bowling green which is entirely free from irregularities or changes in levels at all. The question is whether a reasonable person would regard it as presenting a real source of danger. Obviously, in theory any irregularity, any hollow or any protrusion may cause danger, but that is not the standard that is required"*.

The appropriate two stage test when determining dangerousness in the highway was set out by Mr Justice Eady in *Galloway v The London Borough of Richmond Upon Thames (2003) EWHC 289 (QB)*: Firstly, it must be established that there is a reasonable foresight of harm to users of the highway. Secondly, the Court has to guard against setting a standard that would impose an unreasonable burden upon Highway Authorities in respect of minor depressions and holes in streets which, in a less than perfect world, the public must simply regard as a fact of life. The law of tort should not impose *"unreasonably high standards"* and there has to be *"a sensible balance or compromise between private and public interest"*.

Dangerousness – Kerb Lines

Whereas the Claimant in the current matter provided undated photographs that appeared to show a difference in levels between 30mm and 40mm, these were not taken utilising accurate measuring equipment and the Defendant Local Authority subsequently measured a difference in levels, utilising correct measuring equipment, between 25mm and 30mm.

The Defendant Local Authority's Code of Practice referred to various potential issues with kerb units, including damaged kerbs, excessive joint gaps and out of vertical alignment channel units, in addition to other trip hazards in footway surfaces. The Code of Practice provided details of intervention levels for these various kerb units and issues, which were useful as the Defendant Local Authority's measurements were specifically for the kerb unit.

The Defendant Local Authority argued that the kerb unit was not damaged and was merely a difference in height at the kerb edge, not being in or near the desired walking line for pedestrians using the highway. Likewise, it was unlikely to fall within the definition of an excessive joint gap, but was likely instead to be defined as an out of vertical alignment channel unit. As such, the Defendant Local Authority was able to argue that the alleged defect did not meet the relevant intervention levels for this particular kerb unit, based upon the Defendant's measurements and photographs.

Claimant's Evidence

The alleged defect was located on a busy high street and the Claimant argued that this presented a danger to pedestrians using the footway and the kerb in particular.

The Claimant gave evidence that the drainage channel had been defective for some time and was present prior to the Defendant Authority's pre-accident inspection just under one month prior to the Claimant's alleged accident.

The Claimant referred to Google Street View images which, according to the Claimant, showed that the alleged defect was in existence approximately two years prior to her alleged accident and following the same.

The Claimant also relied upon a pre-accident complaint that related to a different location, but suggested that there were other uneven areas on the same footway.

Defendant Local Authority's Evidence

The footway at the location of the Claimant's alleged accident was inspected by foot on a monthly basis and the Defendant Local Authority confirmed that the alleged defect had not been repaired as it was not considered to be actionable nor dangerous by any of the Highways Officers who had inspected the relevant location before and after the Claimant's alleged accident.

In addition to giving evidence regarding the Code of Practice and kerb lines in particular as referred to above, the Defendant Local Authority's witnesses were also able to comment upon the various photographs/measurements and were able to reiterate that this was not a defect that posed a real source of danger to ordinary users of the highway.

It was argued by the Defendant Local Authority that the outer edge of the kerb in itself is a point of abrupt change in height between the footway and the carriageway, where a change in height is fully expected and anticipated by pedestrians taking reasonable care. The difference in height was not aggravated, for example by being loose or rocking, and the change in height was, therefore, described as being "secure". Indeed, the alleged defect was static and had not deteriorated/changed in height, since it was measured by the Defendant Local Authority following the Claimant's alleged accident, at between 25mm and 30mm.

A reactive system of inspection and maintenance was also in place. However, there were no previous complaints and/or accidents relating to the kerb at the location of the Claimant's alleged accident.

It was reiterated that the Court should take account of the fact that the alleged defect had been inspected by several experienced Highways Officers, who gave evidence at trial and that none had considered it necessary for the alleged defect to be repaired at any time, as referred to above.

Judgment

The Trial Judge initially applied the two stage test in *Galloway v The London Borough of Richmond Upon Thames (2003)* and described the alleged defect as a break in the kerb stones with a concrete drainage stone that allows water to drain into the carriageway, the alleged defect being the lower level of the drainage stone that appeared to the Judge to have dropped at some time.

REPORT ON

The Judge preferred the Defendant Local Authority's measurements, finding that there was a difference in levels between 27mm and 29mm. However, the Judge preferred the Defendant Local Authority's definition and intervention criteria for the kerb unit at this particular location, finding that the Defendant Local Authority's measurements fell within the relevant intervention level for the kerb unit and that the alleged defect was not, therefore, actionable.

