DOLMANS INSURANCE BULLETIN

Welcome to the December 2020 edition of the Dolmans Insurance Bulletin

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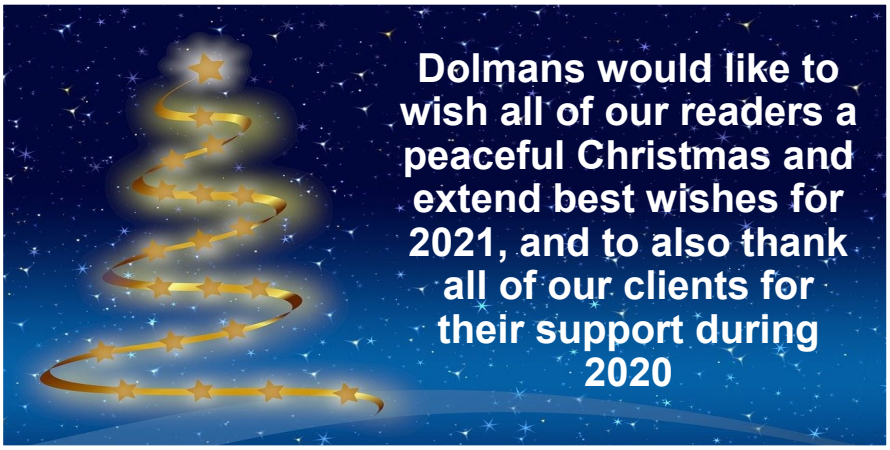

If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor,
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REPORT ON

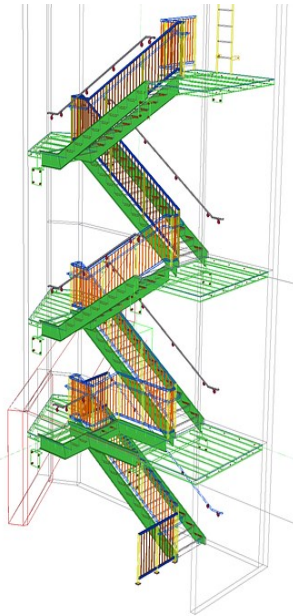
Workplace Accidents - Stripping Away the Issues

S F v Rhondda Cynon Taf County Borough Council

A variety of issues often arise in claims by employees against their employers following accidents at work and the recent case of *SF v Rhondda Cynon Taf County Borough Council* is no exception to this.

The Judge in this particular case, in which Dolmans represented the Defendant Authority, was faced with a number of arguments and allegations by the Claimant, including those relating to various Building Regulations, Risk Assessments, Workplace Regulations, Framework Directives and Workplace Directives.

Background



The Claimant was employed by the Defendant Authority in premises that were owned and controlled by the Defendant Authority. The premises had been purchased by the Defendant Authority approximately six years prior to the Claimant's alleged accident and had not been altered structurally during this period.

The Claimant alleged that he was walking up a flight of open tread metal stairs within the premises when he caught his foot under one of the treads, causing him to fall and suffer relatively serious injuries to his dominant left hand.

The Claimant's hospital records stated that he had fallen over in work while "running upstairs", although the Claimant argued that this was a figure of speech. Nevertheless, there were no witnesses to the alleged accident and the Claimant was put to strict proof as to factual causation, particularly the exact circumstances and mechanics of his alleged accident. Liability was disputed.

Claimant's Allegations

The Claimant pleaded that the open tread design of the stairs, and specifically the lack of any risers, which were sometimes also referred to as kickboards, had caused the Claimant to catch his foot and fall. The Claimant alleged, therefore, that the stairs were unsafe and that the Defendant Authority had breached its duty of care to the Claimant.

The Claimant was in possession of a Risk Assessment which related to a similar flight of open tread metal stairs at a different location also within the Defendant Authority's ownership and control. This particular Risk Assessment pre-dated the Claimant's alleged accident and identified that the stairs posed a medium risk to staff walking up them.

The Defendant Authority admitted that there was no similar Risk Assessment for the stairs where the Claimant's alleged accident occurred and the Claimant argued that had there been such a Risk Assessment of the stairs at the location of the Claimant's alleged accident, it follows that a similar risk would have been identified.

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REPORT ON

Regulations, Directives and Civil Liability

It is pertinent to mention that the Claimant's pleaded case was that his accident was caused by a breach of statutory duty or negligence on the Defendant's part, insofar as the stairs were unsafe and that the Claimant sought to rely upon alleged breaches of various Regulations. These included the Management of Health and Safety at Work Regulations 1999 and the Workplace (Health, Safety and Welfare) Regulations 1992, although the Defendant Authority argued that these are not actionable by virtue of section 69 of the Enterprise and Regulatory Reform Act 2013.

The Claimant also pleaded breaches of the Framework Directive and the Workplace Directive but failed to cite the actual wording of the individual Directives, and the Defendant Authority argued that these Directives do not confer a separate civil cause of action for damages in any event.

