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Newsletter

An update on vicarious liability

Employers' liability insurers will be very familiar with the general principles under which the courts consider whether or not an employer should be vicariously liable for the acts of its employees. Practitioners will also be aware that the courts have generally not, in recent years, actively sought to restrict the circumstances in which vicarious liability is established.

The general underlying principles for a finding of vicarious liability can be summarised as follows:

- Is there a sufficient connection between the acts of the employee and the employment?
- Is it the employment which enables an employee to be present at a particular time and place?
- Is the act sufficiently and closely connected with what the employee is authorised to do, even if it was an improper way of carrying the work out?

These principles were reviewed in two recent cases, *Weddall v Barchester Healthcare Ltd* and *Wallbank v Wallbank Fox Design Ltd (2012)*, both involving an assault by one employee on another.

The cases were heard together by the Court of Appeal. In both cases the judge at first instance had decided the employee who committed the assault was not acting in the course of his employment.

In *Weddall*, Mr Weddall was the deputy manager of the defendant care home. Another employee, Mr Marsh, was a senior health assistant, junior to Mr Weddall. Mr Marsh had a conviction for assault but had never been violent to either residents or staff, although the men were known to dislike each other. On the day of the incident, Mr Weddall telephoned Mr Marsh and asked him to cover a shift due to another's sickness. Mr Marsh, already drunk at 6pm, apparently took the view Mr Weddall was mocking him. Mr Marsh telephoned his employers and offered his resignation and then cycled to the care home, saw Mr Weddall in the garden and attacked him. Mr Marsh fled the scene and was later convicted of assault.

In *Wallbank*, Mr Wallbank was employed by the defendant company and was manager, director and sole shareholder. The defendant employed four employees including

Mr Brown who worked as a powder coater. On the day of the assault Mr Brown was making use of an oven which fused a sprayed powder to metal bed frames. Mr Wallbank instructed Mr Brown to put some more frames through to make more efficient use of the oven and then, as he walked to the end of the belt, said "*come on*" to Mr Brown. Mr Brown went over and threw Mr Wallbank onto a table causing a fracture to his lower back.

In both cases the violence was a response to lawful instruction. However in *Weddall*, the employee received the instruction at home and he had to ride into work to commit the offence whereas in *Wallbank*, the offence was committed immediately after the instructions were given.

It was therefore held, on appeal, that in *Weddall* there was no vicarious liability for the acts of Mr Marsh as he was on an *"independent venture of his own, separate and distinct from his employment"*. The instruction was no more than a pre-text for an act of violence unconnected with his work. He was actually off duty when the telephone call was made. In *Wallbank* however, it was held the employer was vicariously liable for the actions of Mr Brown. The reaction was almost immediate and in response to a lawful instruction given by a superior employee. It seems therefore both physical and temporal proximity remain determining factors.

Weddall and *Wallbank* are illustrative of the application of existing principles. However, in *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust (2011)* EWHC 2871 (QB), the court appears to significantly broaden the circumstances in which a finding of vicarious liability can be made.

The case involved a claim brought by a child following sexual abuse by a priest. The priest had died by the time of the trial. The priest had no employment contract with the defendant and there was no wage agreement, no mechanism for the defendant to dismiss or discipline him and no mechanism by which the defendant could control the priest. Unsurprisingly therefore the defendant argued the priest could not be considered an "*employee*" and they could not be held vicariously liable for his wrongdoing.

The judge held that the court must look beyond the strict formalities of the relationship and "*scrutinise the substance and reality of it*". He took the view the defendant's appointment of the priest gave him a uniform, premises and a position of authority and so they had to take responsibility for any wrongdoing carried out by the priest. The connection between the parties was therefore made out and effectively the priest was acting as an employee. The judge considered that the lack of control by the defendant was a factor to consider but was not the deciding one. It is understood this case will be appealed to the Court of Appeal and it will be interesting to see if the court upholds such a wide application of the doctrine. It is perhaps therefore premature to suggest this case represents a worrying extension of the applicability of vicarious liability, but is a case which highlights the broad definition given to employer/employee relationships.

In *XVW & YZA v a Kent grammar school*, Clyde & Co acted for the successful defendant in a claim which demonstrated the limits which do apply to the doctrine of vicarious liability.

