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,
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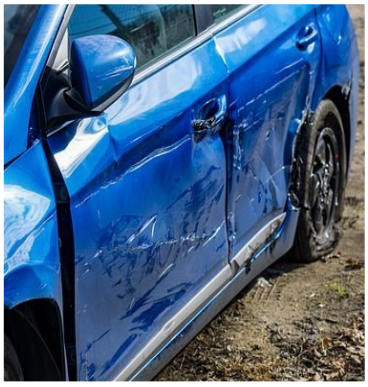
REPORT ON

That Was Close, In More Ways Than One

HTIL v Pembrokeshire County Council

On 24 July 2018, a road traffic collision occurred on a road in Tenby, when it was alleged that a Council's employee drove a Council recycling vehicle into the Claimant's vehicle which was parked and unattended on a work site, causing damage to the Claimant's vehicle. The Claimant claimed damages for the damage sustained to its vehicle and Dolmans was instructed to represent the interests of the Council.



Accident Circumstances

The alleged circumstances of the accident were that the Claimant's vehicle was parked at a work site that was set up within a set of temporary traffic lights. It was alleged that the Council's refuse vehicle was proceeding too close to the Claimant's vehicle. Whilst passing the Claimant's stationary vehicle, it was claimed that the Council vehicle's wing mirror made contact and damaged the offside of the Claimant's vehicle in numerous areas. The Claimant provided a number of photographs and an engineering report to confirm the damage.

A few days after the incident, the Claimant claimed to have received a phone call from the Police confirming that the Council had spoken to the driver, who had accepted full liability for the incident.

The Claimant completed an Incident Report which identified three potential witnesses who saw the collision who, we presumed, from the outset would be able to affirm/strengthen the Claimant's account.

Initial View

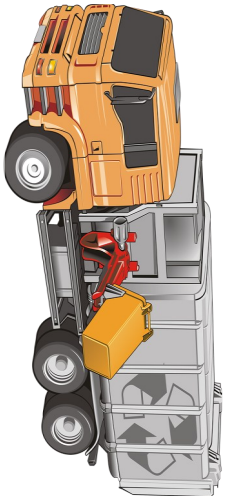
The evidence favoured the Claimant. We anticipated that it was going to be difficult to argue that the damage to the upper section of the Claimant's vehicle did not occur as alleged and it may, therefore, have followed that the whole of the damage was caused by the Council's vehicle.

Although the photographs relied on by the Claimant did show a visible gap between the two vehicles, they also showed that the Council's vehicle was extremely close to the Claimant's vehicle and we anticipated that it was going to be difficult to persuade a Court that the damage occurred in another way. There was no evidence, for example, that the Claimant's vehicle had pre-existing damage.

In addition, the camera on the recycling vehicle was not working, so there was no video footage to assist the Council's defence. We recommended that a number of enquiries be made with the Council's driver, but, ultimately, the only real evidence the Council had was the account of the driver, who was seemingly unaware of the incident, but it must be remembered that he was driving a large and noisy vehicle so may not have heard, or felt, an impact.

We identified that the matter would be allocated to the Small Claims Track, so the costs of defending the matter would be irrecoverable. The Claimant would have been entitled to fixed costs, plus reasonable disbursements. However, if the claim were to be settled, it would be preferable for the same to be met before the hearing fee was due, such were the economics.

Witness Evidence



Claimant

The Claimant's evidence could be summarised as follows:

The Council's vehicle came through traffic lights and attempted to pass the Claimant's parked vehicle. However, the road was narrow, and the Council's vehicle was rather wide. The Claimant's driver watched the Council's vehicle getting too close to the Claimant's parked vehicle and realised it was going to collide with it. It appeared that the driver was not going to stop, so the Claimant's driver shouted. Unfortunately, it was too late, and the Council's vehicle scraped the Claimant's vehicle as it went past. The Council's vehicle should not have attempted to *squeeze passed* as there was insufficient room.

Council

The driver's account could be summarised as follows:

He remembered passing a number of vehicles before approaching the Claimant's vehicle, which was parked on the right-hand side of the road. The carriageway was narrow and, given the size of the recycling truck, was proceeding with caution. He was concerned that given the position of the Claimant's vehicle in the narrow road, that there may not have been enough space to proceed. He also noticed that the front offside tyre was positioned outwards, which presented as a potential hazard. He brought the truck to a stop and asked one of the workmen who were present to move their vehicle closer to their side of the road, to which the workman replied that he would not be able to move the vehicle further over as it was already as close as it could get to the edge of the carriageway, but he did confirm there was enough room and that he would guide the driver through the gap. The Council's driver, therefore, positioned his vehicle as far to the left as possible and pulled the offside wing mirror in, to provide maximum clearance. He then edged forwards and manoeuvred his vehicle very slowly through the gap at no more than 2mph. Once the front end of the vehicle was through the gap, he remembered saying to the workman who was standing behind the Claimant's vehicle "thank you, that was close", to which the workman responded "yeah".