The Judge was also persuaded by the fact that the alleged defect had not been repaired since the Claimant's alleged accident and that it had not deteriorated since then, with no previous complaints and/or accidents relating to the relevant location.

In finding that the alleged defect was not dangerous, the Trial Judge held that this was an unremarkable defect at a point where the kerb marked a difference in levels and care must be taken by pedestrians. The Judge found that it would be too high a burden to alter the kerb line and dismissed the Claimant's claim accordingly.

In finding that there had been no breach of Section 41 of the Highways Act 1980, the Trial Judge held that he did not need to consider Section 58 of the Act.

Comment

The success of the above matter rested upon a robust Defence, augmented by strong witness evidence adduced by the Defendant Local Authority's various Highways Officers and personnel.

The Trial Judge was assisted by the accuracy of the Defendant Local Authority's measurements and the conviction of its witnesses not to repair the alleged defect, given their arguments that the same was not actionable nor dangerous.

In addition, the detailed insight provided into the Code of Practice, insofar as the same related to various kerb units, obviously assisted the Trial Judge in making his decision. Indeed, the Judge was persuaded that the specific intervention levels for these particular kerb units were most appropriate when considering dangerousness in this matter.

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FOCUS ON

The HSE Annual Workplace Injury and Ill Health Statistics 2020-2021

- what can they tell us as to claims and enforcement trends in 2022 and beyond?

On 16 December 2021, the HSE published its annual report on accident and ill health statistics for the UK workplace. These statistics are a useful guide to future enforcement trends and also, in a wider context, provide something of a signpost to possible future employers' liability personal injury claims trends.

In this article, we will analyse the statistics and seek to draw out the underlying themes and information contained therein. The full report is worth reading and can be found at https://www.hse.gov.uk/statistics/overall/hssh2021.pdf.

Work Related Stress

One of the immediate headline figures (or sets of figures) from the statistics are those relating to workplace stress.

Workplace stress claims, a number of years ago, were regarded as potentially the next 'big' claims trend in employers' liability. However, following several decisions from the Court of Appeal in relation to the same, their importance, or possible importance, receded once again, principally because the legal causation rules around such claims, as laid down by the Court of Appeal, made them more difficult to prosecute for claimants.

However, times change and we are now in a society where the emphasis on mental health is very different from where it was 15 to 20 years ago. Slogans such as "it is OK not to be OK" are gaining increasing traction and, bluntly, workforce expectations are changing. Ultimately, the Courts will reflect that change in emphasis sooner or later, in our opinion.

We are now seeing figures which are a potential concern, both to regulatory and personal injury practitioners, particularly those representing the public sector, I would argue (see below). During the 2020-21 period under consideration, the HSE recorded 822,000 cases of workers suffering with work-related stress, depression or anxiety (including both new and longstanding cases). However, of that figure, 451,000 cases related to a *new case* of work-related stress, depression or anxiety.

Industries with higher-than-average rates of stress/ depression/anxiety are, in descending order of magnitude:

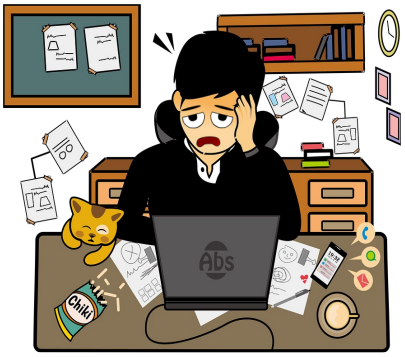
- Public administration and defence (i.e. public sector and armed forces)
- Human health and social work (the so called 'caring professions')
- Education

All three of these "worst" categories for stress, therefore, are heavily represented in the public sector. Moreover, unsurprisingly perhaps, there has been a significant 'spike' in cases of stress/anxiety in the period 2020-21 (according to the HSE figures); with the average pre-pandemic figure in industry being circa 1,600 cases per 100,000 of the working population. This figure rose to more than 2,200 cases per 100,000 of the working population during 2020-21. The precise figures are difficult to extrapolate from the graphs within the HSE report, but, on the above (approximate) figures, this represents a 37.5% rise in such cases from the previous year's figure(s).