The claimants were pupils who had attended a school trip/expedition to Belize. A local company provided accommodation to the members of the expedition party. During the early hours, an employee of the local company raped the claimants and another young woman staying in the same cabana accommodation. The claimants brought proceedings against the defendant school alleging that they were vicariously liable for the conduct of the local man, who was the son of the owner of the accommodation and might have been co-owner of the resort where the group were staying.

At trial, the court was clear that the local employee could not be described as an employee of the defendant and that his involvement with the expedition was sufficiently limited that it was not just and fair to describe him as a person for whom the defendant should be vicariously liable. The school party was continuously supervised by three experienced adults and, short of placing a guard outside each cabana occupied by the school party at the resort, there was no means by which to defeat the assault.

Rosalind Bird
Senior Associate
T: +44 (0)20 7876 6006
E: rosalind.bird@clydeco.com

Key points for defendants

- Vicarious liability claims will continue to be difficult to defend
- Once the employer/employee relationship has been established, proximity (in time and place) remains the most important factor in determining whether the action was connected to the employment or a frolic of the employee's own
- Whilst 'employee' has been loosely interpreted, it may not, however, be an infinitely stretchable definition. As the doctrine of vicarious liability imposes strict liability, the principle is not infinitely extendable
- On cases involving unusual facts, the court will consider whether the nature of the relationship is such that it is just and fair to hold defendants vicariously liable for the torts of the actual perpetrator

Interim payments – life after Eeles

CPR Part 25 provides that interim payments may be awarded where the claimant can show that he has obtained judgment or would, at trial, obtain judgment for a substantial amount of money against an insured defendant or public body. The rules provide that the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

In *Eeles v Cobham Hire Services Ltd CA 13/3/09*, the question arose whether an interim payment should be a reasonable proportion of the overall lump sum value of the claim or, alternatively, of only the capital sum that the claimant is likely to be awarded by the trial judge. The court determined that, "*In a case in which a periodical payments order is made, the amount of the final judgment is the actual capital sum awarded. It does not include the notional capitalised value of the periodical payments order, which sum is irrelevant for the purposes of determining an interim payment in a case of this kind.*" The court then gave guidance as to the approach that should be adopted when interim payment applications are made in cases where a PPO may be awarded at trial, which can be summarised as follows:

1. Assess, on a conservative basis, what is likely to be awarded for the heads of damage which are bound to be ordered as lump sums
2. The court may award a reasonable proportion of that lump sum figure, and the court may allow a high proportion, provided that the estimate has been a conservative one
3. Where the judge is able to predict with a high level of confidence that the trial judge will capitalise additional elements of the future loss to produce a greater lump sum award, he may then make a larger interim payment. These will be cases where the claimant can clearly demonstrate the need for an immediate capital payment, probably to fund the purchase of accommodation
4. The judge need have no regard as to what the claimant will actually do with the interim payment
5. Where the interim payment is requested to purchase a house, the judge must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable but he must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary.

That approach has since been argued before, and adopted by, the courts, most recently in the matters of *Crispin v Webster 4/11/11* and *TTT v Kingston Hospital NHS Trust 25/11/11*, both High Court decisions.

In *Crispin*, the judge refused the claimant's application for an interim payment of £1 million which was sought to enable her to purchase a character property in the heart of Winchester at a cost of £750,000 plus a further £250,000 for general expenses up to trial. Whilst the payment in respect of general expenses of £250,000 was granted, there was an issue between the parties as to whether the property identified by the claimant was reasonably necessary to meet her needs when assessed on a conservative basis. The court was not satisfied that the trial judge would hold that the purchase was reasonably necessary when there was evidence of other housing available to the claimant on the market at a lower value. It was not an issue for determination on an interim payment application as the court did not wish to fetter the trial judge's discretion – this part of the claimant's application accordingly failed.

In *TTT*, the claimant had greater success. Interim payments of a total of £1.1 million had already been made and a suitable property purchased for the claimant. A further interim payment of £280,000 was sought to adapt and extend the new property and £120,000 to cover the cost of the claimant's care and therapy regime until a case management conference fixed for October 2014. The defendant argued that the interim payment sought was disproportionate, and that payment of the building costs would render the playing field unlevel because there was no reasonable immediate need for all the building works proposed by the claimant. The court held that, on a conservative approach, the total of the interim payments (received and applied for) would not exceed 90% of the capital sum likely to be awarded at trial, and the interim payments were awarded.

