DOLMANS INSURANCE BULLETIN

Welcome to the September 2022 edition of the Dolmans Insurance Bulletin

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- Vicarious liability - sexual assault of school pupil by work experience placement

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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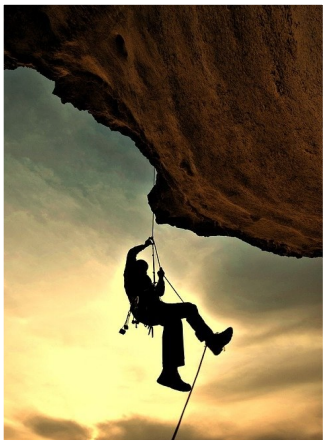
REPORT ON

The Operation of the Definitive Sentencing Guideline in a Public Sector / Emergency Service Sentencing for Breaches of the Health and Safety at Work Act 1974 Arising from Very Serious Injuries to a Member of Staff Participating in a Training Exercise

Health and Safety Executive v Staffordshire Fire and Rescue Service
[District Judge Grego, Newcastle Under Lyme Magistrates' Court, 13 July 2022]



On 29 September 2019, a group of firefighters from Staffordshire Fire and Rescue Service ("SFRS") resolved to undertake continuation training at a location known as Harpur Hill Quarry, near Buxton in Derbyshire. This disused quarry site is the location of several hundred climbing (mainly sport climbing) routes in a human modified limestone quarry environment. The purpose of the continuation training was to practice a so called 'pick off' rescue – simulating a situation where a casualty is 'crag -fast' – that is located a distance up a rock face and in need of rescue by someone abseiling into their position and then lowering them to the ground.

This is a complex manoeuvre requiring precision, knowledge and expertise in regard to rope systems; in particular knowledge about the methods to be used to escape from an existing rope system and entry into a secondary 'rescuer's' rope system. It is a manoeuvre which is of considerable utility in regard to incidents and accidents where climbers are injured – ironically (see below) – usually as a result of rock fall – as they are climbing on a particular face and cannot proceed further either up the route or down to ground level.

All the firefighters in the group were qualified and experienced rope rescue technicians suitably trained by an outside training body and subject to regular refresher training to fulfil this role within SFRS. The SFRS rope rescue team were experienced and had been instrumental in the rescue of several seriously injured young persons in the incident involving The Smiler rollercoaster at the Alton Towers theme park in June 2015. However, the venue chosen for the training was not a regular training venue for SFRS and, indeed, was located outside the county boundary, in Derbyshire. The venue had been used recently by another group of SFRS firefighters led by another senior rope rescue technician within the Service, but, apart from that, it was a wholly new venue for the Service to train at. It had not been approved for training by the SFRS's Learning and Development Team.

A risk assessment for the training was undertaken, via a dynamic risk assessment process, at the SFRS fire station from which the team operated. Importantly, this risk assessment was, therefore, not undertaken at the site itself – albeit the evidence suggested it would have been revisited in the pre-training briefing which would have taken place on site immediately prior to commencement of the training. Critically, the risk assessment did not mention the risk of loose rock or rock fall at the venue, or measures to address the same.

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On arrival at the site, the team selected what appeared to them to be the rock face which was the subject of the previous training visit. Unfortunately, due to a miscommunication between the teams beforehand (members of the team who had visited the venue previously and the current team – the former providing details via WhatsApp message) this was incorrect and the team, on 29 September 2019, accessed a rock face which had not been used for training before. This rock face was subject to loose rock and the subsequent investigations following the incident described below revealed that this rock face had recent scars and rocks which had fallen from it at the bottom of the face. Moreover, earlier that weekend, the top of the cliff had been subjected to significant rainfall, thereby enhancing the risk of rock fall.

The SFRS rope rescue team set up several suitable anchor points via suitably sized boulders at the top of the rock face. Having done that, one member of the team, 'X', descended the rock face via abseil to a point approximately 5 metres off the ground to act as the casualty. Having established himself in that position, his colleague, 'Y', began to abseil down to him to conduct the 'pick off' drill. Shortly after Y began to descend, a fist sized rock fell from the rock face and struck X's head on his protective helmet. Seconds after that, a larger rock (estimated to be the size of a microwave oven) fell from the rock face and struck Y on his helmet. Y was rendered momentarily unconscious and it quickly became obvious that he had sustained very serious spinal injuries. The SFRS rope rescue team swiftly moved from a training scenario to a rescue scenario regarding one of their own colleagues. Y was eventually brought down to ground level and transported to hospital where, tragically, his injuries were confirmed to have led to paralysis from the chest down. He is now a wheelchair user.

Following the incident, an independent investigation by Derbyshire Fire and Rescue Service ("DFRS"), a neighbouring Service, was instigated by SFRS. DFRS interviewed a significant number of personnel and produced a report into the incident of well over 100 pages. This concluded that there had been deficiencies in the management of the training event. In particular, the use of a "new" training venue, outside the county boundary, had not been the subject of a proper system of scrutiny. Moreover, there were deficiencies with the risk assessment process that was engaged both before the journey to the venue began and at the venue itself. Finally, the miscommunication between those involved in this event and a previous event had led to an unsuitable and dangerous part of the crag being used. DFRS also identified that the SFRS's Learning and Development Department did not have a suitable formal process for the visiting, vetting and certification of training venues/new training venues.

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The incident was obviously reported to the Health and Safety Executive ("HSE") – via RIDDOR – and they instigated their own investigation into the incident. This investigation lent heavily on the work undertaken by DFRS.

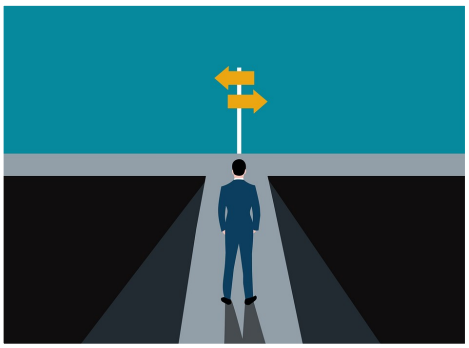
As part of the HSE investigation, the HSE wrote to SFRS indicating several contraventions of health and safety law which they considered their investigation had confirmed. SFRS responded in detail to these allegations.