These figures coincide (or perhaps it is no coincidence) with a concerted effort by the HSE to address the issue of workplace stress management via specific guidance as for employers. Further information on this can be found at:

- https://www.hse.gov.uk/stress/assets/docs/eurostress.pdf
- https://www.hse.gov.uk/stress/index.htm

This strongly implies that stress in the workplace is now on the HSE (longer term) enforcement agenda; that is to say employers not following the HSE guidance who suffer instances of workplace stress may find themselves the subject of enforcement, including prosecution. We do not see that as an immediate risk for employers but, in the medium to long term, we consider the HSE will start to treat workplace stress in the same manner that, for instance, they treat workplace induced HAVS. If a cluster of HAVS cases arises (now), and the employer was found not to have followed appropriate guidance as to the reduction of workplace vibration and monitoring via occupational health, a prosecution follows. In our view, in due course, we may see a similar approach in workplace stress claims (albeit one has to accept that enforcement in relation to HAVS is rendered easier by the existence of the Control of Vibration at Work Regulations, and similar regulations do not, yet, exist with regard to workplace stress and anxiety).



In purely civil law context, sheer numbers (see above) of instances of workplace stress tend to suggest that employees' unions (one might say, starved of the common or garden workplace claims, such as tripping and slipping claims or lifting cases, due to employees not being in the workplace to sustain such injuries – see later comments) will be looking to support claims for workplace stress. At the same time, there is no doubt that the remote working environment is much more of a challenge for managers and business owners, giving rise to more easily made allegations as to inappropriate and/or ineffective supervision or excessive workloads.

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Musculoskeletal Injuries

In the same period under consideration, the HSE recorded 471,000 musculoskeletal disorders (new or longstanding) related to work; around half the figure for stress induced conditions. Moreover, 162,000 of those cases were new instances.

The breakdown of these musculoskeletal claims is interesting. They break down as appears below:

- 45% (212,000 cases) – upper limb(s) or neck
- 39% (182,000 cases) – back
- 16% - lower limbs

Unsurprisingly, the 'riskiest' occupations in the context of these types of conditions and/or injuries are within the construction sector (with an average figure of circa 2,000 cases per 100,000 of workforce). However, this sector is closely followed by the human health and social work sector. Again, that latter sector is one where there is considerable representation by public sector workers.

Interestingly, the HSE statistics note a (shallow, but long term) downward trend in relation to these types of injuries.

Lung Disease

The HSE estimates an annual death toll of 12,000 for conditions arising from previous workplace exposures. This is, of course, an estimated figure and, in the context of so-called occupational lung cancer, for instance, there are many confounding factors at work, such as smoking (albeit the synergistic effect of smoking and, for instance, asbestos exposure, is well known). Conditions such as COPD, for instance, in the context of concurrent smoking, are much more nebulous in occupational causation terms.

The HSE figures, consistent with previous years, provide a definitive annual figure for mesothelioma deaths – 2,369 per annum in 2020-21. By definition, these deaths are connected to workplace asbestos exposure or so-called para-occupational exposure to asbestos (for instance, the wives of asbestos workers being exposed via their overalls).

The graph of mesothelioma deaths in the overall historical period, interestingly, suggests that we may have now (finally) passed the peak annual mesothelioma deaths figure. However, by the same token, annual deaths due to mesothelioma are still predicted to be circa 2,000 as at 2030.

The graph within the HSE report suggests a possible steeper decline in mesothelioma deaths, in that there is a relatively steep fall in numbers of deaths between 2015 and 2020. However, it remains to be seen if mesothelioma figures are still at the 2,000 per annum mark as at 2030. Inevitably, the problem with mesothelioma deaths is that one is, by definition, dealing, as at 2020-21, with exposure potentially back as far as the early 1960s, thus, realistically, one is still looking back to an era before the Asbestos Regulations 1969, which were a watershed for asbestos control.

The question of asbestos control is now heavily legislated and well recognised. There ought to be no excuse for exposure of workers to asbestos (of any kind) in 2022. However, the HSE enforcement press releases regularly contain prosecutions of employers for failing to control asbestos exposure and the HSE will almost always enforce in relation to such incidents, with the justification of the same, rather obviously, being the potential consequences of exposure in the context of mesothelioma causation.

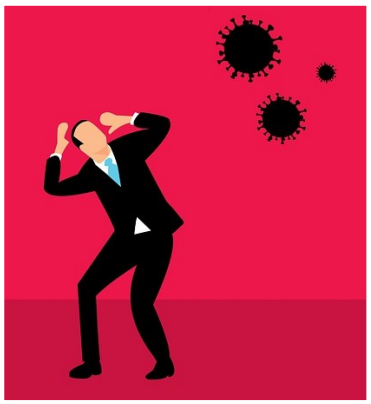
Coronavirus (COVID-19)

For the first time, the HSE figures for 2020-21 contain data in relation to the COVID-19 pandemic. The HSE report states:

"93,000 workers (reported) suffering with COVID-19 in 2020-21 ***which they believe may have been from exposure to coronavirus at work*** *(new or longstanding cases). Around half of these cases were in human health and social work (classes of employment)."*

(emphasis added)

Additionally, the report states that 645,000 workers are *"suffering from a work-related illness caused or made worse by the effects of the coronavirus pandemic in 2020/21 … Around 20% of these (persons) were in human health and social work activities."*



Of that 645,000 figure, 70% of cases (449,000) are said to be cases of stress, depression and anxiety. So, there is, seemingly, an additional burden of stress related disease explicitly connected to the pandemic and the effects of the same on workers seeking to make their way through the pandemic environment.