The decision in *Berry (A Protected Party by his Wife & Litigation Friend Carol Berry) v Ashtead Plant Hire Company Ltd & Others CA10/11/11* provides a fresh reminder that a claimant must be able to show that he will secure judgment from the defendant against whom an interim payment is sought. The claimant was unsuccessful in his application against three of the four defendants to the proceedings (the fourth being uninsured and not joined to the application). The case on liability against the key defendants was not clear cut and a fact sensitive enquiry would be required at trial to determine the issues – thus the court could not award the interim payment sought.

Michelle Traxler
Legal Director
T: +44 (0)20 7876 6089
E: michelle.traxler@clydeco.com

Key points for defendants

- The claimant must be able to establish liability against the specific defendant (or defendants) against whom the application for an interim payment is made
- In any case where there is a claim for significant future losses and thus the trial judge may wish to make a PPO, applications will be assessed by reference to the guidance set out in *Eeles*
- In significant claims the court now has to consider the reason for interim payments to enable an assessment to be made pursuant to *Eeles*
- With large interim payment awards now less likely, there may be a greater incentive for claimants to move towards earlier settlement or trial, potentially leading to overall savings in the cost of claims

Part 36 offers and refusal to mediate

The following two quotes from *Lord Justice Rix (in Rolf v De Guerin [2011]* EWCA Civ 78 and *Epsom College v Pierse Contracting Southern Limited [2011]* EWCA Civ 144 respectively) neatly encapsulate the present concerns about costs in litigation:

"This is an appeal solely about costs. It is also a sad case about lost opportunities for mediation. It demonstrates, in a particular class of dispute, how wasteful and destructive litigation can be."

"I am concerned about the costs which have arisen in this case….. I am also concerned that this is another case in which the existence of a conditional fee agreement has made it practically impossible to obtain a settlement."

Defendants, of course, are only too aware of the costs risks of litigation. Even at a reasonably early stage the claimant's costs can include CFA uplifts, front loaded experts' fees and ATE insurance premiums; costs regularly spiral well beyond the damages claimed. Settlement options must invariably be considered but defendants do need to have confidence in the cost consequences of any offer that they may make. Although Part 36 is intended to be a self-contained and predictable framework within which parties can negotiate, as the continuing stream of first instance and Court of Appeal decisions on Part 36 illustrate, this is not always the case.

In the recent High Court decision of *Norman Lee Thewlis v Groupama Insurance Company Limited [2012]* EWHC, despite the heading and body of an offer letter referring to Part 36, the fact that it said the offer was open for 21 days and *"thereafter it can only be accepted if we agree the liability for costs or the court gives permission"* was fatal. A Part 36 offer can be accepted at any time, even after the expiry of the relevant period, unless the offeror has served notice of withdrawal (CPR 36.9(2)); a letter suggesting otherwise is an invalid Part 36 offer. (See also *French v Groupama Insurance Company Limited [2011]* EWCA Civ 1119).

Part 36 offers accepted after expiry of the relevant period

If a claimant accepts a defendant's Part 36 offer late and the parties cannot agree costs the usual rule is that the claimant will receive his costs up until the expiry of the relevant period and thereafter the claimant will have to pay the defendant's costs up until the date of acceptance (designed to encourage the claimant to accept the offer in good time)(CPR 36.10(5)). However, the defendant cannot always assume they will obtain these costs. The court can make a different order if following the usual rule would be unjust.

In *Lumb v Hampsey [2011]* EWHC 2808 the usual rule was followed. The claimant (a protected party) argued that it was not in a position to accept the offer at the time because during the relevant period, amongst other things, his advisers were unable to value his claim as he was in neurological rehabilitation and they wanted to wait and see how his treatment progressed. It was also argued that the expert evidence which would have been needed for the approval of the Court of Protection was incomplete. These arguments were rejected and it was not considered that it would be unjust to depart from the usual rule on costs. The Court of Appeal decision in this case is awaited.