Following the conclusion of the HSE investigation, in September 2021, the HSE indicated to SFRS that they intended to prosecute the Service for breaches of the Health and Safety at Work Act 1974 and/or the Work at Height Regulations 2005. Criminal Proceedings were served in November 2021. An initial Plea and Case Management Hearing was listed in March 2022 (ultimately adjourned to 31 May 2022) and, following the entry of a formal guilty plea at that hearing, a sentencing hearing was listed before District Judge Grego in Newcastle Under Lyme Magistrates Court on 13 July 2022.

Dolmans were instructed shortly after the initial indication as to prosecution by the HSE in September 2021.

We conducted several meetings with senior members of the SFRS Management Team and also the Police, Fire and Crime Commissioner (PFCC) for Staffordshire. As part of that process, we were privy to the report from DFRS, the exhibits to that report (a large number of witness statements and photographs) and correspondence with the HSE from the outset of their investigation and to date. We provided initial legal advice to the Chief Fire Officer, Chief Financial Officer and Service Solicitor regarding the potential culpability of the Service in regard to the charges brought by the HSE and a proposed approach to the prosecution in general.

We also instructed specialist counsel to provide further advice (in conference) regarding breach of duty, and, on the basis of that collective advice, the Service resolved upon a plea of guilty to the charges brought by the HSE.



Most importantly, we advised the Service as to the approach which would be necessary regarding the Definitive Sentencing Guideline ("DSG") in regard to this case, with a view to mitigating what could be a very significant regulatory fine arising from the prosecution. The consequences of the incident to at least one member of the Service had been life changing and, in that context, the extent of the regulatory fine contemplated in this matter could have been very significant indeed based on a mechanistic analysis of the Definitive Sentencing Guideline without adequate modification to account for the financial circumstances of the Service as a public sector defendant.

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Readers of this publication will be aware that the DSG explicitly contemplates a reduction in fines where the same are levied on a public sector organisation, *provided* that organisation can adduce suitable evidence to the sentencing court of the impact on the provision of services to the public that a substantial regulatory fine would have.

Therefore, it became the focus of our pre-sentencing preparation to ensure that full and proper enquiries and discussions were conducted as to the impact of a potentially significant regulatory fine upon the Service. In that context, detailed Witness Statements were compiled on behalf of the Chief Fire Officer and the Chief Financial Officer of the Service. Both these Witness Statements addressed the difficult financial position which the Service found itself in; because of a long period of austerity and cost cutting, together with the need to address the Government's desires as to building safety following the Grenfell Tower disaster and the creation of the new Building Safety Regulator as a consequence of that tragedy. Additional financial stresses were imposed on the Service by the impact of the HS2 rail project and climate change – leading to further summer wildfires and winter flooding events.

The Deputy Chief Fire Officer (DCFO) also provided a Witness Statement addressing certain evidence from the local access representative of the British Mountaineering Council (BMC), relied on by the prosecution, which could be read to suggest that cliff rescue activities and the like were best left to the local Mountain Rescue Teams and not something which the Fire Service should be involved in. This, in turn, suggested that there was, in fact, no proper basis for the training activity being undertaken by SFRS. This had a potentially very serious impact on the assessment of culpability by the Court and, therefore, needed to be addressed via detailed evidence from the DCFO setting out the extent to which SFRS has been involved in cliff rescues in the recent past. This Witness Statement also addressed issues around the difference between a dedicated rope rescue team within the Fire Service and the, essentially, volunteer staffed mountain rescue teams who may not be as readily available as an FRS rope rescue team.

Readers will be aware that the basis for fines for any public sector organisation is their annual revenue budget, which is the equivalent of 'turnover' for sentencing purposes. The annual revenue budget for SFRS is circa £42.5 million. The prosecution contended that the appropriate categorisation of the incident was one 'at the top end' of medium culpability. The nature of the injury risked, according to the prosecution, was such that this was a Medium Culpability, Category 3, Level A Offence. There was agreement as to the nature of the categorisation of the offence (unsurprisingly, given the injuries which arose from it), however the defence argued that this was a low culpability case.

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At sentencing, the prosecution contended for a fine towards the top end of the relevant bracket, which was from £50,000 to £300,000. Indeed, the prosecution argued that the Sentencing Judge would have to consider moving further up the fine range – in accordance with the DSG – *because the risk engaged by SFRS had been a significant cause of actual injury to the injured person (Y)*. Readers will recall that a Defendant is sentenced for the risk they have run in their unsafe system of work. If that risk eventuates – leading to injury (as is very often the case in prosecutions) – there is a requirement within the DSG for the Sentencing Judge to (at least) consider moving further up the fine range, either simplistically (within the relevant fine bracket) or via movement into the next category of culpability (above) – to arrive upon a suitable fine to properly reflect the nature of the Defendant's offending.

Thus, at sentencing, given the seriousness of the injuries sustained by the injured party, SFRS were faced with a potential start point for the fine of more than £300,000. Additionally, the prosecution were seeking an enhancement to that figure to account for the result of the incident on the injured person.

Detailed arguments were put forward by SFRS at sentencing, both regarding culpability (which SFRS argued was lower than high medium culpability – see above) and in relation to the proper approach the Court would need to take having regard to the financial circumstances of SFRS and the impact on their provision of services that a significant regulatory fine would have. These arguments grew out of the detailed evidence assembled (see above) on behalf of SFRS.

Based upon those arguments, the District Judge, firstly, accepted that this was not, in fact, a high medium culpability case, but, rather, a low culpability case (but still Category 3, Level A). This enacted a start point for fines of £14,000, with an overall (amended) fine range of £3,000 to £60,000.

The District Judge accepted that the offending had been a significant cause of actual harm to Y as a result of the incident in question. Thus, he concluded that, in this case, the start point of the fine should be £50,000. He then proceeded to reduce that start point to £30,000 to reflect the previous good character of SFRS (which had never previously been the subject of a regulatory prosecution or intervention) and its role servicing the public at great risk. Moreover, the District Judge explicitly found that this was a case where there was real contrition on the part of the Defendant which had been expressed powerfully by some of the evidence provided by the Chief Fire Officer. Finally, there had been a real effort by SFRS to learn lessons from the incident.