In summing up the Defendant Authority's case at Trial, Counsel summarised the position as follows:

It was argued that whilst it is correct that the Defendant Authority is an emanation of the state, any breach of the Directives does not create civil liability for the following reasons:

- Neither of the Directives specify that a Claimant may sue for damages for breach of their provisions.
- The choice of remedy is a matter for the member state.
- The Directives leave open to member states freedom to decide how to implement them.
- The Directives were not intended to create new remedies in national courts to ensure the observation of EU law other than those already laid down by national law.
- The UK has implemented the Directives appropriately and the Regulations provide for criminal but not civil liability, which is adequate.
- The provisions of the Directives are not unconditional or sufficiently precise so as to give rise to actual rights for damages in a civil claim.

Reference was also made to the decision in *Sayers v Cambridgeshire County Council [2006] EWHC 2029*, in which Mr Justice Ramsay held, in the context of a claim for damages for psychiatric injury due to work-related stress, that the Working Time Directive does not confer a cause of action for breach of statutory duty and the Working Time Regulations which implemented the Directive likewise did not create civil liability.

REPORT ON

Standard of Care - Occupiers' Liability Act 1957

Although not specifically pleaded, both parties agreed at Trial that the Defendant Authority, as the Claimant's employer, had a duty to provide safe premises, and that the standard of care was akin to that provided by Section 2(2) of the Occupiers' Liability Act 1957, namely to take reasonable care to see that the Claimant was reasonably safe for the purposes for which he was permitted to be there.

Were the Stairs Reasonably Safe?

The test to be applied is whether the stairs posed a real source of danger to their users, in accordance with the decision in *Debell v Dean of Rochester Cathedral [2016] EWCA Civ 1094*.

The Defendant Authority relied upon witness evidence by its own Health & Safety Advisor, who contended that the staircase was reasonably safe, with evenly spaced, large, wide treads, and concluded that no action was required following his post-accident inspection of the stairs.

The Defendant Authority's witness also confirmed that the staircase complied with 2010 Building Regulations (Part K), which were in force when the Defendant Authority purchased the premises, and that the same type of open tread metal staircase was still available to purchase at the time of Trial.

Following an observation that the Building Regulations had been updated since 2010, the Court was reminded that those Building Regulations in place at the time of construction were relevant and that there was no obligation upon the Defendant Authority to upgrade the stairs to comply with any current Building Regulations. The 2010 Building Regulations were adduced by the Defendant Authority's witness, merely as an indicator of the Regulations in place when the premises were purchased by the Defendant Authority and, therefore, within its ownership and control at that time.

The Defendant Authority argued that similar stairs without risers/kickboards are found in a variety of work, commercial, retail and domestic environments and are not prohibited. If risers/ kickboards had been fitted, the Defendant Authority argued that the depth of each tread would have been reduced and that it would have been more likely for detritus to collect on the stairs, potentially causing a hazard.

In addition, the nosings of the stairs were painted yellow and there was a handrail for use by staff using the stairs.

REPORT ON

Was there a Lack of Reasonable Care by the Defendant Authority?

If, despite the Defendant Authority's above arguments, the Court found that the stairs were dangerous, then the Court would need to consider whether or not the Claimant's alleged accident was due to a lack of reasonable care on the part of the Defendant Authority.

The Defendant Authority did not design, supply or purchase the stairs, but inherited them from the previous owner of the premises. There had been no accidents either between the date that the Defendant Authority purchased the premises and the date of the Claimant's alleged accident or thereafter. Neither the Claimant nor anybody else had complained about the stairs previously.

In the absence of any complaint or prior accident relating to the state of the stairs, it was submitted that the Defendant Authority had not failed to take reasonable care by omitting to add risers/kickboards or make other modifications.

Despite the Defendant Authority's arguments, or possibly because of such arguments, the Claimant did attempt to introduce new allegations on the day of the Trial which had not been pleaded or referred to in the Claimant's Witness Statements.

Counsel for the Claimant argued at Trial that, notwithstanding what had been said regarding Building Regulations, the depth/goings of each step did not comply with the 2010 Building Regulations and were insufficient/not uniform. It appeared, therefore, that the Claimant was now arguing that this was also a contributing factor to the alleged accident.

Judgment

The Judge was not persuaded by the late allegations, finding that the Claimant's Witness Statement was clear as to the specific cause of the alleged accident, namely that this could have been avoided if there were risers/kickboards present.

The Judge was, however, persuaded that the Claimant's alleged accident had occurred as alleged, despite the content of the hospital records and that factual causation had been proved.

It was accepted by the Judge that the stairs were in situ when the Defendant Authority purchased the premises, that the relevant Building Regulations were those in force at the time of construction and that there was no obligation upon the Defendant Authority to upgrade the stairs to comply with subsequent Building Regulations.