He then pushed the wing mirror back out and continued to drive through the gap very slowly, taking care as he did so. At no point did his vehicle make any contact with the Claimant's vehicle.

Review of Evidence

A full review was undertaken after witness evidence was exchanged. Key points considered were:

- The Council's driver was not aware that the Police were contacted and no Police report was available.
- The three potential witnesses who apparently saw the collision did not provide statements to support the Claimant's account.
- The Council's driver said there was no collision.
- The Claimant's photographs showed a visible gap between the two vehicles.

Further, the photographs appeared to have been taken a few seconds after the alleged impact and the Council vehicle's wing mirror would not have been in the position depicted when the vehicles passed each other. We also questioned whether the areas of damage to the Claimant's vehicle were consistent with the Council's vehicle and whether the extent of that damage could have been caused at low speed. For example, if the vehicles did collide, we could not see how the damage to the lower section of the Claimant's vehicle could have occurred, when considering the alignment of the vehicles.

With all the evidence provided and the risks summarised, the Council agreed to support their driver and proceeded to a Small Claims Hearing based on his testimony and the above issues.

Hearing

The hearing took place on 9 October 2020 at Llanelli County Court, listed before District Judge Wilson-Williams.

Defence Counsel was informed when he arrived that the Claimant's witness was not present, but that *he was expected*. Counsel for the Claimant indicated that he would make urgent enquiries of those that instructed him as to the whereabouts of the Claimant's witness, but added that it was unfortunate that he only had the landline number of the Claimant's witness.

The matter was called before the Court and the Judge noted that there were too few people in the Court (attendees having been pre-authorised due to Covid) and asked for an explanation as to why this was the case. Counsel for the Claimant submitted that the Claimant's witness was not in attendance as he was "shielding" in accordance with Covid-19 guidelines. The Judge replied that this must be incorrect as the Government guidelines in relation to "shielding" ended in mid-August. Counsel for the Claimant could not provide any further information and requested that the matter be adjourned, to the first open date, after 7 days.

REPORT ON

The defence objected on the following grounds:

(1) The Claimant's witness had made no effort to contact the Court to indicate that there was an issue relating to Covid-19.

(2) Contradictory information had been provided at the Court to indicate that the witness was initially expected to arrive, but then an indication provided that the witness was ''shielding''.

(3) It would be very easy for the Claimant's witness to say he was shielding and there was little evidence that could be provided to refute that. However, it would be expected that some contact would have been made to either the Court or the Claimant's solicitors.

(4) The Council's witness was a resident of Milford Haven, Pembrokeshire. In the current circumstances, he should not be required to attend Llanelli again.

The Judge invited comments from the Claimant's Counsel. He requested that any adjourned hearing could be listed remotely, thereby affording the Council's witness the benefit of not having to travel again.

The Council's witness advised that internet connection at his home would be an issue and his office was open plan. The defence submitted, therefore, that a remote hearing was not appropriate in the circumstances. Further, the defence invited the Court to note that if the Claimant's witness was "shielding", he would presumably be at home and so would be able to answer his landline. Counsel for the Claimant confirmed that the Claimant's witness would be able to attend by telephone, but not CVP. The Judge made enquiries of the Court staff and a telephone conference was arranged to enable the witness to give evidence.

Opening Statements were made and the Claimant's witness was then telephoned.

The Defence began cross-examination and asked the Claimant's witness where he was. He replied that he was in his van. He was asked where his van was and he replied "at work".

The importance of this reply was noted by the Judge, as the witness should, of course, have been at home 'shielding'.

The cross-examination continued, but the call failed just as the witness was asked about the possibility that something else may have hit the van and not been noticed. The Judge asked Counsel for the Claimant to try and reconnect the call. Numerous efforts were made, voicemails left and text messages sent, but the Claimant's witness did not respond.

The Council's driver proceeded to give evidence and under cross-examination, performed well.

In closing, the defence submitted that the question at the heart of this matter was integrity and the Claimant's witnesses was in tatters. Not only because of the conduct of the Claimant's witness, but also due to the causation issues, i.e. that the alleged damage to the Claimant's vehicle could not have been caused by the Council's vehicle when the vehicles were aligned and the passing manoeuvre considered.

In reaching Judgment, the Judge considered that the Claimant had not discharged the requisite burden of proof to demonstrate, on a balance of probability, that the Claimant's vehicle had been damaged in the circumstances alleged, and found that the Claimant's witness was not credible. The Judge went onto find that the Council's driver was credible, and dismissed the claim on the basis that there had been no collision between the vehicles.

Costs

The Defence sought costs on the basis that the Claimant had behaved unreasonably under CPR 27.14(g), arguing that whilst the information may have been provided to the Court in good faith, someone in the chain of communication had provided information that was untrue and had caused delay and wasted costs. The Court had been treated with disrespect by the Claimant and there was sufficient evidence to allow the Court to award costs.