The figure of £30,000 was then reduced further (at steps 3 and 4 of the DSG) to £15,000 to account for the detailed financial evidence provided in relation to the impact that a significant regulatory fine would have upon the Service. The District Judge, finally, reduced the fine from £15,000 to **£10,000** to reflect the usual reduction for the early guilty plea entered by the Service.

REPORT ON

Comment

Regulatory fines, calculated according to the DSG, which has been in place since 2016, continue to prove to be highly problematic for public sector organisations. The DSG does provide a mechanism by which these fines can be reduced, but this is only engaged where proper and detailed evidence is deployed as to the impact of a regulatory fine on the provision of services. A public sector organisation cannot simply expect that such a reduction will be provided unless proper evidence is assembled and deployed.

In this case, we have, once again, demonstrated that this evidence, properly considered, can have a major favourable impact on the eventual regulatory fine. From a position where a fine was contended for in excess of £300,000 and, possibly, as high as £500,000 given the consequences of the incident, through the use of detailed and carefully constructed evidence, the Service was able to secure a fine of £10,000 (plus prosecution costs). The saving achieved by the assembly of this evidence is, therefore, obvious.

Inevitably, that requires a significant amount of work and considerable engagement by the public sector client, both in terms of providing instructions for the drafting of a Witness Statement or Statements and ensuring signature of that/those Witness Statement(s) moving forwards. In this instance, we were blessed with an extremely well-motivated and engaged senior management team. Without their very considerable input it is likely that this kind of result simply could not have been achieved. In that sense, the legal team is only as effective as the evidence provided by the public sector client. In this instance, once again, we were fortunate enough to have very high quality evidence.

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FOCUS ON

The Mandatory Use of the Damages Claims Portal ("DCP") by Defendants - the 150th Civil Procedure Rules Practice Direction Update - PD 51 ZB

Background

The Damages Claims Portal[1] (a wholly electronic way of issuing proceedings in the County Court) has been mandated for Claimants to commence County Court proceedings for some time. The Damages Claims Portal ("DCP") was launched at the end of May 2021 (the pilot began on 28 May 2021), however its usage at that time was voluntary.

Via the 142nd Practice Direction update, usage of the DCP by Claimants became mandatory from 4 April 2022. This only applied to claims which were required to be issued within the DCP, however, for the purpose of this discussion, that included most personal injury claims (see later comments), with the only obvious exception being claims where one or other party was a protected party (albeit claims involving children represented by Litigation Friends were included within the ambit of the DCP).

At that point in time, HM Courts and Tribunal Service ("HMCTS") indicated that Defendants would be required to use the DCP "shortly". There was an initial proposal that the DCP would become mandatory for Defendants from June 2022. However, due to apparent technical issues, HMCTS postponed that rollout indefinitely.

Thereafter, with very little fanfare on 8 September 2022, the 150th update to Practice Directions under the Civil Procedure Rules announced that *from 15 September 2022* the DCP would be compulsory for (legally represented) Defendants.

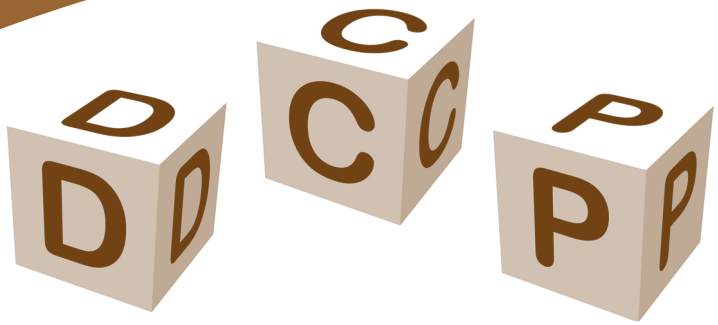
Practice Direction 51 ZB – Effective from 15 September 2022

Accordingly, from 15 September 2022, a legally represented Defendant is now required to utilise the DCP, at least for the initial stages of litigation (see below). The following relevant aspects of PD 51 ZB are worthy of noting:

- The 150th update requires the Claimant to provide the Defendant with at least 14 days notice of their intention to issue a claim via the DCP (unless this is "impracticable" – presumably, for example, due to limitation considerations).

[1] Which is still, technically, a pilot project, lasting until 30 April 2024, according to Practice Direction 51 ZB.

FOCUS ON



- In order for the mandatory requirements of the DCP to "bite" on a Defendant, they need to have instructed legal representation in relation to the claim – before it is served. If legal representation has been instructed, then, the mandatory requirements of the DCP become effective upon that legal representation, and they are:
  - To register with the relevant DCP platform – via the 'myHMCTS' portal platform and secure access via that platform to the DCP.
  - Notify the Claimant that they are instructed.
  - Provide the Claimant's solicitors with their (generic) email address for claim notifications (i.e. confirmation of issuance of the claim and updates via DCP platform).

The Claimant, in turn, is required to:

- Provide the Defendant's representative's email address for claim notifications to the Court, using the DCP, when commencing the claim under section 2 of PD 51 ZB.
- Notify the claim to the Defendant using the procedure set out in section 3 of PD 51 ZB.

Consequent upon the above, Defendant law firms are required to register with myHMCTS by 15 September 2022. Dolmans is, obviously, registered in this regard and capable of accepting service of proceedings via the DCP platform.

Importantly, from 7 September 2022, further changes to the system have been made which are:

- Claims issued in the DCP on or after 15 September 2022 now ***must be responded to online.***
- Any paper responses to such claims filed in the County Court Money Claims Centre (thereafter) will be returned unless "an acceptable reason" is given for not using the DCP process.