The Judge agreed that the standard of care was akin to that provided by the Occupiers' Liability Act 1957 and that he needed to consider whether or not the stairs were safe for the Defendant Authority's employees to use, irrespective of the Building Regulations referred to.

In so doing, the Judge considered that there were no complaints or similar accidents, either before or after the date of the Claimant's alleged accident, and that the stairs had not been altered in the meantime.

Although the Risk Assessment relating to the stairs at the other location had identified a medium risk, there was no suggestion that risers/kickboards should have been installed, only noting that they were not installed. The Judge was not prepared to find that a Risk Assessment of the stairs at the location of the Claimant's alleged accident would definitely have concluded that risers/kickboards should be installed, finding instead that the absence of a Risk Assessment did not of itself prove a cause of action. The Judge did not find the evidence relating to Risk Assessments in this particular matter to be of much use anyway.

The Judge found that the stairs at the location of the Claimant's alleged accident were not unusual and did not look unsafe from the photographs. The Judge was also mindful that any stairs can pose a risk of falling.

In dismissing the Claimant's claim, the Judge concluded that the absence of risers/kickboards did not make the stairs unsafe in this matter.

Conclusion

The Judge in this matter had to streamline the issues and concentrate on the relevant test, akin to the duty provided by the Occupiers' Liability Act 1957. By stripping away the Claimant's arguments regarding Building Regulations, Risk Assessments, Workplace Regulations, Framework Directives and Workplace Directives, etc, the Judge was able focus on whether or not the stairs were dangerous to their users. The Defendant Authority's comprehensive witness evidence by its own Health & Safety Advisor, who had subsequently investigated the stairs, undoubtedly assisted the Judge in reaching his conclusion.

The Claimant's Claim Form valued damages up to £100,000.00 and the Claimant's Costs Budget was agreed at £90,297.00, excluding VAT. The above decision, therefore, represents a substantial saving for the Defendant Authority, particularly as the Claimant had made a Part 36 offer before Trial that could have posed a costs risk to the Defendant Authority had the Claimant succeeded at Trial in this matter.

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FOCUS ON

Employers' Liability / Vicarious Liability

Andrew Chell v Tarmac Cement and Lime Limited
(5 October 2020, Martin Spencer J, Queen's Bench Division, Birmingham District Registry)
[2020] EWHC 2613 (QB)

"The practical joke must be the lowest form of humour. It is seldom funny, it is often a form of bullying and it has the capacity, as in the present case, to go seriously wrong. Mark Twain was surely right when he said:

"When grown up persons indulge in practical jokes, the fact gauges them. They have lived narrow, obscure and ignorant lives, and at full manhood they still retain and cherish a job-lot of left-over standards and ideals that would have been discarded with their boyhood if they had moved into the world and a broader life."

(Martin Spencer J, paragraph 1, Chell v Tarmac, Judgment, 5 October 2020)

For some time now there has been speculation and debate as to the perception that vicarious liability has been 'on the march' – that is to say there have been a number of cases which have suggested that, predominantly for public policy reasons, the ambit of vicarious liability may be widening, albeit the situation was far from clear [1]. Naturally, this has been a matter of concern for both institutional defendants and insurers alike.

Horseplay and 'frolics of one's own' have long been a source of difficulty in employers' liability situations, often as a result of serious injury being caused in circumstances where, undoubtedly, there was a moral case for the Claimant to recover damages, but, legally, the situation was underdeveloped.

A recent appeal decision from Martin Spencer J, sitting in Birmingham District Registry, suggests that whilst vicarious liability may have been on the move, that movement might well have paused, at least for the moment.

[1] See *Mohamud v WM Morrison Supermarkets PLC [2016] UKSC 11* and *WM Morrison Supermarkets PLC v Various Claimants [2020] UKSC 12*

FOCUS ON

In *Andrew Chell v Tarmac Cement and Lime Limited*, the Claimant/Appellant (hereafter 'Appellant') was the victim of grossly stupid and transparently unsafe conduct by others, leading to serious personal injury. The question for the Court was whether he should be entitled to recover damages from the site operators of the site in question and/or employers of the employees responsible for the prank which gave rise to his injury – Tarmac – by reference to the law of vicarious liability.

The Appellant was employed as a fitter and was contracted by his employers (Roltech) to work at a quarry site owned and operated by Tarmac (the Respondents). The Respondents employed their own fitters on site, but used additional, external workers (such as the Appellant) as well for a particular project/period of time. Tensions arose between the two sets of workers, possibly because of a perception that the agency workers (such as the Appellant and his brother who also worked at the same site) were being brought in to the detriment of the permanent staff. There certainly appeared to be reason (on the part of Tarmac management) to suspect that the Roltech workers were completing their work more efficiently. The explicit risk of the Roltech workers supplanting the Tarmac fitters, however, was something denied by the Respondents. Nevertheless, the Appellant had allegedly raised this issue (tensions and the perception of permanent workers that their jobs were in jeopardy), with the Respondent. It was certainly accepted by his own Manager at Roltech that such tensions and concerns existed.