Counsel for the Claimant objected on the basis that the CPR set the burden very high and the conduct had not reached that level, in his submission.

The Judge held that whilst there were substantial unsatisfactory issues before the Court, of which there was no satisfactory explanation, they had not affected the administration of justice, as the Trial had, ultimately, been able to proceed, albeit the Judge acknowledged the issue was 'finely balanced'.

Conclusion

On the face of it, this was a difficult case to defend. The Claimant had adduced photographic evidence to demonstrate damage to its vehicle. There were contemporaneous photographs showing that the Council's refuse vehicle was very close to the Claimant's vehicle. The Claimant suggested there was independent witness evidence to support its claim and that the Police had apparently reported a concession on the part of the Council's driver. An assessment of the evidence on paper could have led to a decision to settle the case, which could not have been criticised.

However, the Council's driver was adamant that no contact had been made between the vehicles. Based upon this account, together with the further factual circumstances of the incident, and an analysis of the photographic evidence and understanding as to the alignment of the vehicles, and potential damage sustained, all cumulatively undermined the Claimant's case.

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Even at Court, the Claimant and witness then sought to use the coronavirus pandemic to its advantage by seeking an adjournment of the Trial. The Judge was sympathetic to the initial application to adjourn, which would have placed even greater pressure upon the Council to settle the case given the increasingly disproportionate economics. However, the Defence was able to 'turn the tables' on the Claimant's witness so as to completely undermine the witnesses' credibility. This, together with the doubt cast upon the Claimant's evidence, combined, of course, with the account of the Council's driver, ultimately led to the dismissal of the claim, completely vindicating the Council's position.

The case emphasises the importance of carefully scrutinising the Claimant's evidence and undertaking a proper risk analysis of all the evidence before deciding whether or not to maintain a Defence to Trial. Having permitted the parties to physically attend Court, albeit limiting numbers to ensure social distancing and compliance with the Covid-19 regulations, the Claimant then sought to take advantage of the regulations by claiming his witness was shielding. Ultimately, the Defence was able to undermine the credibility of the witness, based upon an understanding of the Covid-19 regulations. At a time when large numbers of the population have suffered unimaginable losses as a result of the pandemic, it was evident that the Judge was wholly unimpressed that the Claimant sought to take advantage of the pandemic so as to suit its own needs in pursuing the case. Whilst disappointing that the Judge could not be persuaded to exercise discretion and award the Council its costs, the outcome of the case was, nevertheless, important in demonstrating that the Council will not entertain non-bona fide cases.

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FOCUS ON

Annual Statistics for Health and Safety at Work (Workplace Accidents and Workplace Ill Health) issued by the Health and Safety Executive (HSE) on 4 November 2020

Every year the HSE issue a statistical analysis of workplace accidents and diseases, the latest such data were published on 4 November 2020. Why is this relevant to institutional defendants and risk management personnel? Inevitably, as the Regulator in respect of workplace environments, the HSE utilise this information (in part) to direct its operations as to regulatory enforcement. Accordingly, this data represents a useful source of potential "early warning" as to the issues which are of concern to the HSE and, also, the industry types which are similarly exercising the concern of the HSE.

Against that background, an analysis of the figures provided by the HSE is a worthwhile exercise for anyone involved in the management of risks presented by workplace environments.

Fatal Accident Statistics

In the period 2019 to 2020, 111 workers were killed in workplace accidents. This is a (significant) reduction from the 147 workers killed in workplace accidents in the period 2018 to 2019.

Inevitably, the reduction in economic activity at the end of the relevant period (March to April 2020) due to the impact of the coronavirus (Covid-19) pandemic, is potentially relevant to the overall figure here. However, even allowing for that, this is a significant reduction (it is considered) on the preceding year's figure. However, by any estimate, this remains a significant number of workers killed in consequence of simply attending their daily work (albeit still, as accepted by the HSE, one of the lowest rates of fatal accidents in Europe); in that context, the HSE has made it clear, on numerous occasions, that all workers should be able to return home from work safely (and who would disagree with that view). Inevitably, therefore, fatal accidents will remain the focus of investigation and enforcement by the HSE.

Any organisation faced with a fatal accident will, inevitably, find itself scrutinised as to almost every aspect of its system of work and risk assessment processes by the HSE. Enforcement via prosecution is, in my experience, highly likely in such situations (albeit each such situation is highly fact sensitive and the outcome will depend on the facts in question).

A breakdown of the distribution of these fatal accidents, across the relevant industries in question, is also of interest in this context:

- Construction – 40%
- Agriculture Forestry and Fishing – 20%
- Manufacturing – 15%
- Transport and Storage – 11%
- Admin and Support Services – 6%
- Other – 8%

Inevitably, in the context of the above statistics, the industry sectors of Construction and Agriculture will, likely continue to receive detailed scrutiny of the HSE and in the context of incidents arising. Given these statistics, it will be relatively easy for the HSE to cross the public interest threshold with regard to any prosecution decision.