Scope of the DCP

To some degree, this is touched upon above, however, to re-emphasise, the following claims are required to be issued via DCP (and have been since April 2022) and such claims are now required *to be responded to* (see below) via DCP or utilising the DCP platform:

- Any County Court claims for damages where the Claimant is legally represented, no matter what value, excluding specified money claims (i.e. where a specific amount is sought – debt claims) and possession claims. By implication, unrepresented Claimants do not have to present claims via the DCP.
- Claims involving children (albeit protected parties – for instance, adults lacking in capacity – are excluded from the DCP platform).
- Exited MOJ Portal claims – issued as Part 7 Claims (but NOT Part 8 Claims – i.e. procedural claims where formal issue is necessary because of impending limitation and in order to complete the MOJ portal process without formal Part 7 proceedings).
- Multiple party claims – albeit only to a certain "party limit" – claims involving up to two Defendants will be included, as will claims with up to 2 Claimants (provided there is a single Defendant). However, claims with more Claimants/Defendants (than the above) will be excluded from the DCP process/platform – this immediately raises an issue in relation to most divisible injury disease claims (where practice is normally to include all extant Defendants).

Currently, the DCP platform/process is only applicable to certain steps within the litigation process. For those familiar with the County Court Money Claims Centre (CCMCC), based in Salford, Manchester, these steps are analogous to the steps normally undertaken within the CCMCC. Thus, briefly, the steps administered within the DCP are as follows:

- Issuing of the claim online.
- Uploading of documentation, such as the Particulars of Claim onto the DCP platform (including, one assumes, medical evidence, Schedules of Loss and so forth).
- Notification of the claim to the Defendant's legal representative (which is now the terminology for service effected as soon as the claim has been notified to the Defendant's legal representative and there is, in effect, no doubt or argument as to physical service).
- Acknowledgement of service by the Defendant's legal representative – via the DCP platform.
- Upload of the Defence via the DCP platform.
- Provision of answers to Directions Questionnaires (by both parties).

Once the steps have been concluded, at present, the claim "is transferred to the County Court Money Claims Centre and, thence, follows the usual procedure to trial" – thus, there is a slight (but important) ambiguity since from this point onwards, claims are sent out from the CCMCC to the appropriate local Court for case management. In many senses, the CCMCC's involvement ends at this point.

It would seem this remains the current approach – i.e. (as above) the initial stages of the litigation – up to Directions Questionnaires – are handled within the DCP (as replacement for the CCMCC), with the local Court then becoming the trial centre and case managing the matter to that eventuality.

Comments and Discussion

Inevitably, given that this use of the DCP has only been mandated very recently, direct detailed experience of its use is, at the moment, limited. However, the experience we have had of this process does provide some sense of the potential issues moving forwards.

It is very clear that Claimant solicitor firms have been having difficulty with the DCP platform/ process. Indeed, logging into the myHMCTS platform is a far from straightforward process. Inevitably, the logistics for any Defendant firm of ensuring that new claims are appropriately notified and then allocated within the organisation are an additional challenge.

Defendant organisations themselves have an immediate question to address: do they nominate legal representatives before the claim is received (thereby triggering the need for those representatives to come on board via the DCP) or do they receive the claim in the conventional manner and then have their legal representatives respond via the DCP? The mechanics of that latter situation are unclear – even now. However, such an approach does have the arguable advantage (for the client) that it provides them with greater control over the direction of instructions until allegations are clear.

We have recent experience of Claimant solicitors believing they have issued a claim appropriately via the DCP, only to find the claim has been automatically dismissed because they have failed to provide notification of the appropriate email address for service. This appears to have been an oversight on their part and due to the nature of the DCP platform.

These kinds of procedural difficulties look likely to continue, at least in the short term, until the whole process "beds in", and it remains to be seen how these will be resolved. In the aforesaid case, there is an obvious tension between the DCP platform being a new process and the case law which has grown up about retrospective extensions of time to the validity period of Claim Forms – which is draconian for parties transgressing the validity period.

FOCUS ON

On 26 August 2022, HMCTS announced that they were closing the Salford Business Centre (i.e. the CCMCC) and amalgamating its functions with Northampton County Court, which has been the issuing Court for all County Court claims for some time now (albeit all those claims were, as we understood it, administered from Salford). This gives rise to justified speculation that the mandating of the DCP for all Defendant firms from 15 September 2022 is connected to this decision. Closure of the CCMCC will otherwise mean significant increases in workload within the system and, therefore, in effect, automating elements of the process via the mandated use of the DCP may be seen to relieve that pressure.

Until recently, obviously, usage of the DCP has been sporadic on the basis that whilst Claimant solicitor firms have been required to issue proceedings via the platform, service has tended to be conventional, albeit since the advent of the Covid 19 pandemic, conventional now normally means electronic service. Usage of electronic means of communication and transfer of documentation in a Court environment is to be welcomed having regard to the new working practices which are very much to the fore since the events of 2020. However, whether this necessarily includes the need for fully electronic issuing and filing of information via the DCP is open to debate. The previous CCMCC system was working, and, to the writer's eye, this recent development is simply designed to replace the initial stage of case management undertaken within the CCMCC (unless there is further expansion – which would imply the closure of local Courts). The writer cannot see how, on present structural understanding, the DCP will replace the role of local Courts 'at the sharp end' in terms of case management.

In that context, the extent to which and the basis upon which local Courts will interact with the DCP remains rather unclear.

Rest assured, we are monitoring developments closely and will keep our readership advised of those developments in relation to this area.

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FOCUS ON

HXA v Surrey County Council and *YXA v Wolverhampton City Council [2022] EWCA Civ 1196*

The Court of Appeal handed down its Judgment in the above joined appeals on 31 August 2022. These appeals were awaited in the anticipation that the Court might provide further guidance on the issues decided in *CN v Poole Borough Council [2019]*, that is, the circumstances in which a Local Authority whose Social Services Department is involved with a child can be said to have assumed responsibility for the welfare of the child such as to give rise to a duty of care at common law. However, the cases which were reviewed by the Court involved Applications to strike out cases at an interlocutory stage and, whilst it was hoped that definitive views might be expressed, ultimately the Court decided that final decisions should be deferred until there had been a full examination of the facts of each case; an outcome which is disappointing to those who are concerned to protect the public purse. We set out below the details of these decisions and an analysis of the matters under consideration.