Nevertheless, in terms of factual findings, the Trial Judge found that there was no notification **to Tarmac employees** of a specific perception amongst either team of employees that the Roltech staff would eventually (or were brought in explicitly to) supplant the Tarmac employees. The Tarmac Site Manager gave evidence on this point, contrary to the Appellant's evidence, and his evidence was accepted at Trial, in preference to the Appellant's. Moreover, there was no evidence to suggest that the Trial Judge found that the tensions which did exist between the two sets of staff might boil over into actual animosity or violence.

The Tarmac fitter responsible for the eventual incident which gave rise to the Appellant's injury (H), had been disciplined previously by his employers, but this related to his manipulation of the time clock system to claim that he was in work longer than he was, in fact, in work.

On 4 September 2014, as a 'practical joke', H brought some pellet targets, which exploded when struck, onto site. He placed them on the Appellant's work bench and, when the Appellant bent down to collect something from under his bench, such that his ear was very close to the targets, struck them with a hammer, causing the Appellant to suffer a perforated ear drum, traumatic hearing loss and tinnitus. H was dismissed from his employment with Tarmac as a consequence of the incident.

FOCUS ON

The Appellant, in his original claim (issued in August 2017), had claimed that the Respondent was vicariously liable for H's actions, as well as being directly responsible for his injuries by breaching its duty of care and failing to provide a safe working environment. The Appellant also proceeded, initially, against his own employers, Roltech; albeit the claim against them was subsequently discontinued (in December 2018). The rationale behind that decision is not discussed in the Judgment, but, one assumes, this was based on the fact that his employers would have had no control over the site in question or the staff operating there. However, as above, they were (through their Manager responsible for the Appellant) aware of the tensions between the Roltech workforce and the Tarmac fitters.

At first instance, in October 2019, the Trial Judge (HHJ Rawlings sitting in the Stoke on Trent County Court) dismissed the claim against Tarmac.

Interestingly, the Respondents called evidence at Trial from only the Site Manager, Mr Grimley. They had, late, adduced two further Witness Statements, one from Tarmac's HR Manager and one from a Maintenance Supervisor at the site. Initially, the Claimant objected to this evidence (it being served out of time) and refused to allow it into the Trial Bundle. Thus, the Defendant prepared a separate bundle with these Witness Statements contained therein. However, at Trial, the Defendant's Counsel decided (with great tactical insight it is submitted – see comments section below) not to make an Application to call these two witnesses. However, the Claimant's Counsel indicated that he wanted the Trial Judge to see the Witness Statements because, in his view, they contained information which would assist the Claimant's case.

In particular, the HR Manager set out what would have happened, in terms of the creation of investigatory documents, if issues had been raised as to the alleged tensions between the Roltech and Tarmac personnel. The Claimant asserted (through Counsel) that, on the basis of the evidence that concerns had been raised by the Claimant and his brother with their Supervisor (also a witness for the Claimant) who, in turn, confirmed that the same had been passed onto the Site Manager, Mr Grimley, the absence of any investigatory documents and the absence of evidence that an investigation had taken place significantly assisted the Claimant.

The evidence of the Site Maintenance Supervisor (Mr Jones) was said to support the Claimant's complaints as to tensions between the Roltech and Tarmac personnel and, therefore, knowledge on the part of Tarmac that something untoward might have occurred, which they should have done more to guard against, in particular, they should have done something to defuse the obvious ill feeling on the part of their own staff leading to the incident in question.

The Judge's findings at first instance were (in summary) as follows:

- H had struck the two pellet targets with a hammer close to the Claimant's ear. H had brought the said pellet targets to site from outside, but the hammer used to strike them was work equipment provided to him in the workshop.

- Immediately before the index incident, the Claimant and H were not working in the same part of the premises and neither H or his colleague (S, another Tarmac employee, present at the time of the incident) had any supervisory or other role in relation to the work that the Claimant was carrying out in the workshop at the time.

- H and S had access to the workshop as part of their role as (Tarmac) fitters.

- H's actions amounted to a joke at the Claimant's expense, which was connected with the tensions between the two sets of employees (see above). Those tensions gave rise to a desire on the part of H and S to play a practical joke on the Claimant.

- From the perspective of the Claimant (and his brother who worked with him and who also gave evidence), the tensions had, in fact, eased in the period before the index incident occurred.

- The Judge was satisfied that the Claimant and his brother had told their own Supervisor (at Roltech) of the tensions in existence between the Roltech staff and the Tarmac staff. Moreover, it was noted in the evidence of Mr Jones of Tarmac (see above) that general tensions had existed on site between the two sets of staff and, therefore, this was within the knowledge of the Defendant via Mr Jones. However, this friction, which was acknowledged, did not include any express or implied threats of violence. In any event, this issue was only raised once with the Site Manager for Tarmac, Mr Grimley, and, in that context, the Judge preferred Mr Grimley's evidence that the Claimant had not, at that time, been asking to be removed from the site.