A further analysis of the types of accidents involved in these statistics is provided by the HSE, breaking down the overall figures by accident/incident type. These figures are as follows:

- Fall from height – 29 incidents
- Struck by moving vehicle – 20 incidents
- Struck by moving object – 18 incidents
- Trapped by something/collapsing overturning – 15 incidents
- Contact with moving machinery – 11 incidents

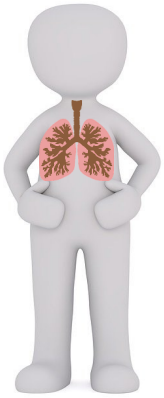
Again, these statistics provide insight into the types of situation where the HSE will be interested in enforcement action – given the wider agenda of ensuring safety in a sector or practice area where risk is regarded as prevalent.

Non-Fatal Accident Statistics

According to the statistics produced by the HSE, 693,000 workers sustained non-fatal injury according to self-reports to the Labour Force Survey in 2019 to 2020. There were 65,427 non-fatal injuries reported under RIDDOR in the same period. According to the HSE analysis accompanying the figures, *"The rate of self-reported non-fatal injury to workers showed a generally downward trend but has been broadly flat in recent years. The rate of non-fatal injury to employees reported by employers shows a downward trend."* This means that RIDDOR reported injuries are continuing to diminish, which must be the result of concerted action by employers and appropriate risk management initiatives in that regard.

FOCUS ON

Occupational Lung Disease



Readers will be aware that the HSE have recently undertaken a specific initiative in regard to the reduction of workplace dust. I suspect that, based on the figures now provided for 2019 to 2020, more such initiatives can be expected in future.

In the period 2019 to 2020, according to the HSE figures, there were 12,000 lung disease deaths estimated to be linked to previous workplace exposures to harmful substances. Mesothelioma deaths (specifically) in 2018 (which, presumably, is the latest date for such information) were 2,446 and the HSE considers that a similar number of lung cancer deaths can be linked to previous asbestos exposure in the workplace.

The HSE breaks down the annual death rate due to occupational lung disease as follows:

- Mesothelioma – 20%
- Asbestos Related Lung Cancer – 20%
- Non-asbestos Related Lung Cancer – 24%
- Chronic Obstructive Pulmonary Disease (COPD) – 33%
- Other diseases – 2%

These figures, inevitably, provide suitable justification for regulatory action in relation to any asbestos contamination incident and, from my own experience, the HSE will readily prosecute where there has been a negligent release of asbestos.

Of the above figures, the COPD figure is the most concerning in terms of potential future regulatory action. As above, the HSE has already launched an initiative this year to specifically deal with excessive workplace dust. Workplace dust of almost any kind, if present in excessive quantities and for a sufficient period of time, could be responsible for lung damage giving rise to COPD. Therefore, the COPD rate/figure is of concern in terms of future action by HSE in regard to “contaminated working environments”.

Work Related Musculoskeletal Disorders

The HSE estimate that 480,000 workers are suffering (new or longstanding) work related musculoskeletal disorders during the period 2019 to 2020. Of that figure, 152,000 workers suffered from a newly reported case of musculoskeletal disorder in the same period. The HSE report that 8.9 million working days were lost in 2019 to 2020 due to musculoskeletal disorders.

Of the abovementioned figure of 480,000 workers, the HSE break down the types of disorders suffered as follows:

- Upper Limbs or neck (212,000) – 44%
- Back (176,000) – 37%
- Lower Limbs (93,000) – 19%

FOCUS ON

The industries with the highest rates of musculoskeletal disorders are also highlighted as follows:

- Agriculture, Forestry and Fishing – 2,030 cases per 100,000 workers
- Construction – 2,020 cases per 100,000 workers
- Human Health and Social Work – 1,420 cases per 100,000 workers

By way of comparison, the "all industry" average for the development of musculoskeletal disorders is reported to be 1,130 cases per 100,000.

However, the HSE analysis with the figures states *"The rate of self-reported work related musculoskeletal disorders showed a generally downward trend. Similarly, working days lost per worker due to self-reported work related musculoskeletal disorders showed a generally downward trend …".*

The HSE go onto state *"Manual Handling, awkward or tiring positions and keyboard work or repetitive action are estimated to be the main causes of work related musculoskeletal disorders based on 2009/2010-2011/12 Labour Force Survey data".*

Accordingly, manual handling remains a key driver to workplace ill health and, therefore, likely to be a target activity in terms of enforcement.

Work Related Stress, Anxiety and Depression

In the period in question, 828,000 workers suffered from work related stress, depression or anxiety (new or longstanding). Of that figure, 347,000 workers suffered from a new case of work related stress, depression or anxiety.