The first instance decisions of Deputy Master Bagot QC in the *HXA* case and Master Dagnall in *YXA* were reported in the June 2021 and February 2021 editions of Dolmans' Insurance Bulletin. The decision of Stacey J in the first joint appeal was reported in the November 2021 edition. It is of assistance to briefly recap the assumed facts of each case and their progress to the Court of Appeal.

HXA v Surrey County Council

HXA, who was born in 1988, suffered abuse and neglect perpetrated by her mother ('M') and one of M's partners, A. The Defendant Local Authority's Social Services had extensive involvement with the family from at least 1993. Numerous child protection investigations were carried out and HXA spent periods on the Child Protection Register. In November 1994, after seeking legal advice, the Local Authority resolved to undertake a full assessment with a view to initiating care proceedings. No such assessment was carried out. In 1996, M formed a relationship with A. Concerns were raised about A's behaviour towards the children. In 1999, there were allegations of sexual abuse. In January 2000, it was noted at a Case Conference that HXA had alleged that A had touched her breast. The Local Authority decided not to investigate due to fear of how A would react and because it was incorrectly thought there had been no previous similar concerns. It resolved to take no action beyond carrying out 'keep safe' work with HXA. This work was not undertaken. In 2004, HXA moved out of the family home of her own accord. In 2007, following further allegations by HXA's sibling, a police investigation was carried out. In 2009, A was convicted of 7 counts of rape in relation to HXA and M was convicted of indecently assaulting her.

Upon the Local Authority's Application, following the Supreme Court's decision in *CN v Poole Borough Council [2019]*, the Deputy Master found that the claims against the Defendant arising out of their child protection activities were bound to fail as there was no arguable duty of care and struck out the claim relating to Social Services.

FOCUS ON

YXA v Wolverhampton City Council

YXA suffers from epilepsy, learning disabilities and autism spectrum disorder. In 2007, when YXA was age 6, he and his family moved to the Defendant Local Authority's area. Within a few weeks of their arrival, an assessment identified concerns about his parents' ability to care for him. In 2008, a paediatrician raised concerns that YXA was being inappropriately and excessively medicated and recommended he should be taken into care. Thereafter, pursuant to an agreement with the parents under s.20 of the Children Act 1989, a pattern was established whereby YXA spent one night a fortnight and one weekend every 2 months in respite care. There were continuing concerns regarding the parents' use of alcohol and cannabis, physical assaults of YXA and excessive medication. In 2009, the parents admitted smacking YXA and giving him excessive medication to keep him quiet, and they agreed to YXA being accommodated full time under s.20. Care proceedings were initiated and a Final Care Order was made in March 2011.

Upon the Local Authority's Application, the Master held that reasonable grounds had not been pleaded to give rise to a duty of care at common law and the common law claims were struck out.

Both HXA and YXA appealed.

In the meantime, in May 2021, Judgment was handed down in *DFX v Coventry City Council [2021]* (see the report in the May 2021 edition of the Dolmans' Insurance Bulletin). This was the first decision in a case that had proceeded to a full trial post the Supreme Court's decision in *Poole*. The Judge dismissed the claim, finding that no duty of care was owed. The case also failed on breach of duty and causation. Whilst the decision in *DFX* was made on the facts of the case, it was a case in which Social Services were closely involved with the family for 15 years. The Judge decided that it was an 'omissions' or 'failure to confer a benefit' case. Operating within a statutory scheme did not, of itself, generate a common law duty of care. Whether a duty of care was generated on the facts of the case by an assumption of responsibility depended upon whether there was '*something more': "either something intrinsic to the nature of the statutory function itself which gives rise to an obligation on the Defendant to act carefully in its exercising that function, or something about the manner in which the Defendant has conducted itself towards the Claimants which gives rise to a duty of care."* On the facts, the Judge could not find 'something more'. The Claimants were "*impermissibly seeking to create a common law duty of care from the Defendant merely operating a statutory scheme"*.

***HXA* and *YXA*: First Appeal Decision**

Before Stacey J, the Claimants appealed on the grounds that:

(1) The first instance Judges were wrong to strike out parts of the Particulars of Claim because they should have found that it was at least arguable that a duty of care arose on the basis that the Local Authority had assumed responsibility for the welfare and protection of the Claimants

- in HXA's case when:
  - the Defendant placed her name on the child protection register on 28 July 1994; or
  - the Defendant decided in November 1994 to undertake a full assessment with a view to initiating care proceedings but failed to do so; or
  - on 27 January 2000, the Defendant resolved to undertake keep safe work with HXA but failed to do so.
- in YXA's case when he was given intermittent accommodation under s.20.

(2) It was wrong to strike out the negligence claims on the basis that the law in this area is a developing area of law.

(3) It was wrong to strike out the negligence claims when certain aspects of each claim would remain, even if the negligence claim were struck out.

The Judge found that none of the matters relied upon were sufficient to amount to the 'something more' required for an assumption of responsibility. The Judge dismissed the arguments that this was a developing area of law. The decisions at first instance that the claims were bound to fail were correct. There was no error in striking out those parts of the claim in the circumstances.

The Claimants appealed.

Court of Appeal Decision

There was criticism of the manner in which the claims had been pleaded, making it difficult to discern the precise basis upon which it was claimed that there was an assumption of responsibility. It was noted that Claimants "*Must identify clearly and concisely what it is said that the Defendant has assumed responsibility for, and what facts are relied upon as establishing that the Defendant has assumed responsibility. In addition, the Claimant should identify the dates upon which the alleged duty arose and, if relevant, the period or periods during which the duty was owed. The Claimant must also identify the facts and matters said to establish breach, causation and loss*."

Baker LJ, who gave the lead Judgment, with whom the other two Judges agreed, noted that whilst initially wide ranging, in oral argument the scope of the Claimants' appeal narrowed and focused on a few incidents said to have given rise to an assumption of responsibility. In HXA's case, the decision in 1994 to seek legal advice with a view to initiating care proceedings and resolving to carry out a full assessment and then failing to do so; the decision not to investigate HXA's allegation that A had touched her breast; and the decision to provide advice in the form of 'keep safe' work. In YXA's case, taking him into care under s.20.