The combination of these cases, and the existing burden of work induced stress conditions (see earlier) – albeit there must be a degree of overlap between the two cohorts – is of considerable concern, probably most acutely, in the context of workplace injury claims generally.

There is a further element to this – the industries with the higher-than-average levels of new or longstanding conditions caused or made worse by the effects of the coronavirus pandemic are:

- Human health and social work (with an average rate of circa 3,250 cases per 100,000 of workforce)
- Public administration and defence (with an average of circa 2,850 cases per 100,000 of workforce)
- Education (with an average of circa 2,500 cases per 100,000 of workforce)

Workplace Injuries and Deaths

Workplace Deaths 2020-21

In 2020-21, an annual workplace fatal injuries total of 142 was recorded.

This figure is around 'normal' for the UK and the HSE accepts that this statistic is 'flat' in terms of the numbers recorded compared to other years. One might argue that the raw figure of 142 deaths is lower than previous years, but, the obvious contrary argument is the impact of coronavirus on business activity in the period (particularly manufacturing). It is clear from the historical statistics provided by the report that annual workplace deaths in the UK have remained at between 130 and 150 for a considerable period.

This figure, in fairness, compares very favourably with European figures, albeit the HSE make the obvious point that since Brexit the UK is no longer part of the EU from which the latter figures are derived. However, one might add that some kind of comparison must take place or figures of any kind become meaningless.

Only Germany (within the EU) has a lower rate of annual workplace deaths.

A workplace fatality brings with it unique challenges as it will engage an inquest process which is intrinsic to the overall investigation and an integral part of the HSE's Work Related Death Protocol (https://www.hse.gov.uk/enforce/wrdp/). Often, for obvious reasons, fatal workplace accidents will lead to prosecution of the employer and possibly related parties. We recommend the very earliest engagement with experienced legal representatives in all workplace death situations.

FOCUS ON

Workplace Injuries 2020-21

During 2020-21, 441,000 workers sustained non-fatal injuries, of which 51,211 were RIDDOR reportable.

The breakdown of the initial figure is worthy of note:

- 33% were due to slips, trips and falls (housekeeping in the workplace).
- 18% were due to lifting, handling and carrying (manual handling).
- 10% were due to being struck by a moving object (pedestrian and vehicular separation issues).
- 8% were due to acts of violence.
- 8% were due to falls from a height (work at height work).

It is enlightening that the 2 'old chestnuts' – slips, trips & falls and manual handling – are still the most populous in terms of injuries caused. This is in the context of 2022 representing, nearly, the 30th anniversary of relevant elements of 'six pack' Regulations which, albeit they have a much lesser significance in civil claims since the Enterprise and Regulatory Reform Act, they are still key in an enforcement context and were, for many years, the basis of civil law compliance in the workplace.

Stratification of industry type in relation to industry statistics produces some predictable results.

The riskiest industries for workplace injuries are:

- Agriculture, forestry and fishing (which tops the list, by quite some margin)
- Construction
- Accommodation and food service activities

The riskiest industries for workplace ill health are:

- Human health and social work
- Public administration and defence
- Education

The latter trio are unsurprising given the earlier statistics discussed above.

Enforcement Statistics

The HSE figures indicate that in 2020-21, 185 cases were taken to prosecution with a successful outcome (conviction or guilty plea). No figures are provided for unsuccessful prosecutions, or, therefore, the costs implications of the same.

However, in 2020-21, from the 185 successful cases, a figure of **£26.9 million** was achieved in terms of fines. It should be emphasised that this is an initial fines figure – that is, it is fines imposed, there is no data available for *fines recovered*. Indeed, as a measure of (actual) success, statistics for fines recovered from successful HSE prosecutions is data which is very hard to come by.