It is worthy of note, in this context, that the period in question ended in the very earliest days/ weeks of the first national lockdown resultant from coronavirus. It is anticipated by commentators that there may be an uptick in work related anxiety and stress resultant from the enforced 'work from home' situation within the UK. Accordingly, this figure is largely, if not wholly, 'Covid-free' in terms of its impact.

Industries with above average rates of stress, depression or anxiety (averaged in the period 2017/18-2019/20) were as follows:

- Electricity, Gas, Steam and Air Conditioning Supply – 3,020 cases per 100,000 workers
- Public Administration and Defence – 2,960 cases per 100,000 workers
- Human Health and Social Work – 2,350 cases per 100,000 workers
- Education – 2,170 cases per 100,000 workers

For the public sector, in particular, these figures are potential grounds for concern (particularly as regards to future claims) with, effectively, 3 out of the 4 "worst sectors" within the sphere of public sector operations generally.

Moreover, the trend in regard to this type of workplace ill health is a further concern. The HSE analysis states:

"The rate of self-reported work related stress, depression or anxiety has increased in recent years. Working days lost per worker due to self-reported work related stress, depression or anxiety shows no clear trend. Workload, lack of support, violence, threats or bullying and changes at work are estimated to be the main causes of work related stress, depression or anxiety based on 2009/10-2011/12 Labour Force Survey data".

Costs to the British Economy of Workplace Injury and Ill Health

The HSE estimate an annual cost of £16.2 billion for all work related injury and ill health (in 2018/2019), excluding long latency illness such as cancer. Of that figure, £10.6 million is the annual cost of new cases of work related ill health (again, excluding long latency diseases such as cancer), with the balance of £5.6 billion being due to workplace injuries. Thus, 34% of the overall cost to the nation is due from workplace injury, with 66% being due to ill health. This is an interesting statistic because, historically, there has been a perception that the HSE focus, at least in enforcement terms, is on incidents and accidents as distinct from workplace ill health.

Enforcement Statistics

As part of the statistical information provided by the HSE, a round-up of the enforcement position for 2019 to 2020 is also provided.

The HSE figures indicate that they successfully prosecuted 325 cases in 2019 to 2020. No figures are provided for unsuccessful prosecutions in this period.

According to the commentary on the data, this represents a fall in the number of cases prosecuted, which allegedly continues a (downward) trend from the year before. However, over the period in question, £35.8 million was levied in terms of fines resultant from HSE prosecutions (in England and Wales and Scotland). According to the data, the average fine on conviction has decreased from £150,000 the previous year to £110,000 in 2019 to 2020.

7,025 Enforcement Notices were issued by the HSE in the relevant period. According to the data, the vast majority of these Notices are Improvement Notices, with Prohibition Notices accounting for circa 25% of the total figure.

Comment

As touched upon already, the figures produced by the HSE provide both an insight into the 'state of the nation' in health and safety terms, but also some sense of where enforcement may be heading over the course of the next 12 months and beyond. One would need a crystal ball to provide definitive guidance as to that latter aspect, however, the following comments may be of some assistance to readers.

FOCUS ON

The reduction in workplace fatal accidents in 2019 to 2020 is significant compared to the year earlier. Reduced economic activity as a result of Covid-19 will have, undoubtedly, had some impact on all the figures set out by the HSE, but it would appear unlikely that this could entirely explain the significant reduction compared to the previous year's figure. Regardless of Covid-19, 2019 to 2020 can properly, in my view, be described as a safer year in terms of fatal accidents at work. The HSE will (rightly, in my view) claim some credit for this.

The preponderance of deaths in the Construction and Agriculture sectors (accounting between them for 60% of the overall figure) is bound to ensure the continued attention of the HSE with regard to both these sectors. Agriculture, in particular, has had more than its fair share of fatalities in a historical context.

Moreover, any fatal incident involving a fall from a height or a collision from a moving vehicle (pedestrian/vehicle collision) is likely to prove problematic for the employer concerned, both in terms of likely enforcement (because it makes financial sense for the HSE to enforce in such cases given their impact by reference to the statistics) and penalty (because of the way in which the Definitive Sentencing Guidelines operates with regard to risk of harm and, therefore, the ability of the prosecution to argue for a risk of significant harm by reference to the statistical data produced from such incidents). The categorisation of risk of harm, as we know, has a major impact on sentencing parameters.

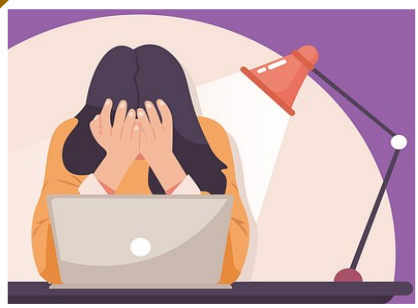
Non-fatal workplace injuries still continue at a significant rate and, in appropriate circumstances, will give rise to enforcement action from the HSE. From a straightforward risk management perspective, the data shows a significant preponderance for injuries arising from slips, trips and falls, as well as manual handling (lifting and carrying).