- The Judge declined to draw adverse inferences from the fact of the previous disciplinary action against H or the lack of documents relating to the purported required investigation into the tensions (as referenced in the Tarmac HR Manager's Witness Statement).

The Trial Judge then came onto consider, via that factual matrix, the issue of vicarious liability, by reference to the cases of *Mohamud v WM Morrison [2016] UKSC 11* and *Lister v Hesley Hall Limited [2001] UKHL 22* (together with other cases mentioned in the Judgement, but the *Mohamud* and *Lister* Judgments were clearly the central legal principles considered by the Judge given their obvious opposition to one another – with *Lister* indicating a generally narrower view of vicarious liability in the context of 'horseplay' and *Mohamud* an assault case arising at a Morrison's petrol station; being one of the seminal cases in the recent 'march of vicarious liability' clearly widening the ambit of the same.

The Judge found that the first limb of the *Lister* two-limb test was satisfied – there being a close relationship between Tarmac and H because H was Tarmac's employee at the relevant time.

The Judge also found (interestingly, in the context of this article if nothing else) that the second limb of the *Lister* test was undisturbed by the Supreme Court's findings in *Mohamud*.

The test was whether there was a sufficient connection between the relationship between Tarmac and H as employer/employee and H's act of striking two pellet targets with a hammer close to the Claimant's ear to make it just that Tarmac should be held responsible for that act.

In considering that critical test, the Judge found that he should consider first the field of activities entrusted to H by Tarmac and, secondly, whether there was sufficient connection between that field of activities and the position in which H was employed, and H's act of striking the two pellet targets, to hold that Tarmac should be liable having regard to the principles of social justice.

Having made those preliminary observations, the Trial Judge found that the following factors in the case, in his Judgment, did not support a finding of vicarious liability for H's actions towards his employers, Tarmac:

- The pellet targets were not work equipment – they were brought onto site either by H or by one of his colleagues.
- It formed no part of H's work to use, let alone hit, those pellet targets.
- What H did was unconnected to any instructions given to him in connection with his work.
- H had no supervisory role in relation to the Claimant's work and, at the index time, he was meant to be working on another job in another part of the site.
- The striking of the targets did not in any way advance the purposes of his employers, Tarmac.
- In the circumstances, work merely provided the opportunity to carry out the prank that he played, rather than the prank in any sense being **in the field of activities that Tarmac had assigned to H.**

Moreover, he also found that the tensions, which he did accept were created by Tarmac in employing Roltech fitters to work on the same site as directly employed Tarmac fitters, and the fact that a Tarmac Manager (Mr Grimley) was made aware of these tensions, did not create a sufficiently close connection between the relationship of employer/ employee between Tarmac and H and H's wrongful conduct in terms of hitting the two pellet targets with a hammer.

The Appellant's Appeal (before Martin Spencer J) was directed, in principle, to the Trial Judge's (alleged) misdirection of himself as to the appropriate test to be applied in a case such as this. Martin Spencer J found, on reviewing the Judgment, that there had been no misdirection as to the appropriate legal test. He stated, *"On the contrary, in my Judgment the exposition of the relevant principles by the Learned Judge below was exemplary, fully and correctly reflecting the authoritative statements from the recent leading cases. As submitted by (Defendant's Counsel), the Learned Judge correctly and appropriately adopted the two-stage test set out at paragraphs 44 and 45 of Lister."*

Interestingly, at the time of the original Judgment, the Trial Judge did not have available to him the Judgment of the Supreme Court in *Morrisons Supermarkets v Various [2020] UKSC 12*, however, had that been available, in Martin Spencer J's view, the Trial Judge:

"… would have been fortified in the conclusions to which he had come and in his approach to this issue which, he would have found, and I find, was endorsed by the Supreme Court's Judgment. I reject the suggestion that [he] failed to give adequate consideration to the matters set out in paragraph 27 above [issues arising, according to the Claimant, from the Morrisons v Various Judgment]. In particular, he rejected the suggestion that what H was purporting to do was to lighten the mood after recent tensions. The fact that H used a work implement, namely a hammer, was rightly regarded as wholly incidental to the act in question."

In regard to the Judge's findings as to direct breach of duty on the part of Tarmac (rejecting an argument from the Appellant that a risk assessment should consider issues of 'horseplay, ill-discipline and malice' – on the basis that they were not matters normally expected to be included in a risk assessment because one would not normally expect them to arise), the Appeal Judge found, *"… it is expecting too much of an employer to devise and implement a policy or site rules which descend to the level of horseplay or the playing of practical jokes …"*

He further found that the Trial Judge's two below findings were wholly reasonable:

(i) The existing site health and safety procedures, which included a section on general conduct stating *"no one shall intentionally or recklessly misuse any equipment"*, was sufficient given the multifarious ways in which employees could engage in horseplay, ill-discipline or malice and nothing more specific could reasonably be expected, and;

(ii) Increased supervision to prevent horseplay, ill-discipline or malice was not a reasonable step to expect this employer to have identified and taken.