The Judge concluded that the circumstances in which a Local Authority may assume responsibility for a child so as to give rise to a common law duty of care are not confined to cases where it acquires parental responsibility under the Children Act 1989. However, the question of in what other circumstances a Local Authority may assume responsibility can only be answered definitively on a case by case basis by reference to the specific facts of each case. This is still an evolving area of law: "*The ramifications of the change of direction heralded by the decisions of the Supreme Court in Robinson and Poole are still being worked through."*

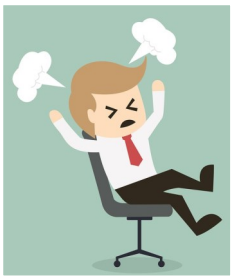
Where a Local Authority has been involved with a child over a number of years, identifying whether there has been an assumption of responsibility may be a complex exercise. It would be wrong to reach a definitive conclusion and strike out a claim before the evidence has been heard, the facts have been found and a thorough analysis of the exercise of the Local Authority's statutory duties and powers has been undertaken.

In relation to YXA's case, Baker LJ considered it was certainly arguable that an assumption of responsibility may arise when a child is voluntarily accommodated in respite care. The Judge disagreed with the views of Master Dagnall and Stacey J that this was merely an assumption of responsibility leading to a duty of care in relation to the accommodation itself. Accommodating a child under s.20 was capable of amounting to 'something more' so as to give rise to an assumption of responsibility and whether or not there had been an assumption of responsibility in this case could not be determined without a full investigation of the facts. The claim should not have been struck out.

As regards to HXA, the fact that the statutory powers and duties under consideration were substantially the same as were under consideration in *Poole* was not, in itself, an answer to the claim. The factual circumstances were very different. It was at least arguable that in resolving in 1994 to take the steps of seeking legal advice and resolving to carry out a full assessment, the Local Authority was assuming a responsibility for the children. Similarly, it was arguable that the decision to carry out 'keep safe' work in 2000 amounted to 'something more' so as to amount to an assumption of responsibility. The claim should not have been struck out.

Baker LJ summed up by saying, "*This is still an evolving area of law in which it will only be through careful and incremental development of principles through decisions reached after full trials on the evidence that it will become clear where precisely the line is to be drawn between those cases where there has been an assumption of responsibility and those where there has not … Whether a duty arises will depend on the specific facts of the case … In due course, as a body of case law emerges, it will become easier at the outset of proceedings to identify the circumstances in which an assumption of responsibility can exist so as to give rise to a duty of care. At that point there will be greater scope for striking out claims … but at this relatively early stage in the development of the law after the Poole case, striking out these claims would … be a wrong use of the power under CPR 3.4.*"

Accordingly, both appeals were allowed.



Comment

This is a somewhat frustrating Judgment for Claimants and Defendants alike. The Court of Appeal has given no clear guidance on when a Local Authority may assume responsibility for a child so as to give rise to a duty of care. Indeed, Baker LJ indicated that it was not appropriate to seek to lay down guidance in a Judgment such as this.

Prior to the Court of Appeal's Judgment, an element of stability had been achieved in this area of the law following the decision in *DFX* and the Judgment of Stacey J on the first appeal herein. Stacey J considered that "*post Poole and DFX, the question of assumption of responsibility by a Local Authority so as to give rise to a duty of care to remove children from their families in child protection proceedings is not a developing, but a settled, area of law.*" It appeared that it would need to be a particularly exceptional case for a Claimant to be able to establish the 'something more' required to give rise to an assumption of responsibility. Whilst that may, ultimately, remain the case, the Court of Appeal's Judgment undermines the stability that had been achieved. Each case will now potentially have to proceed to a full trial on its own particular facts, unless it is wholly in line with an established decision.

DFX was a case where this approach was taken. It proceeded to a full trial and a decision was made on the facts. It is, therefore, disappointing that Baker LJ questioned some of the findings made in *DFX* without providing any clear guidance or conclusions on those issues.

These types of claims are very costly for Local Authorities. They are generally very document heavy. In relation to liability issues, there will usually be a need for social work expert evidence on both sides. The costs incurred are sometimes out of proportion to the potential value of the claim. In light of the Court of Appeal's decision, there is now limited scope for striking out such claims. The costs involved in proceeding to a full trial in all cases will have a substantial adverse effect on the public purse. Further, to date there has been only one full trial since the Supreme Court's decision in *Poole* in June 2019. It may, therefore, be some time before a sufficient body of case law is built up for the lower courts to once again be prepared to entertain strike out.

However, both Defendants have sought permission to appeal to the Supreme Court.

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RECENT CASE UPDATES

Civil Procedure - Service of Claim Form - Agreements to Extend Time - Estoppel

Longsdale & Others v Wedlake Bell LLP
[2022] EWHC 2169 (QB)

The Claimants brought a professional negligence claim against the Defendant. The Claim Form was served in July 2021 and the parties reached an agreement to extend time for service of the Claim Form, pursuant to CPR 2.11. The Claim Form was not served in that agreed period.

An Application was made by the Defendant seeking a declaration, pursuant to CPR r11.1, that the Court did not have jurisdiction to hear the claims issued in July and/or that service of the Claim Form be set aside.

An Application was made by the Claimants seeking a declaration that a valid extension of time had been agreed between the parties (or that the Defendant was estopped from contending otherwise), such that the Claim Form issued in July had been validly served. Alternatively, the Claimants sought a declaration that, pursuant to CPR r6.15(2), the Claim Form was to be treated as served in time or, alternatively, an Order was sought, pursuant to CPR r6.16, that service of the Claim Form be dispensed with.

The Judge found that the difficulties arose because of mistakes made by the Claimants' solicitors. There was no argument in relation to estoppel available. The parties were not in a contractual relationship, which is the standard field of operation for promissory estoppel. In order for the Defendant to be estopped from relying on a procedural right under the CPR there must be an unequivocal representation that it was foregoing that right. None of the correspondence relied upon by the Claimants came anywhere close to being a representation to that effect.

The extension for service of the Claim Form was agreed to allow mediation to take place. On 01 November 2021, the Defendant's solicitors wrote to say that this would not be possible, and suggested January 2022 for the mediation and that a further extension of time for service of the Claim Form be agreed. The Claimants' solicitors failed to respond until after the agreed deadline for service of the Claim Form had expired.