These are already well recognised as a source of incidents and claims, but the HSE figures reinforce the need for employers (and their risk management professionals and advisors) to redouble their efforts in relation to these activities to seek to ensure that they can be undertaken safely at all times.

The economic costs figures provided by the HSE serve to underline the potential savings that such initiatives will bring in due course.

Occupational Lung Disease continues to be a concern, but a significant element of this concern relates to historical periods of time when particular problematic materials (notably asbestos) were in use. However, due to the nature of the claims generated by such materials, they continue to be a problem for employers well beyond the time in question. The HSE have recently become interested in "nuisance" dust levels in the working environment and I anticipate a continued interest (in both advice and enforcement terms) in this regard moving forwards. The COPD figure in the 2019 to 2020 data provides obvious justification for such an approach given the risk of COPD arising from more common dust exposures (i.e. not those involving particular risks, such as asbestos dust).

The stress and anxiety figures are a further source of concern.



A number of years ago, it was anticipated that there would be an 'explosion' of stress claims from a wide variety of occupational settings. It did not materialise, in large part because the legal landscape made such claims more difficult. However, we now appear to be entering into a period of time where there are grounds for concern that workplace mental health issues are undergoing an upsurge. This is something which the HSE will, undoubtedly, be interested in. Moreover, in claims terms, it is possible that this environment will see more claims being generated as organisations, like unions, come to the view that these are issues which need to be tackled.

In this context, the fact that these statistics do not contain data for the main lockdown period (or, at least, most of the main lockdown period) in the UK means that the 2021 figures will be particularly interesting. As touched upon above, 3 out of the 4 industry sectors with the highest prevalence of work related stress, depression or anxiety are "public sector based" or will contain a preponderance of public sector employees (Public Admin/Defence, Human Health/ Social Work and Education).

I may say I am surprised by the enforcement data provided. My experience is that enforcement (usually by prosecution) is now much more likely as an outcome from an HSE investigation and, moreover, far more resources are being deployed to such investigations (albeit that may be a product of the Fee For Intervention (FFI) regime). Moreover, with the advent of the Definitive Sentencing Guidelines 2015, my experience is that fines have increased. Certainly, there is no doubt, based on my experience, that prosecutors are using the DG to seek higher fines from both public and private sector defendants. The drop in average fine figure from £150,000 to £110,000 may owe more to the make-up of the case cohort (i.e. possibly less corporate defendants with high turnovers in this year's figures). Regardless, regulatory fines are not an insurable risk and, therefore, payment of the same represents a direct drain on corporate resources.

Clearly, in an environment where defendants are emerging from the coronavirus pandemic and there is even more of a strain on finances (both public and private sector), it remains even more important than ever to ensure that proper legal advice is sought in any situation where the HSE (or, indeed, any Regulator) are, or may be, involved and/or considering regulatory investigation or action.

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RECENT CASE UPDATES

Civil Procedure – Costs – Indemnity Basis – Discretion

Telefonica UK Ltd v Office of Communications [2020] EWCA Civ 1374

The Appellant mobile network operator appealed against the refusal by the Trial Judge to award enhanced interest on a Judgment and on an award of indemnity costs in its favour.

The Appellant brought an action against the Respondent and obtained a Judgment at Trial which was more advantageous than its Part 36 Offers. The Judge awarded indemnity costs under CPR 36.17(4)(b) and an "additional amount" of £75,000 under CPR 36.17(4)(d). However, the Judge refused to award additional interest under CPR 36.17(5).

The Court of Appeal allowed an appeal against this decision.

It was held that the Judge's reasoning on interest on the principal sum did not bear scrutiny. The Judge had considered that it was relevant that the Part 36 Offer represented only a small discount on the amount claimed, although it was found to be a genuine attempt to settle. It was difficult to see the relevance of the level of the offers given that the key factor was that the Defendant could have avoided the need for a Trial by accepting the offer. Once the Judge had found it was a genuine attempt to settle the claim, the level of the offer could not, in itself, form the basis of an assessment of the 'proportionality' of enhanced interest, let alone finding that any enhanced interest would be unjust. The Judge improperly declined to implement Part 36 because of the small margins involved; *Carter v BAA Plc [2008] EWCA Civ 412* disapproved.

The Court had a wide discretion as to the rate of enhanced interest to award. Any disproportionality should be addressed that way rather than not awarding any interest at all.

There was no justification for the Judge's approach of treating the award of the additional amount of £75,000 and of indemnify costs as factors rendering it unjust to also award enhanced interest on the principal sum. The rules provided for a successful Claimant to receive each of the four entitlements and there was no suggestion that the award of one in any way undermined or lessened the entitlement to the others.