Any criticism of the 'failure' on the part of Tarmac to address the tensions between Roltech and Tarmac employees, in its risk assessment(s), was driven by the issue of hindsight, as were a number of the alleged failings of Tarmac in the case.

Ultimately, and not without considerable sympathy for the Appellant (see paragraph 39 of the Judgment), Spencer J dismissed the Appeal in its entirety.

Comment

It is an oft used initial comment in these circumstances, but, one must keep in mind that this is a case dependent on its own (rather unusual, to say the least) factual circumstances. Thus, it would be dangerous to assume any immediate guiding principles from the decision which is, after all, a first-tier appellate decision in any event.

However, the very careful analysis by the Trial Judge of *Lister*, through the prism of *Mohamud* (now, seemingly, explicitly supported by the approach of the Supreme Court in *Morrisons v Various Claimants*), represents, in my submission, confirmation (particularly given its endorsement on Appeal) that the *Lister* test remains good law in employers' liability cases (despite *Mohamud*) and, moreover, a good template to consider almost any 'horseplay' and/or scope of employment case moving forwards.

At the same time, it is easy to see how a relatively modest adjustment of the factual circumstances might have contributed to a very different result. What if, for instance, the pellet targets were not brought in from outside the quarry premises but were, for instance, detonators or blasting caps used to trigger explosives used in quarrying operations? One might speculate that this might be sufficient to cause differing results.

Moreover, concessions by other possible witnesses on behalf of Tarmac (see below) might have also altered the balance in favour of the Appellant.

In that sense, albeit this Judgment is welcome for both institutional defendants and insurers alike, it also serves, in my submission, to underline the need, at all times and in all factually or legally difficult employers' liability cases, to seek detailed legal advice at the earliest opportunity.

In that context, and hidden beneath the surface of this case, are also, in my view, a number of tactically interesting decisions. For example, what if the Appellant's solicitors had not opposed the late introduction of the two additional Witness Statements for Tarmac, but actually allowed those witnesses to give evidence and sought to cross-examine them on the very matters which the Appellant's Counsel was, ultimately, forced to seek to address by inference only (arguably to the Appellant's cost).

Would that submission, on inference, have been stronger if the witnesses were intended to be called (i.e. their evidence was not opposed and included in the Trial Bundle), but then the Respondent made a tactical decision, during the course of the Trial, not to do so?

The Respondent's Counsel's decision not to renew any Application to call this witness evidence (before the Trial Judge) can be seen as tactically very astute, and one can but wonder, assuming those witnesses were present in the Pre-Trial Conference, what was revealed in the Pre-Trial Conference in October 2019.

Horseplay cases remain problematic for Defendants, but the impact of *Morrisons v Various Claimants* via *Chell v Tarmac* appears to confirm the continued applicability of the *Lister* test for all of the reasons outlined above. Moreover, it appears, subject to any further appeal, that the *Chell* case has signalled a retreat from what was anticipated to be a fairly high tide for vicarious liability following *Mohamud*.

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RECENT CASE UPDATES

Civil Procedure - Coronavirus - Default Judgments - Injunctions

Martin Glenn v Craig Kline
[2020] EWHC 3182 (QB)

The Claimant applied for Judgment in default after the Defendant failed to acknowledge service of his defamation claim.

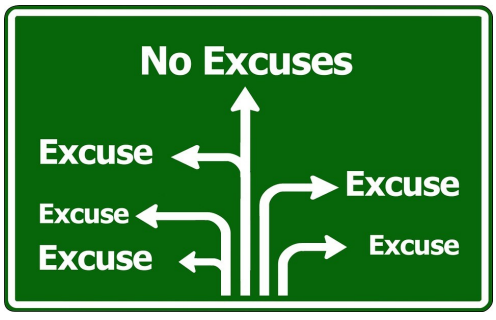
The Defendant submitted that the hearing of the Claimant's Application should be adjourned because (1) he had not had sufficient time to prepare a Defence or obtain representation; (2) he was facing other claims that might need to be consolidated with the Claimants; (3) the Covid-19 pandemic had impacted his ability to acknowledge service and file a Defence.

It was held that the Defendant's grounds did not justify an adjournment:

(1) The Defendant had had ample time to read the Particulars of Claim and file an Acknowledgment of Service. He had provided no evidence of any unsuccessful attempts to obtain legal advice or representation.

(2) On the limited information the Defendant had provided, it was impossible to assess whether there were other claims in which there was a sufficient overlap of issues and/or parties to make it arguable that there ought to be some consolidation of proceedings. It was impossible to identify the issues that would arise in the instant proceedings.