It was held that the Claimants' solicitors failed to take reasonable steps to effect service by the agreed date or to agree a further extension in writing for service of the Claim Form. The Defendant did nothing to create or contribute to the difficulty. On the contrary, the Defendant suggested a new date for mediation and indicated a willingness to agree a new extension. The Claimants' solicitors, however, failed to respond to either proposal.

It was reasonable for the Defendant's solicitors to sit back and await developments after sending the correspondence in November 2021. There was, in particular, no duty to remind the Claimants' solicitors that the extended deadline for service of the Claim Form was about to expire before it did expire.

There was no satisfactory explanation as to why the Defendant's proposals (for mediation in January 2022 and to further extend time for service) were not accepted or, failing that, why the Claim Form was not served by the agreed date. There were no other factors or circumstances which weighed in favour of the Claimants.

The Court also refused to make an Order dispensing with service of the Claim Form, under CPR 6.16, owing to "exceptional circumstances". The Claimants had made a strategic decision to issue (but not serve) the Claim Form. They agreed one extension for the period for service, but then failed to serve the Claim Form within that period and failed to agree another extension. In the circumstances, the case could not conceivably amount to "exceptional circumstances" to justify dispensing with service altogether.

Accordingly, the Claimants' Application was dismissed, and the Defendant's Application succeeded. The service of the Claim Form was set aside because it had expired by the time it was served and the Court, therefore, had no jurisdiction to hear the claims.

Privileged Material - Disclosure - Expert Evidence

Pickett v Balkind
[2022] EWHC 2226 (TCC)

Background

The underlying claim related to a tree root subsidence claim. The parties each had permission to rely on expert evidence from two experts (an arboriculturist and a structural engineer). The Court provided directions for the experts to meet and provide joint reports.

The matter was listed for Trial, however in May 2022 the Claimant's solicitors informed the Defendant's solicitors that the Claimant's structural engineer, Mr Cutting, would not be available to give evidence. The Claimant issued a formal Application for an adjournment of the Trial, which was supported by a Witness Statement from the Claimant's solicitor. The Witness Statement exhibited an unredacted copy of a letter from Mr Cutting which set out the position on his unavailability, but also made it clear that the Claimant's legal team had had some considerable involvement in the drafting of the joint report.

The Defendant's solicitors wrote to the Claimant's solicitors indicating that the letter breached the TCC guidance. In response, the Claimant's solicitors asserted that the material in the letter was privileged and the fact that it was included in full in the exhibit (rather than in redacted form) was obviously a mistake. A new Application Notice with a new Witness Statement was filed. The Claimant's solicitors then applied for an injunction to prevent the Defendant from using the Witness Statement and letter. The Witness Statement supporting the Injunction Application stated that the letter had included Mr Cutting's comments in respect of an "aide memoire" that the solicitors had sent him.

The Defendant responded with a cross-Application seeking production of the "aide memoire" and permission to cross-examine Mr Cutting at Trial as to the preparation of the Joint Statement and the completeness of the statement of instructions in his expert's report; and permission to deploy in evidence at Trial the letter from Mr Cutting.

Separately, the Defendant sought an Order that the Claimant should produce for inspection a copy of an earlier report by Prior Associates (Mr Cutting's firm) which had not been disclosed, but was referred to in the report of the Claimant's arboriculturist (Mr Pryce).

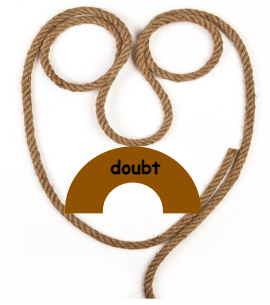
Decision

Injunction

The Judge dismissed the Claimant's Application for an injunction, having considered the applicable principles in *Al Fayad v Commissioner of Police of the Metropolis [2022] EWCA Civ 780*.

The Judge accepted the Claimant's solicitor's evidence that an unredacted copy of the letter had been inadvertently exhibited, but found that this error was not obvious, and he accepted the Defendant's solicitor's evidence that he had not appreciated the error upon receiving the exhibit.

The Judge expressed some doubt as to whether the relevant section of the letter was privileged in any event as it revealed potentially a serious breach of paragraph 16.6.3 of the TCC guidance. If the letter was privileged, the question was whether that privilege survived its disclosure in unredacted form to the Defendant. The Judge found that this was intimately tied up with whether an injunction will be granted to restrain its use. If it will, then, generally, privilege is not waived. If it will not, then privilege has usually been waived.



The Judge concluded that it would not be right to grant an injunction restraining the use of the information in the letter since it revealed a potentially serious breach of the TCC guidance. That conclusion was strengthened by the fact that the Defendant had relied on the letter to raise its concerns with the Claimant immediately, to which there had been no satisfactory response. Privilege had been waived in respect of the whole of the letter.

Defendant's Cross-Application for Disclosure of the Documents Sent to the Expert

The Judge declined to order disclosure of "the written instructions/comments/aid memoire" provided to Mr Cutting, but did order that Mr Cutting could be cross-examined about these documents.

The Judge accepted that not every communication between experts and those instructing them is part of their "instructions" for the purpose of rule 35.10(3). The aim of that rule is to ensure that the "factual basis" for the expert's opinion evidence is apparent to the reader and, therefore, a "wide reading" of the term "instructions" is needed.

Whether the expert is then independent of the instructing party in giving an opinion is a different matter from the facts on which the opinion is based. That is governed by CPR 35.2, 35.10(1), Part 35 PD para 2.1 and the TCC Guide para 13.6.3. The words in rule 35.10(3) did not require the expert to state the substance of all communications with those instructing them which go beyond providing the facts or factual assumptions for the opinion.

The Judge was not satisfied that the aide memoire fell within 35.10 and, therefore, he had no power to order its disclosure. However, there was nothing in rule 35.10(4) to prevent a party cross-examining the other party's expert on such an aide memoire or on other communications which go beyond providing the facts or factual assumptions for the opinion. There was a proper basis for the cross-examination of Mr Cutting on these matters.