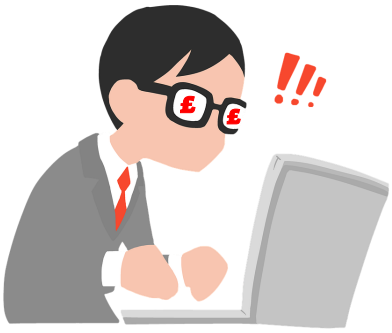
The figure of 185 cases is circa 50% of the figure from the previous year (2019-20). The HSE cites COVID-19 as the reason for this:

"The restrictions imposed by the coronavirus pandemic have had an impact on the number of prosecutions and notices served. This year has seen a substantial fall in the number of cases prosecuted."

*"Though the total value of all fines has decreased from 2019-20, the average fine per case has increased from £107,000 to **£145,000**."*

(emphasis added)

This latter figure represents a 50% increase in the average fine figure. Whilst one might say that statistics in the context of a shrinking cohort (i.e. the pool of prosecuted cases decreasing to 185 in 2020-21 from an earlier, much higher figure) are always unreliable, this is a startling statistic. It must owe itself, in part at least, to the ongoing fine inflation seen since the advent of the Definitive Sentencing Guideline from 2016.



Comments

The first observation which needs to be made is simply the extent to which the public sector, in one form or another, appears in these statistics; whether it be in the context of workplace stress or in the context of riskier industry sectors for injuries and disease, the situation is the same – 'public sector' employers carry a significant reported burden of injuries and disease. This must impact, both in terms of personal injury claims and, in another context, with regard to possible enforcement.

Getting somewhat off topic, it also likely impacts on risk weighting for the public sector and, therefore, the cost of obtaining appropriate insurance cover.

Secondly, perhaps not unexpectedly, coming out of the pandemic, it seems likely that British industry as a whole (but, also with a preponderance towards the public sector) will be carrying a significant burden of mental health issues rooted in (or exacerbated by) the pandemic itself. This, if only because of the lack of other types of claim, may well cause there to be a 'spike' in claims related to workplace stress and coronavirus related ill health caused, or more likely exacerbated by, allegedly poor management during the remote working or adapted working (as the case may be) phase.

In some senses, one might speculate that 'secondary injury' – such as workplace stress (rather than the 'primary injury' of coronavirus itself) – might be easier to seek to prove is linked to factors in the workplace. Time will tell on this; there are major causation issues (in a civil claims context) to be worked through here.

Thirdly, with regard, specifically, to enforcement, the HSE accept that prosecution numbers are down in consequence of the pandemic. One assumes they will be looking, as they too return from their pandemic monitoring and control duties, to increase prosecutions and enforcement to previous, pre-pandemic, levels. It will be interesting to see what the focus of those enforcement activities will be, but the combination of (a) the stress induced illness seen and (b) the HSE's "tackling stress initiative" (see above) provides an ominous sense that matters might be heading in that direction as to enforcement in the fullness of time.

Fourthly, we are struck, in particular, by the statistic that the average level of fines has increased, in 2020-21, from earlier years, *by 50%*. That is a significant increase and whilst part of the explanation for this mathematic difference is the smaller cohort of cases due to reduced prosecution activity, there is, in our mind, absolutely no doubt that fines have continued to increase in the relevant period as a consequence of the impact of the Definitive Sentencing Guideline (DSG).

That is (and always has been) in some senses the purpose of the DSG; however, emerging (hopefully in 2022) from a prolonged period of reduced business activity, the risk of yet further enhanced fines is a major concern. Regulatory defence lawyers must redouble their efforts in mitigation terms and prepare mitigation thoroughly with the assistance of clients who must appreciate the risk of significant fines, nonetheless.

Moving into 2022 and 2023, there is a need, more than ever, for institutional defendants to have available to them appropriate and trusted legal advice and support, both in relation to personal injury claims and with regard to potential enforcement activity by the HSE. In the former context, obviously, outlay can normally be mitigated through insurance arrangements, and in the latter, fines and prosecution costs will have to be met from public sector or corporate budgets directly.

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RECENT CASE UPDATES

Costs - Grade of Fee Earner - Abuse Cases

TRX v Southampton Football Club
[2022] EWHC B7 (Costs)

The Claimant brought a claim against Southampton Football Club alleging historical sexual abuse against a convicted football coach who perpetrated a campaign of abuse against boys at the Southampton Academy in the 1970's and 1980's.

The claim settled for £4,000. The Claimant sought to recover costs of £65,523.26 against the Defendant. The costs were disputed, with the main issue being the appropriate hourly rate and level of fee earner to have conducted the case. The Claimant had instructed a firm of solicitors in London, Bolt Burdon Kemp, a specialist firm in the sector, and at least five different fee earners had been involved in the claim. The Claimant sought to recover an hourly rate of £480.00 in respect of work carried out by a Grade A fee earner, £365.00 per hour in respect a Grade B fee earner and £350.00 in respect of a Grade C fee earner.