In relation to the enhanced interest on costs, the key question was which party was responsible for costs being incurred when they should not have been. In this case, the costs were incurred because the Defendant could have, but did not, accept the Appellant's offer.

In allowing the appeal, it was held that the Judge took account of irrelevant considerations, contrary to clear statements of principle in the authorities, and failed to take account of his discretion about the rate of interest.

RECENT CASE UPDATES

Damages – Illegality – Diminished Responsibility

Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43

The Claimant, 'H', who suffers from paranoid schizophrenia, stabbed her mother to death whilst experiencing a serious psychotic episode. H pleaded guilty to manslaughter by reason of diminished responsibility and was sentenced to a Hospital Order under s.37 of the Mental Health Act 1983 and an Unlimited Restriction Order under s.41 of the 1983 Act. The Defendant Trust, 'D', admitted negligence in failing to return H to hospital on the basis of her manifest psychotic state and that the killing of H's mother would not have occurred had this been done. H claimed damages against D as a result of its admitted negligence, comprising general damages for personal injury (depressive disorder and PTSD) consequent upon killing her mother, her loss of liberty and loss of amenity, loss of the share in her mother's estate that H was unable to recover as result of the operation of the Forfeiture Act 1982, the costs of future psychotherapy and a care manager/support worker. D denied liability on the grounds that the damages claimed were the consequences of the sentence imposed upon H by the criminal court and/or her criminal act and were, therefore, irrecoverable by reason of illegality.

In *Gray v Thames Trains Ltd [2009]*, the House of Lords held a similar claim for damages to be irrecoverable. H submitted that her claim could be distinguished from *Gray* or, if not, the decision in *Gray* should be departed from in light of the Supreme Court's decision in *Patel v Mirza [2016]*.

A preliminary issue trial was ordered to determine whether the damages claimed were recoverable as a matter of law. H failed at first instance and before the Court of Appeal. H appealed to the Supreme Court.

In relation to distinguishing her case, H sought to rely on obiter comments in *Gray* to the effect that the decision in that case should not apply where the Defendant did not have significant personal responsibility for what occurred. The Judge in H's criminal trial had said in his sentencing remarks that there was no suggestion H should be seen as bearing a significant degree of responsibility for what she did. The Supreme Court dismissed this finding that the degree of responsibility involved formed no part of the reasoning of the majority in *Gray*. The crucial consideration for the majority was the fact that the Claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected. *Gray* could not be distinguished.

As regards departing from *Gray*, H submitted that the decision in *Gray* was an example of the now discredited rule-based approach to illegality and was contrary to the flexible policy approach endorsed in *Patel*. It did not allow for the Court to take into account the particular circumstances of the case, such as the degree of the Claimant's personal responsibility. Nor did it allow for consideration of proportionality. The Court rejected this finding that the reasoning in *Gray* was consistent with the approach adopted in *Patel*.

H further submitted that it should be held that *Gray* does not apply where the Claimant has no significant personal responsibility for the criminal act and/or there is no penal element in the sentence imposed as there is no inconsistency or incoherence between the civil and criminal law in such circumstances.

The Court found that H's arguments did not meet the high hurdle of justifying departure from *Gray*. The majority in *Gray* had considered that an inconsistency would arise between the civil and criminal law regimes if a Claimant was allowed to recover damages resulting from a sentence imposed on them for an intentional criminal act for which they had been held responsible; that would be to treat an offender under the criminal law as a victim under tort law and entailed a clear risk of inconsistent decisions being reached in the criminal and civil courts. That conclusion was not altered by the fact that the sentence imposed by the criminal court, such as a Hospital Order, might not entail a penal element; such an Order did not mean that the Claimant was blameless. Moreover, a sentencing Judge would not be specifically addressing the issue of significant personal responsibility, which raised questions of great complexity.

H submitted that application of the 'trio of considerations' approach set out in *Patel* led to a different outcome. The Court considered and applied the trio of considerations approach and found that it did not lead to a different outcome.

The Court, thus, affirmed the decision in *Gray* as being '*Patel* compliant' and held that the clearly stated public policy-based rules set out *Gray* should be applied and followed in comparable cases. The Claimant's appeal was dismissed.