Application for the Production of Prior Associates Report

The Judge held there was no evidence to support the Claimant's assertion that the 'Prior Associates' report was privileged. Privilege had been waived in any event.

Documents mentioned in an expert's report are subject to a more restrictive regime than CPR 34.14(1), as contained in CPR rule 34.14(2). This confers no right on any party, but instead gives the Court a power to order production of such a document, subject to the restrictions contained in rule 35.10(4).

The Judge found that the earlier 'Prior Associates' report was not privileged from production, and it should be disclosed under CPR rule 31.14(2). The Claimant had filed and served Mr Pryce's report relying on the earlier report. It would not be right for the Claimant to do so without disclosing the whole of it so that the Defendant could be satisfied that the Claimant was not 'cherry picking'.

RECENT CASE UPDATES

Vicarious Liability - Sexual Assault of School Pupil by Work Experience Placement

MXX v A Secondary School
[2022] EWHC 2207 (QB)

The Claimant, MXX, brought a claim for damages against the Defendant School alleging that it was vicariously liable for torts committed by an individual who carried out a work experience placement at the school comprising assault and battery (sexual assaults) and intentional infliction of harm (grooming). The Judge held that the Defendant was not vicariously liable.

Between 24 and 28 February 2014, PXM, a former pupil of the Defendant Secondary School, undertook a Work Experience Placement (WEP) at the school. PXM was then age 18 and attending college hoping to qualify as a PE teacher. Attending a WEP was a compulsory part of his course. At that time, the Claimant, MXX, was a Year 8 pupil (age 13) at the school. PXM had approached the school enquiring about the possibility of undertaking the WEP. Before starting the WEP he attended an induction meeting with the Head of PE and was told he would have to be with a member of the PE staff at all times. PXM was made aware of the school's policies and guidance, including on safeguarding, and signed a declaration confirming the he understood his responsibilities for child protection whilst at the school. The Judge found that, during the WEP, there were two occasions on which PXM had more than passing interaction with MXX; when he spoke briefly to MXX at school and suggested that she attend the afterschool badminton club and the club session itself on 28 February 2014. PXM was supervised at all times by an experienced teacher at the club, during which PXM taught MXX to play badminton. The Judge found that PXM did not carry out any grooming behaviour during the WEP.

There was no social media contact between PXM and MXX until after he had completed the WEP. Any significant social media communications were, at the earliest, from late April 2014. On 4 July 2014, PXM first sent MXX indecent images over Facebook. They first met up in person on 2 August 2014 at a park when PXM committed a serious sexual assault against MXX. A friend of MXX became aware of the Facebook messages and reported them to the school on 10 September 2014. PXM was arrested and subsequently convicted.

The Defendant admitted that torts of assault and battery were committed by PXM no earlier than 2 August 2014. The Defendant did not admit that the elements required to prove the tort of intentional infliction of injury were present but, if they were, they post-dated the WEP. The Judge found that torts of assault and battery were committed by PXM on 2 and 5 August 2014. The tort of intentional infliction of injury was committed by PXM and that tort was first complete at the time of the sexual activity on 2 August 2014.

RECENT CASE UPDATES

The Judge considered the 2 stage test for the imposition of vicarious liability.

In relation to the first stage, PXM was neither an employee nor an independent contractor. The Judge had to consider whether PXM was in a relationship with the Defendant akin to that between an employer and employee, and found he was not. PXM had approached the school asking for the opportunity to carry out a week's WEP. He was, in effect, asking for a favour and that was how the Defendant treated his request. The school wanted to encourage and support a former pupil in his further education. PXM was age 18 and unqualified. The school did not derive benefit from his presence. The WEP was an altruistic gesture. There was force in the Defendant Counsel's observation that a student at PXM's stage imposed a burden on the school rather than a benefit. There was no real degree of integration into the Defendant's business. No pupils were ever entrusted to PXM's care to any extent.

The Judge accepted the Defendant's submission that it would not be fair, just and reasonable to conclude that a WEP with the Defendant of one week's duration in these circumstances amounted to a relationship akin to employment.

Whilst satisfied that this was not a doubtful case, the Judge went on to consider the 5 incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on an employer set out in *The Catholic Child Welfare Society v Various Claimants (FC)* and *The Institute of the Brothers of the Christian Schools and Others [2012]* which supported the conclusion. The grooming and sexual assaults committed by PXM were committed well after the WEP ended and had no connection with the Defendant's activity. PXM's activity within the school was not integral to the Defendant's undertaking. The Defendant did not create the risk of PXM committing the tort. The most that the Defendant did was to provide PXM with the opportunity to meet its pupils. PXM was under the Defendant's control during the WEP only to the extent that if he had refused to do anything the WEP would probably have been brought to a premature end.

Whilst stage one was not satisfied, the Judge went on to consider stage two, that is, whether there was a sufficiently close connection between the relationship between the Defendant and PXM and the wrongdoing perpetrated by PXM such that the wrongful conduct could fairly and properly be regarded as done by PXM whilst acting in the ordinary course of the Defendant's employment. The Judge found that the second stage of the test for vicarious liability was not satisfied either. On the facts found, the entirety of the wrongdoing occurred many weeks after PXM's relationship with the Defendant had ceased. The wrongful conduct was separated from any relationship that had subsisted in the past between the Defendant and PXM by both time and location. PXM's role at the school was extremely limited. He had no caring or pastoral responsibility, no teaching responsibility and no aspect of the Defendant's function was delegated to him. Whilst pupils were required to treat PXM with respect, he was not placed in a position of authority over pupils.

The Judge was not satisfied on the evidence that MXX was influenced by any perception that PXM had authority or status within the Defendant's organisation. The Defendant simply allowed PXM to spend a week learning from its staff and whilst doing so to provide them with some minor practical assistance under close supervision. That did not significantly increase any risk created by the Defendant's enterprise of the Claimant later becoming a victim of abuse. The most that could be said about the relationship between the Defendant and PXM was that it provided an opportunity for PXM to meet the Claimant, which was not sufficient to satisfy the second stage of the test.

Accordingly, the Defendant was not vicariously liable for the torts committed by PXM and the claim was dismissed.

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