A similar outcome occurred in the case of *SG (a minor by his mother and litigation friend Mrs AG) v N K Hewitt (High Court, 02.12.11.)* The claimant had sustained a traumatic brain injury as a result of a road traffic accident in March 2003, when he was six. Liability was not in dispute. In April 2009, the defendant made a Part 36 offer. The claimant spent a further two years and three months compiling supplementary evidence from their existing experts and undertaking substantial preparatory work on the case. The offer was then accepted, in August 2011. The claimant sought to argue that, on the medical evidence available at the time of the offer, it was not possible to advise on

acceptance of the offer, or commend it to the court for approval. The defendant argued that it was not appropriate to vary the usual order merely because the value of the claim was uncertain - the losing party should pay, and there was no rule which states that cost consequences should only follow once a case is capable of being quantified. The court accepted that, when the offer was submitted, it would have been impossible for the claimant to determine whether it should be accepted. However this was not a sufficient reason to justify departure from the normal costs order. Whilst the claimant had done nothing wrong in completing further investigations, the defendant was entitled to invoke the function and purpose of Part 36. (For more information on this case, please click **here** to read our previous update).

By contrast in another recent first instance decision, the memorably titled *PGF II SA v OMFS Co [2012]* WL 14891 (a building case) the claimant had accepted the defendant's Part 36 offer on the day before trial following a previously unpleaded point being raised that day in the defendant's skeleton argument, which threatened the claimant's case on liability. The judge decided that despite the late proposed amendment he would have made the usual order that the claimant pay the defendant's costs incurred after the expiry of the relevant period because the newly pleaded point could have been picked up by them earlier when considering their case on liability. However in fact he made no order as to costs for that period because he decided that the defendant had unreasonably refused to take part in mediation.

Refusal to take part in mediation relevant to the court's discretion on costs

This point was also raised by the Court of Appeal in *Rolf v De Guerin [2011]* (see above). This was a small domestic building claim in which the bulk of the claim was dismissed except in relation to one defect for which Mrs Rolf was awarded £2,500, considerably less than originally claimed (at its highest £92,515) and less than her own Part 36 offers. Effectively the defendant had won and wanted his costs. However, Mrs Rolf's solicitors had invited Mr Guerin to participate in mediation several times. He had refused on the basis that he wanted his "*day in court*". This refusal was considered to be unreasonable behaviour for the purposes of CPR 44(5) and the appropriate order was no order as to costs.

Lord Justice Rix referred to *Halsey v Milton Keynes General NHS Trust [2004]* EWCA Civ 576 (a clinical negligence claim) in which the Court of Appeal had given consideration to the circumstances in which it might be said that a party had acted unreasonably in refusing ADR. The question of whether there was a reasonable prospect that mediation would have been successful is one of a number of factors to be considered.

Refusal of mediation on the grounds that all the expert evidence required to value the claim is not available at the time may not be reasonable. As the judge in *PGF* put it: *"The rationale behind the Halsey decision is the saving of costs and this is achieved (or at least attempted) by the parties being prepared to compromise without necessarily having as complete a picture of the other parties' case as would be available at trial."*

Parties cannot be forced to mediate, especially when, for example, as in *Halsey*, the defendant has a good defence and the costs of mediation were disproportionately high when compared to the value of the claim. However, it is now standard both in clinical negligence and personal injury cases for the court to give a direction regarding ADR and both parties need to be prepared to justify rejection of ADR at the conclusion of a trial should the judge consider that it would have been appropriate when considering what costs order to make.

Mary Edis
Barrister
T: +44 (0)20 7876 6028
E: mary.edis@clydeco.com

Key points for defendants

- Care must be taken with the wording of offers, which must comply with the provisions of Part 36 in order to attract its costs consequences
- Late acceptance of a Part 36 offer by the claimant will usually mean that the claimant will have to pay the costs after the expiry of the relevant period, but the court has discretion to make a different order if that would be unjust
- Refusal to mediate may be conduct to be taken into account when the court exercises its discretion on costs
- Defendants may wish to consider suggesting mediation at the same time as making a Part 36 offer; unreasonable refusal by the claimant could in some circumstances alter the final costs order even if the claimant succeeds
- Defendants should be aware that unreasonable refusal to mediate may be used against them by the claimant on costs arguments

Discounting awards for multiple injuries

What is the correct approach towards damages for pain, suffering and loss of amenity when multiple categories of injuries are suffered by a claimant?

This was the question considered by the Court of Appeal in *Sadler v Filipiak (October 2011)*, in an appeal by the claimant against the general damages awarded by the trial judge.