(3) The Defendant could not use the pandemic as a reason for requiring an adjournment because he had had five weeks to prepare for the instant hearing, where the only real issues were whether the conditions for the grant of Judgment in default were met and, if so, what relief the Court should grant. The Claimant had had three months to obtain advice and representation. Even making due allowance for Covid-19, that was ample time.



The conditions for Judgment in default were, therefore, considered to be satisfied pursuant to CPR PD 12 para 4(1). The Court had no doubts over the claim's viability.

It was further held that the injunction sought by the Claimant should be granted. It would be a proportionate interference with the Defendant's right to freedom of expression, as the legitimate aim being pursued was the protection of the Claimant's reputation against false and damaging allegations.

RECENT CASE UPDATES

Costs - Summary Assessment - Hourly Rates

Cohen v Fine & Others
[2020] EWHC 3278 (Ch)

This was an Appeal from a decision of a District Judge in relation to the Summary Assessment of costs. The Claimant, 'C', sued in his capacity as the professional Executor of a Will as a result of the failure by the Defendants, 'D', to reach agreement in relation to the sale of a residential property, comprising the sole significant asset in the Estate. At the hearing, an Order was made for the sale of the property and for C's costs to be paid from the Estate. C's Statement of Costs was in the sum of £48,846.

The issue of costs was dealt with in the last five minutes of the hearing. C did not request an adjournment or Detailed Assessment. The District Judge found the amount of costs claimed wholly unreasonable and that a global total of no more than £27,000 would be fair and reasonable. C appealed against this Summary Assessment on the grounds that the District Judge had applied the wrong test by failing to have regard to the fact that the Summary Assessment was the costs of an Executor and was on the indemnity basis; was wrong and had erred in law by imposing her own unilateral tariff with no calculation or proper reasoning; and was wrong for failing to consider adjournment for later Summary or Detailed Assessment. The Judge found that the decision of the District Judge was wrong and unjust. Whilst Summary Assessment can be 'broad brush', a Judge still has to consider the individual elements of the bill item by item. In doing so, the Judge came to a figure of £35,703.

In reaching this figure, it was necessary to determine the applicable hourly rates. The Judge noted that prior to 2010, the Guideline Hourly Rates were increased broadly in line with inflation, but had not been revised since. In *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019]*, the Costs Judge said that the guideline rates are significantly lower than current hourly rates in many London City solicitors. The Judge in this case considered the same could be said for the current hourly rates in many North-West commercial litigation solicitors' practices. The Judge considered that pending the outcome of the present review of the Guideline Hourly Rates, the rates should be the subject of, at least, an increase that takes due account of inflation. Using the Bank of England Inflation Calculator, the Judge considered that a 35% increase on the Band One rates would be justified as a starting point. This provided figures of Grade A £295, B £260, C £220 and D £160, which the Judge adopted in this case (subject to the indemnity principle). The Judge further noted that whilst in many cases pending in the Business and Property Courts even higher rates would be justified, that was not so in this case, which was not particularly complex, specialist or high value.

The Judge also gave guidance on the conduct of costs assessments in future. If there is insufficient time to undertake an item by item consideration, the Court should ask the parties to expressly consent to the Court adopting a broad brush and global approach. If consent is not forthcoming, then the Court has the option of ordering that the assessment will be determined on paper following exchange of written submissions; re-listing the matter for Summary Assessment; or directing a Detailed Assessment. If a Detailed Assessment is ordered, the Court should order the paying party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

The Judge, thus, allowed the Appeal and summarily assessed C's costs of and up to the hearing before the District Judge, payable by D, in the sum of £35,703 and ordered D to pay C's costs of the Appeal, summarily assessed in the sum of £8,298.12.

EL Insurance - Avoidance

Komives v (1) Hick Lane Bedding Limited (2) AM Trust Europe Limited [2020] EWHC 3288 (QB)

The Claimants, 'C', had been trafficked to the UK and worked for the First Defendant, 'D1', in circumstances amounting to modern slavery. C worked for 'D1' between 2009 and 2013. Both Claimants suffered psychiatric injuries and one of them also suffered a serious physical injury at work when the forks on a forklift truck failed causing a heavy industrial bin to fall onto his leg, resulting in a below knee amputation. D1 went into administration in June 2015 and was insolvent. Between 12 July 2011 and 11 July 2012, D1 had EL insurance with the Second Defendant, 'D2'. C's claims were advanced pursuant to the provisions of the Third Parties (Rights Against Insurers) Act 1930. However, D2 avoided the policy ab initio on grounds of material non-disclosure and misrepresentation. C challenged D2's right to avoid the policy on the grounds that D2 could not satisfy the common law requirements of a valid avoidance and that, in any event, the common law was now subject to a regulatory overlay, introducing a reasonableness requirement which, on the facts of these cases, was not made out. A preliminary issue trial was ordered.