QOCS – Pre-Action Costs

Waterfield & Others v Dentality Ltd (T/A Dentality @ Hoddeston) &Others [2020] 11 WLUK 223

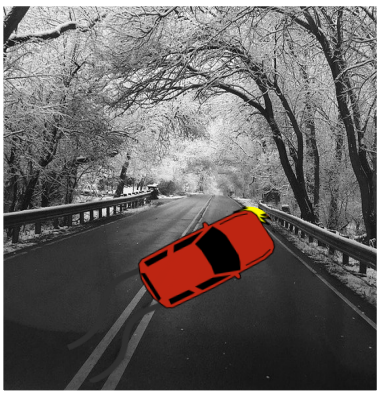
The Claimants, 'C', were patients of the Defendant dental practice, 'D'. C indicated their intention to bring claims for damages against D after being exposed to a risk of contracting blood borne viruses following failings by a dental hygienist. Before issuing any claims, C applied for a Group Litigation Order (GLO). This was refused on the basis that it was inadequate and premature. Whilst C accepted a Costs Order should be made against them, C submitted they were protected by the Qualified One-way Costs Shifting regime (QOCS). D submitted that as there were no proceedings afoot, QOCS did not apply.

The general rule in CPR 7.2 states that proceedings are started "*when the Court issues a Claim Form at the request of the Claimant*". The Judge found that there was no specific rule within the CPR which conflicted with that general rule and construing the definition of proceedings in CPR 44.13 to give it the meaning in the general rule in CPR 7.2 did not conflict with the aim and purpose of the QOCS regime.

Accordingly, '*proceedings*' for the purposes of CPR 44.13 started when the Court issued a Claim Form on the request of a Claimant and the QOCS rules did not apply to pre-issue Applications, including the pre-issue GLO Application in this case. This did not undermine the purpose of the QOCS regime of ensuring access to justice as the option remained to make a post-action GLO Application which did benefit from costs protection.

Road Traffic Accidents – Breach of Duty – Ice – Burden of Proof – Apportionment

Smithson v Lynn (1) North Yorkshire County Council (2) [2020] EWHC 2517



Facts

The Claimant, a passenger in the First Defendant's car, sustained a serious brain injury when the First Defendant lost control of his vehicle due to the presence of ice on the road.

The First Defendant denied that he had driven negligently and alleged that his vehicle left the road due to the presence of black ice. The First Defendant brought contribution proceedings against the Second Defendant, the Highway Authority, for their failure to treat the road. The Highway Authority was made a Second Defendant within the proceedings by the Claimant.

The First Defendant compromised the Claimant's claim prior to Trial, such that the action proceeded against the Highway Authority alone to determine the additional claim for an indemnity or contribution based on an alleged breach of the Highway Authority's duty under Section 41(1A) Highways Act 1980.

Burden of Proof

The High Court held that the burden of proof under Section 41(1A) rested with the Highway Authority, which was under a duty to prove that all "reasonably practicable" steps had been taken to ensure that the safe passage along the highway was not endangered by the presence of ice or snow.

Findings

Witnesses for the Highway Authority gave evidence at Trial as to the Authority's Winter Service Manual which set out the Highway Authority's Scheme for prioritising roads and managing resources. Expert evidence was adduced and the experts agreed that, in general terms, the Winter Service Manual represented a reasonable compromise between the duty to keep the highways safe without imposing a rigid obligation to keep ***all*** highways free from ice and snow.

However, the Court was critical of the absence of any guidance within the Winter Service Manual on how to respond to ad hoc requests, which had led to practices developing requiring "exceptional circumstances" before a response/action was deployed. The Court found that the way in which the Second Defendant's witnesses interpreted this phrase was, whilst consistent with each other, unduly restrictive. As such, as a result of a total of five incidents which had occurred on the stretch of road in question prior to the index accident (albeit not all at the exact same location), the Court found that the Second Defendant had not ensured that safe passage along that road was not endangered by ice or snow.

Accordingly, the issue to be determined was whether the Second Defendant had done all that was "reasonably practicable". The Court held that the Second Defendant had failed to discharge the burden of proof due to the fact that the Highway Authority had a system which was prepared to entertain ad hoc requests, but which placed an unnecessarily restrictive test before being prepared to exercise this discretion. The quantum of risk was easily identifiable in terms of the foreseeability that a serious road traffic accident may occur if the road was not treated, but the likely costs in terms of finance and manpower to ameliorate that risk was unspecified in evidence, but did not seem, in principle, particularly significant.

Causation

The Second Defendant sought to raise a causation argument submitting that even if it had taken action, that action would not have prevented the index accident (because the police gave incorrect information about the precise location of one of the previous incidents relied upon by the First Defendant). This argument was rejected on the factual matrix and on the basis of *Wilkinson v City of York Council [2011] EWCA Civ 207*.

Indemnity and Apportionment

The Court had considerable sympathy for the First Defendant for having lost control of his vehicle on black ice. However, the evidence was that the First Defendant had been driving around for 3 hours before the collision and it was, therefore, not accepted that he did not know, as he suggested, that the roads were icy. There were 'Police Slow' signs in place following previous incidents in the area. The First Defendant was found to have been driving too fast in the circumstances.

Having regard to the Highway Authority's statutory duty to users of the highway however, it was considered that the Highway Authority should bear the greater share of the blame. The Second Defendant was held to be two-thirds liable and the First Defendant one-third.

Liability was apportioned accordingly.

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

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