The claimant's claim arose following a road traffic accident on 26 November 2006. The claimant had been the driver of a vehicle travelling with passengers to church when there was a frontal collision with the defendant's car travelling on the wrong side of the road in the opposite direction. One of the claimant's passengers was killed and the claimant suffered serious injuries, which were summarised as follows:

- Transverse fracture of the mid femur on the left side
- Formatic dislocation of the right big toe
- Whiplash injury to the neck
- Blunt abdominal injury to the spleen
- Concussive head injury
- Multiple scarring to the face, arms and legs
- Blurred and patchy vision in the right eye following a blow to the front of the head
- Post-traumatic stress disorder

The trial judge at first instance considered, as his starting point, reported previous awards, but decided that none of the "*comparable*" awards put to him adequately met the circumstances of the claimant's case, or her particular constellation of injuries. The trial judge did not consider it was appropriate to simply add up different amounts for each injury as set out in the JSB Guidelines, because the pain and suffering had occurred at the same time.

The trial judge felt that the claimant suffered considerable interference with her life over a period of about five years, reducing from an initial intensity in the first few months, that she would recover substantially but that she will be left with permanent scars. In reaching his award of £32,000, the trial judge stated *"I do not accept that I can simply aggregate the figures in each category, however I come to them…. there must, it seems to me, be an element of overlap"*.

The Court of Appeal was asked to review the general damages award. It was argued that either the trial judge undervalued each of the individual categories of injury, or had applied too great a discount before arriving at his award of £32,000.

The Court of Appeal agreed that it was always necessary to stand back from the compilation of individual figures, whether guidance had been derived from previous, comparable cases, or from the JSB guidelines, and to consider whether the actual award for pain and suffering and loss of amenity should be greater than the sum of the parts, in order to properly reflect the combined effect of the injuries, or should be smaller than the sum of the parts in order to remove any element of double recovery.

Lord Justice Pitchford noted that *"in some cases, no doubt a minority, no adjustment will be necessary because the total will probably reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment, and occasionally a significant adjustment may be necessary"*.

Lord Justice Etherton was in no doubt that the trial judge should have *"firstly considered the various injuries and fixed a particular figure as reasonable for each and then, secondly, stood back, and had a look at what would be the global aggregate figure and ask whether it was reasonable compensation for the totality of the injury"*.

On the facts of this case, the Court of Appeal considered that the correct figure for damages, by simply adding the component parts of the award, by reference to the JSB guidelines, would produce a figure of £47,500. On the facts of this case, the court considered an appropriate discount for overlap brought the award down to £40,000, which figure was about 85% of the total.

Kamal Bedi
Associate
T: +44 (0)20 7876 6005
E: kamal.bedi@clydeco.com

Key points for defendants

- In multiple injury claims, defendants should consider the various injuries, fix a particular figure for each, and then consider whether that figure would be reasonable compensation for the totality of the injuries
- The courts recognise that an adjustment may be necessary in the majority of cases. That adjustment can be downwards or upwards
- The JSB guidelines are issued to inform practitioners of the range of current awards made by the courts for roughly comparable injuries, but do not amount to a straight jacket within which awards of damages for different forms of injury must fall. The courts will, and should, take into account relevant comparator cases
- It would be wrong to draw the conclusion that there is judicial support for an automatic 15% discount in multiple injury cases

RTAs – it's all in the facts!

This article considers three contrasting decisions relating to road traffic accident claims.

Whilst, for obvious reasons, insurers and practitioners will seek the comfort of established precedent in assessing claims, inevitably many cases turn on their own facts. This is particularly so in claims which arise following road traffic accidents. Three recent decisions highlight the contrasting approach that can be taken in road traffic accident claims.

In *Ali v D'Brass (Court of Appeal, November 2011)* the claimant appealed against the dismissal of his claim for personal injury. The claimant had been driving on a dual carriageway at about 35-40mph when he braked negligently, when there was no hazard. The defendant had been travelling about half a car's length behind. The claim was initially dismissed on the basis that the accident occurred because the claimant had braked for no good reason. The Court of Appeal, however, considered that, even though the claimant had braked for no good reason, the defendant was at fault for driving too close to the rear of the claimant's vehicle, and applied the well reported decision of *Stapley v Jypsom Mines Ltd (1953 House of Lords)*. Liability was apportioned 40% to the claimant and 60% to the defendant.