The parties' experts were in agreement in their evidence that had the true state of affairs been known, no insurer would have provided cover. However, C's expert asserted that D2 had made scant enquiries. He also opined that as a matter of market practice, D2 should have paid the claims, albeit the expert accepted that this was the only case of trafficking he had come across and could not give an example of an insurer forbearing to avoid in such a case. Reliance was placed on the rules contained in the Insurance Conduct of Business Sourcebook (ICOBS) made pursuant to the Financial Services and Markets Act 2000 (FSMA) which, inter alia, provide that an insurer must not unreasonably reject a claim (including by terminating or avoiding a policy). C submitted that to allow avoidance in these circumstances would create a lacuna in the compulsory EL insurance scheme. Further, insurers had a role to play in combating modern slavery which included being astute to make enquiries where appropriate when accepting a risk. The public policy interest in protecting victims of trafficking should also be taken into account when deciding whether to avoid a policy.

The Judge was satisfied on the facts of this case that there were material non-disclosures and material misrepresentations which influenced D2 to accept the risks, any of which would have justified avoidance at common law. There was nothing within the information provided that could realistically have put D2 on inquiry. D2 were not precluded from relying on the illegality of D1 as a ground of avoidance. There was no established market practice whereby it was incumbent on an insurer to pay the claim and recover, if feasible, from the insured. Accordingly, there could be no doubt that D2 was entitled to avoid at common law. The central issue was, therefore, the impact of the ICOBS.

RECENT CASE UPDATES

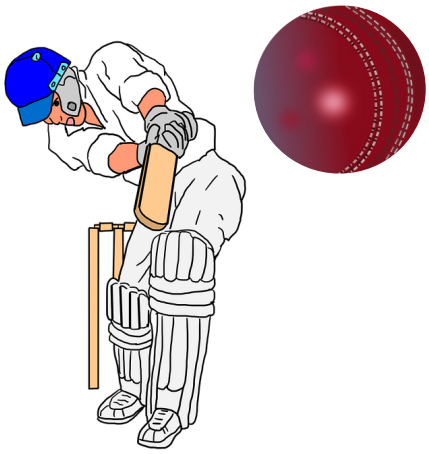
The Judge held that whilst the ICOBS had introduced a regulatory overlay to insurers' decisions to reject or avoid, that overlay was fundamentally concerned with process and did not change the substantive law. Whilst there was a 'protection gap' in the statutory scheme that had existed for many years, which would benefit from legislation, it was not realistic to submit that the ICOBS and FSMA constituted that legislative intervention. On the facts of this case, the process by which D2 incepted and subsequently avoided the policy was not unreasonable.

The Judge commented that if, contrary to his interpretation, there was a broad test of reasonableness introduced by the ICOBS, then that applied between the insurer and the insured. It made no reference to injured parties. On that basis, it could not be said that D2 acted unreasonably.

The Judge, therefore, came to the 'reluctant conclusion' that D2 was contractually entitled to avoid the policy and that it did not act unreasonably in doing so.

Negligence - Personal Injury - Cricket - Foreseeability

Phoebe Lewis v Wandsworth London Borough Council [2020] EWHC 3205 (QB)



The Claimant brought a claim against the Defendant Local Authority in respect of injuries she sustained after she was hit in the eye by a cricket ball whilst walking in one of its parks. The Claimant was walking along a path which was outside the boundary of the cricket pitch.

At first instance, the Claimant succeeded in her claim, the Recorder finding that the possibility of an incident and injury was quite extensive given the location of the path and the pitch. He found that the Local Authority had failed to exercise the required duty of care under the Occupiers Liability Act 1957 because it had allowed pedestrians to walk alongside the boundary of the pitch, they had failed to display signs to warn the Claimant that the game of cricket was in progress, they had failed to warn her that a hard ball was being used and that the path she was using ran alongside the boundary of the pitch.

On Appeal, the Recorder was found to have failed to take into account material factors in evaluating the risk of injury and had failed to give adequate weight to the Local Authority's evidence on the period of time for which cricket had been played at the location and its evidence of the lack of knowledge of previous injuries.

In relation to the failure to warn the Claimant:

(1) The Claimant accepted that she knew of the existence of a cricket pitch and that she might have seen that a game of cricket was in progress.

(2) The strong presumption had to be that adult men playing a cricket match would be using a proper cricket ball.

(3) The precise location of the boundary was largely irrelevant because a batsman would hit a ball as hard as possible (*Bolton v Stone [1951] AC 850*) and hitting the ball out of the ground was an incident of the game and one which the batsman would wish to bring about. The risk of balls being hit towards the path was so evident that any warning should have been superfluous. To a reasonable person, a warning in the terms suggestion by the Recorder was unnecessary and irrelevant.

It was, therefore, held that the Recorder's Judgment was wrong. He failed to take into account material factors and there was a lack of logic in his analysis of the facts. In any event, the alleged breach by failure to warn the Claimant in the terms suggested did not withstand proper analysis.

Allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) were remote. Appeal allowed.

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

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