The Costs Master, Master Brown, considered the factors set out in CPR 44.4(3).

The Master held that in the circumstances of this case, it was reasonable for the Claimant to have instructed a firm in London, a firm which was experienced in and specialised in sexual abuse cases, and a firm that might be dealing with other sexual abuse cases in relation to allegations against the same football coach.

Ultimately, however, the Master formed the view that the Claimant's case could reasonably and adequately have been dealt with by a Grade C fee earner in the firm he had instructed. Such an instruction would be sufficient to protect the Claimant's interests. In instructing such a firm, one would reasonably expect a Grade C solicitor to be qualified and have had experience of sexual abuse cases for up to four years, such that they were able to conduct the claim as the principal or main fee earner. The Master accepted that in relation to the more generic costs aspects of the bill, in respect of this particular claim, some input by way of supervision from a more senior fee earner (Grade A or Grade B) was also reasonable.

In relation to the hourly rates, it was not disputed that there should be an enhancement of the guideline summary assessment rates and it was noted that the extent to which they assisted in a detailed assessment was limited. Following lengthy submissions, the Master found that some enhancement of the hourly rates was appropriate, even on the proposed rates that were set out in the new GHR, CJC consultation documents. For work done in 2019 and 2020, the Master reduced the Grade A hourly rate to £330.00, the Grade B rate to £250.00, the Grade C rate to £210.00 and considered an appropriate Grade D rate was £135.00.

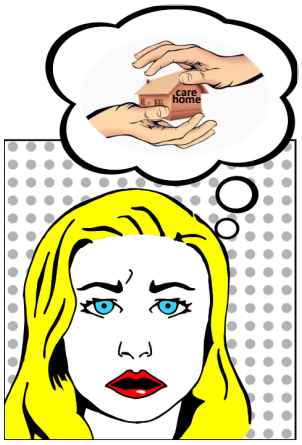
The Claimant's bill was assessed at £23,008.15.

RECENT CASE UPDATES

Human Rights Act 1998 - Articles 2 and 3 - Strike Out

Milner v Barchester Healthcare Homes Limited [2022] EWHC 593 (QB)

The Claimant, 'C', brought a claim for damages under the Human Rights Act 1998 as an indirect victim seeking damages for alleged breaches of Articles 2 and 3 of the ECHR against the Defendant, 'D', operators of a Care Home, relating to treatment of a resident of the Care Home, 'E'. E was a resident of the Care Home from 2013 until her death in 2017. The cause of death on E's death certificate was pneumonia and dementia. There was no post mortem or inquest.



Whilst E was a resident of the Care Home, C became concerned about the level of care she was receiving. C alleged there had been instances of E being left unable to access the toilet and in a soiled state for prolonged periods. She was often unkempt and unhygienic. E was segregated from other residents, not assisted to mobilise and was inappropriately restrained by staff. E was often left thirsty and hungry and her risks of choking and falling were not adequately managed. Reports of the Care Quality Commission and Local Authority in 2017 were critical of the care of residents at the Home.

E's husband had predeceased her. She had no children and few living relatives. C's mother and E had been lifelong friends and C considered E as part of the family. E was C's daughter's Godmother. C had been appointed as E's Deputy for property and affairs. C chose the Care Home for E and was named as E's next of kin / meaningful person on the admission documents.

D applied to strike out C's claim or for Summary Judgment. The issues for consideration were whether Articles 2 and 3 were engaged on the pleaded facts and whether C had locus standi to bring the claim.

Article 2

In the healthcare context, Strasbourg jurisprudence is clear that mere clinical negligence does not engage Article 2. In the context of personal care in a Care Home, Strasbourg jurisprudence distinguishes between persons 'detained' and persons 'placed' in social care homes. E fell into the latter category. The trigger for a duty is a 'real and immediate risk to life' about which the authorities knew or ought to have known. The only risk to life identified in the Particulars of Claim was the risk of choking or aspirating. D submitted that this was a case of medical negligence (the failure to manage E's risk of choking) and Article 2 was not engaged at all. In the alternative, if it was, the duty to take reasonable steps was not triggered. There was no real and immediate risk to life nor any evidence that E's death was caused by the alleged risk.