In *Ringe v Eden Springs (High Court, 2012)* the court imposed 80% contributory negligence on a claimant motorcyclist who had been hit by the defendant van driver emerging from a side turning. The accident occurred when the claimant had just overtaken an articulated lorry and the van driver's view of the claimant had been obscured by the presence of the lorry. The motorcyclist was estimated to have been travelling at 60-70mph before the collision. The speed limit was 40mph. The defendant was criticised for having pulled out in circumstances where the size of the approaching articulated lorry was such that he could not see if there was any vehicle overtaking the lorry but the claimant bore considerable responsibility for his driving. Permission to appeal has been granted to the defendant.

A similar factual scenario resulted in a very different outcome in *Woodham v JM Turner (Court of Appeal, 2 February 2012)*. In that case, the court set aside the trial judge's original finding on liability. The facts involved the driver of a coach who was turning out of a T-junction. The coach pulled out to make a right turn manoeuvre past a tractor which had left a gap. The motorcyclist was filtering past the queue of traffic and, inevitably, collided with the front offside corner of the emerging coach. The trial judge found that the coach was at fault in moving forward into the gap when she was not properly able to see whether a road user was overtaking on the offside of the stationary tractor. Unlike the motorcyclist in *Ringe*, the motorcycle here was not travelling at a grossly excessive speed. The judge found that the motorcylist was travelling at 20mph when a speed of 15mph or less would have given him a greater chance to take evasive action. He considered, however, that the coach driver should bear 70% responsibility.

On appeal by the defendant, the Court of Appeal took the view that the accident would not have happened if the coach driver had waited until she had a clear view to her right. Equally, however, the accident would not have occurred if the motorcyclist had not, contrary to the Highway Code, filtered up the off side of a queue of traffic when this gave rise to a foreseeable risk of injury from an emerging vehicle. As there was no reason to differentiate between the two parties, the court considered a finding of 50/50 appropriate. This apportionment was made notwithstanding that the facts were very similar to the well known case of *Powell v Moody (Court of Appeal, 1966)* where the claimant motorcyclist was held 80% liable.

Grant Conway
Legal Executive
T: +44 (0)20 7876 6018
E: grant.conway@clydeco.com

Key points for defendants

- Decisions in claims from motor accidents are often highly fact sensitive. The courts often reach very different liability outcomes on superficially similar claims
- When considering precedent in motor cases, consider the basis of culpability, rather than the broad facts
- Where both parties are culpable, and there is no clear reason to attribute more blame to one party than another, a 50/50 outcome is likely

Focus on causation

There have been some recent Court of Appeal decisions highlighting the need to consider the issue of causation in detail even in cases where breach of duty can be established.

The case of *Sutton v Syston Rugby Club [2011]* EWCA Civ 1182 considered the duty of care owed by a rugby club to inspect the pitch prior to a practice session.

At first instance the club was held liable for personal injury sustained by a player when he injured his knee having fallen on a broken cricket boundary marker submerged in the ground. The judge found that the club should have conducted a walked inspection of the pitch and, whilst not required to investigate underneath every blade of grass, a slightly more careful degree of attention needed to be paid to the touch down ends where players were expected to dive or fall onto the ground. A more careful inspection would have discovered the hazard.

The club appealed on the basis that the duty of care imposed was too high; a "reasonable walk over the pitch" was sufficient but in any event even if a more detailed inspection had taken place it would not have revealed the stump as it was not visible beneath the grass.

The Court of Appeal noted that it was for the claimant to prove that a defendant's breach of duty caused the loss for which he claimed. On the facts of this case, the court found for the defendant rugby club, ruling that the judge at first instance had placed too high a duty on the club to pay a more careful degree of attention to the touch down ends and that a "reasonable walk over of the pitch" was sufficient. The court was keen not to place too high a burden on ordinary coaches and match organisers given that games of rugby are a desirable activity within S1 of the Compensation Act 2006, but in any event the Court of Appeal considered the claimant could not prove that a reasonable walk over of the pitch would, on the balance of probabilities, have revealed the stub's existence.

The decision in *Harlow v Peterborough City Council (2011)*, an employers' liability claim, is less helpful to defendants. The claimant was a teacher at a secure facility for women operated by the local council. She was due to teach a class of three in a secure locked class room. Policy stated that staff should not be alone with more than two women. The claimant usually had a teaching assistant who was running late that day. Shortly before the class was due to start two escorts brought a woman into the class and both left. The claimant did not realise they had both left until the door was locked and she had been left alone with three women. She therefore went to fetch another member of staff. In her haste to leave the room she tripped on her chair and fell sustaining injury. The council argued that the accident was not reasonably foreseeable as she was not injured as a result of the threat of violence or actual violence; her own actions had broken the chain of causation.

The court at first instance held that breach of duty had been established as the claimant had been left alone with three women contrary to policy. The known source of danger had been the women. The claimant was therefore at a foreseeable risk of injury. The council conceded she had acted appropriately in going to seek another member of staff. Although the injury did not occur in the most likely manner, her injuries were still sufficiently envisaged to be caused by the breach of duty and so liability was established.

Katrina Rea
Associate
T: +44 (0)20 7876 6071
E: katrina.rea@clydeco.com

Key points for defendants

- If it is likely breach of duty will be established, consider whether the accident would have been prevented had the defendant complied with the duty
- Where a breach of duty causes a foreseeable risk of injury, even if the foreseeable incident did not occur, liability may be established where the claimant's injury was caused trying to avoid this risk
- Remember it is for the claimant to prove that a breach of duty caused the injury sustained; therefore do not concede this point too early
- Although pure causation defences are often considered the last refuge for the desperate defendant, such defences can succeed in the right case
- When making any admissions be careful to consider how these are worded. It is important to clarify whether an admission of a breach of duty is subject not only to medical causation but also whether the breach caused the incident complained of

Animals Act 1971, section 5(2) - not a dangerously high horse!

As reported in our previous newsletter, defendants are starting to have considerable success in defeating claims brought under the Animals Act 1971 by relying on one of the three statutory defences to strict liability under section 2 of the Act. The recent Court of Appeal decisions in *Goldsmith v Patchcott* and *Turnbull v Warrener* continue the trend of success for defendants relying on the statutory defence, whilst also providing some useful guidance as to the manner in which section 5(2) of the Act, and the often criticised section 2(2)(b) of the Act, should be interpreted.

In *Goldsmith*, the facts were relatively straightforward. The defendant was the keeper of a horse called Red. He was looking to dispose of Red, and hoped to find someone to whom he could give the horse away for no charge.

The claimant was introduced to the defendant in March 2008. They discussed the horse and the claimant expressed some interest in taking it. She visited the defendant at his home on three occasions in short succession and rode the horse in the company of the defendant.

On 24 March 2008 she went for a ride on Red by herself. During that ride, Red reared up then bucked violently. The claimant was thrown to the ground and then struck by the horse's hoof, suffering severe facial injury.

During trial, the claimant agreed that she was an experienced, confident rider and that she knew the horse could be spooked for no apparent reason. She denied that she knew that Red had a tendency to rear and buck violently and claimed that, had she known this fact, she would not have ridden Red. She accepted, however, that she knew that horses could buck when startled or alarmed. The trial judge held that Red's bucking was a normal characteristic of horses in the particular circumstances of being startled or alarmed. The defendant had relevant knowledge of the characteristic and so, subject to the statutory defences, strict liability attached.

However, turning to the statutory defences, the trial judge found that the claimant was aware of the risk that horses would rear and buck if startled or alarmed and therefore had voluntarily accepted the risk of that happening.

The Court of Appeal was asked to consider whether or not the claimant had, in fact, voluntarily accepted the risk of injury for the purpose of section 5(2) of the Animals Act. It also reviewed the effect of section 2(2)(b) of the Act and in particular, considered the submission that the phrase "*at particular times or in particular circumstances*" denotes times or circumstances which can be described or predicted.

As horses do not only buck when startled or alarmed, the Court of Appeal was asked to agree that bucking does not fall within the second limb of section 2(2)(b). The Court of Appeal rejected that argument, section 2(2)(b) should not be given a restrictive interpretation. The court accordingly agreed that the behaviour of Red in bucking fell within section 2(2) and that strict liability, subject to the statutory defence, applied.

The Court of Appeal considered the statutory defence. Having indicated that a non-restrictive approach must be taken to the interpretation of section 2(2), it indicated that, similarly, a non-restrictive interpretation should be applied to section 5. The claimant could not seek to differentiate between voluntarily accepting the risk of "*normal*" bucking, but not accepting the risk of the type of "*violent*" bucking that occurred in this case. The claimant foresaw the possibility of bucking and voluntarily accepted the risk. The fact that Red bucked more violently than anticipated could not take the case outside section 5(2) so as to defeat the defendant's defence.