C alleged that there was a spectrum between simple clinical negligence at one end and cases of protracted neglect and/or abuse sufficient to trigger Article 2 at the other end and it was wrong to strike out a claim before disclosure, evidence and a trial enabled the Court decisively to determine where on the spectrum the case lay. C further submitted that the cause of death was probably aspiration pneumonia and, subject to expert medical evidence, causation would be made out.

The Judge held that whilst it was right that the exercise of placing E's treatment on the spectrum between simple medical negligence and protracted neglect was not one for a strike out / Summary Judgment application, wherever the case was placed on the spectrum it was clear that the operational duty was triggered by a 'real and immediate risk to life' and that for both the systems duty and the operational duty there had to be a link between the matters impugned and the harm. The Particulars of Claim disclosed no reasonable grounds in support of either. The risk of choking was only ever described as a medium risk which persisted at the same level throughout E's time at the Home. Aspiration pneumonia was not on the death certificate and there was no mention of E having aspirated food or liquids or that her chest infection was connected to any such issue. The plea that E contracted aspiration pneumonia was pure conjecture.

Accordingly, the Judge struck out and gave Summary Judgment to D on the Article 2 claim.

However, the Judge did comment that he would have found that C had sufficient standing for an Article 2 claim, under which the principles for standing are more liberal than for Article 3, as the relationship between E and C was akin to a daughter and mother relationship.

Article 3

D submitted that E's treatment did not attain the minimum level of severity for a claim under Article 3 as it fell short of the threshold for inhuman or degrading treatment. The Judge concluded that the issue of whether the Article 3 threshold was met in this case was a matter for trial as the Judge was unable to decide that issue without conducting an impermissible 'mini trial' on incomplete evidence.

In relation to locus standi, to qualify as an indirect victim C had to show either a strong moral interest, beside the mere pecuniary interest in the claim, or other compelling reason, such as an important general interest, which required her case to be examined. The Judge found that this was also a matter for trial.

Accordingly, D's Application in respect of the Article 3 claim was refused.

RECENT CASE UPDATES

Limitation - Human Rights Act - Extensions of Time

Rafiq v Thurrock Borough Council
[2022] EWHC 584 (QB)

The Claimant, a Kurdish Iraqi who claimed asylum in the UK, brought an action against the Defendant Council alleging it acted unlawfully in making him 'street homeless' for a week in 2017, violating his human rights and causing him physical and mental harm.

Background

The Claimant was 17 when he arrived in the UK (in 2015). The Defendant Council accepted an obligation under the Children Act 1989 to support and house him. When the Claimant turned 18, the Council had continuing support and housing duties to a 'former relevant child'.

The Claimant's asylum claim was refused in 2016, which he unsuccessfully appealed. The Council notified him that it intended to cease supporting and housing him. The Council undertook a human rights assessment in June 2017, which decided that the Claimant would be given a final weekly allowance and a travel warrant to go to the Home Office and apply for residual support before returning to Iraq. The Claimant was subsequently told that the necessary referral to the Home Office had not happened. The Claimant had to leave his accommodation on 31 July 2017 and was street homeless until 07 August 2017.

The Claimant received assistance from the British Red Cross who put him in touch with an established firm of solicitors specialising in public law and human rights. They sent the Council a pre-action judicial review letter challenging its human rights review and decision to evict the Claimant. The Council reinstated accommodation and support for the Claimant on 21 August 2017.

Two years later, a new firm of solicitors were instructed by the Claimant and issued a claim on behalf of the Claimant in November 2019 seeking compensation against the Council for making him street homeless in 2017.

The Defendant sought an Order striking the action out on the ground that it was not brought within time. The Claimant sought an Order extending time.

RECENT CASE UPDATES

Principles

The Judge reviewed the principles relating to an extension of the one year limitation period and refused to extend time on the facts of this case.

- ***Length of delay***

The Judge considered that the length of the delay in bringing the proceedings was considerable, relatively speaking, in the circumstances of the case.

- ***Reasons for the delay***

There was no "positive explanation" for the delay. It was noted that the Claimant was represented at the relevant time by experienced human rights solicitors who asserted a judicial review and human rights claim against the Council, but they did not seek damages. The letter from the Claimant's solicitors was swiftly followed by the Council providing the remedy sought – reinstatement – and the dropping of the threatened judicial review. The Judge found that the matter was resolved at the time to the parties' mutual satisfaction and the Claimant now wished to revisit it for a fuller vindication of his rights. There was no evidence that the Claimant's solicitors had failed to act in his best interests at the time or were unable to raise a damages claim because of the Claimant's mental state (as the Claimant had sought to persuade the Court).

- ***Evidential prejudice and the prospects of a fair trial***

The Judge accepted that the Council would suffer evidential prejudice in defending the Claimant's claim because key witnesses, who dealt with the Claimant's case at the time, were no longer in post or on long term sick leave. It appeared that the Council would face the prospect of significant adverse inferences being drawn from the relatively scant documentation which was available and that its ability to address that with witness evidence may be compromised to at least some degree.

There was also an issue with the medical evidence. There was little in the way of relevant mental health evidence dating from close to the time of the events themselves. It acknowledged that the ability of an expert to be able to make a fair and robust assessment of the effect of the week of street homelessness on the Claimant's admittedly multi-factorial and fluctuating condition had to be regarded as significantly compromised by the passage of time.

- ***Proportionality***

The value of the Claimant's claim was likely to be relatively modest (in the region of £8,000) if successful. It was noted that the Claimant's legal costs already exceeded £30,000 and proportionality was, therefore, a factor to be taken into account.

- ***The equitable balance***

The strongest argument in favour of extending time for the Claimant was that there was at least arguable merit in the Claimant's claim. However, against that, the reservations about the prospects for the fair conduct of a trial some five years or more after the event had to be considered. At least some weight was given to the evidential prejudice likely to be faced by the Council, but more weight was given to what was likely to be the prohibitive difficulty for the Council in obtaining robust medical evidence on the question of the impact of the homelessness on the Claimant's health. This would also be relevant to the issue of quantum, which was very much in issue.

Decision

There were good public policy reasons – the same reasons underlying the short primary limitation period – for discouraging routine applications for extensions of time where solicitors' firms happen upon potential cases long after the event. It does not reflect the balance Parliament has struck between the vindication of individual rights and the exposure of public authorities to litigation and expense.

In any event, the evidence in this case was that the mutual understanding between the parties at the time, when the Claimant was represented, was that the threat to bring legal proceedings in relation to his period of homelessness was withdrawn in consideration of the prompt reinstatement of support and housing. It was accepted that the Council genuinely considered the matter closed in these circumstances and the attempt to reopen it came as a 'bolt out of the blue'. There was a strong public interest in encouraging public authorities to deal quickly, efficiently and finally with legal grievances as seems best suited to eliminating the need for litigation on both sides and they were entitled to look to the Courts to support them in doing so.

The unfairness, prejudice and administrative burden the Council faced if time for this claim was extended was real, and the litigation circumstances in which the application was brought weighed heavily against the equitableness of granting it. There were real concerns about the possibility of a fair trial (to both sides) and the substantial expense to the public purse that would be involved in establishing how much additional vindication of his rights the Claimant was entitled to, beyond that which he had already secured, was not in proportion to the likely degree of additional vindication which was realistically capable of being achieved.

The Claimant's Application to extend time was, therefore, refused. The Defendant's Application to strike out the Claimant's claim succeeded.

RECENT CASE UPDATES

Solicitor's Equitable Lien - Access to Justice

Bott & Co Solicitors Limited v Ryanair DAC [2022] UKSC 8

Bott and Co Solicitors Ltd, 'C', handle large volumes of passenger compensation claims for flight cancellation and delays primarily on a 'no win no fee' basis. Prior to 2016, when claims against it were admitted, Ryanair paid compensation directly to C's client account. Ryanair changed its practice and began communicating directly with C's clients and paying compensation directly to them. As a consequence, C was unable to deduct its fees from the compensation and had to pursue their clients for payment. C brought proceedings against Ryanair claiming an equitable lien over the compensation in respect of its costs and an injunction restraining Ryanair from paying compensation directly to customers when Ryanair was on notice that C had been retained by them. An equitable lien would allow C to pursue Ryanair for fees unpaid by its clients.

In the High Court, the claim failed on the basis that it was held that an equitable lien only arose once legal proceedings were commenced. C appealed. Prior to the hearing of the appeal in the Court of Appeal, the Supreme Court held in *Gavin Edmondson Solicitors Ltd v Haven Insurance Ltd [2018]* that an equitable lien can arise where no proceedings have been started. However, C's appeal was unsuccessful as the Court of Appeal held that unless or until Ryanair disputed a claim for compensation, C was not providing a litigation service in the promotion of access to justice. C appealed to the Supreme Court.

By a majority of 3 – 2, the Supreme Court allowed C's appeal. For a lien to arise there did not have to be a dispute, either existing or reasonably anticipated. The majority held that the relevant test for a solicitor's equitable lien is whether a solicitor (within the scope of the retainer with its client) provides services in relation to the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client. On the facts of this case, the majority was satisfied that test was met.

For further information on any of the above cases, please contact:

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