In *Turnbull* the claimant and defendant were equally experienced horsewomen. The defendant, when she became pregnant, allowed the claimant to ride her horse, Gem. Following equine dental treatment, the defendant was advised that Gem should be ridden for a week with a bitless bridal. The defendant borrowed such a bridal and discussed its use with the claimant, as Gem had never experienced a bitless bridal. Gem had been ridden in an enclosed area to make sure that she was comfortable with a bitless bridal but was not cantered in that area.

The claimant then took Gem out on a canter. The horse pulled to the right, and veered onto a road where the claimant fell and sustained injury. At first instance, the trial judge considered that the claimant failed to establish liability under section 2 of the Animals Act, and that the defendant had a defence under section 5(1) in that the accident had been wholly caused by the claimant's negligence. The first instance trial judge indicated, however, that he could not accept that, for the purpose of section 5(2), the claimant had voluntarily accepted the risk of the injury which she eventually sustained.

The claimant appealed against the dismissal of her claim, and the defendant served a respondent notice arguing that the trial judge wrongly found that the claimant had not voluntarily accepted the risk for the purpose of section 5(2). The Court of Appeal was unable to agree as to whether or not, on the evidence, the claimant succeeded in arguments under section 2 of the Animals Act (the majority view being

that she did not). The court unanimously agreed, however, that:

a) Defence under section 5(1) of the Animals Act, namely that the accident was wholly the fault of the claimant, should fail; and
b) Defence under section 5(2) of the Animals Act, namely that the claimant voluntarily accepted the risk of injury, should succeed

In respect of section 5(1), the court considered that, as both the claimant and defendant were equally experienced horsewomen, the defendant was in a position to insist that Gem should be cantered in an enclosed space before being allowed to canter in a field. Accordingly, in a statutory sense, the incident could not be said to be wholly the fault of the claimant. In respect of section 5(2), however, the court noted that the claimant knew that a horse, just fitted with a bitless bridal, bore an increased risk of not being responsive to a rider's instructions. That was the whole point of the initially cautious approach in the enclosed area. The claimant also knew that Gem had not cantered when fitted with the bitless bridal. In those circumstances, it was plain that she had voluntarily accepted the risk which occurred. As put by Lewison LJ "*an individual who chooses to ride horses for pleasure no doubt derives enjoyment from being able to control a powerful beast. But inherent in that activity is the risk that on occasions the horse will not respond to its rider's instructions, or will respond in a way that the rider did not intend. That is one of the risks inherent in riding horses. That is all that happened in the present case.*"

Andrew Sheppard
Legal Director
T: +44 (0)20 7876 6078
E: andrew.sheppard@clydeco.com

Key points for defendants

- Courts are prepared to support defendants who seek to rely upon the statutory defences in the Animals Act 1971
- If the claimant is an experienced horse rider, always seek evidence as to the knowledge that one would expect to find in a horse rider of the claimant's general experience
- Always seek evidence about the claimant's actual knowledge
- Do not accept "*fine distinctions on the facts*". The courts will interpret section 5(2) by giving the words their ordinary meaning, in a non restrictive manner

Occupier or employer – who pays?

It is accepted law that employers owe a non-delegable duty of care to their employees. However as covered in our previous review of the CEVA Logistics decision, the non-delegable nature of the duties owed by an employer does not preclude another party owing co-extensive duties, thus offering scope for an employers' liability to be shared with another party.

The High Court considered such a situation in the case of *Helen Shearer Evans (Executrix of the Estate of Malcom Evans Deceased)* and *Royal Borough of Windsor and Maidenhead (1)* and *Charles Wilson Engineers Limited (2) (July 2011)*.

The claimant sustained fatal injuries by striking an overhead pipe whilst reversing a mobile elevating work platform. He was employed by the second defendant as an HGV driver. He was responsible for the delivery and collection of a mobile elevating working platform ('MEWP') at a site belonging to the first defendant. At the site there was an overhead pipe, linking a heating installation to a gymnasium over a private access way. The pipe was situated about 3.3 metres from the ground. The height of the MEWP when fully stowed was three metres. The second defendant's sales manager had visited the site to assess the size of plant required.

The accident occurred when the claimant collected the MEWP. He was reversing the same and struck the pipework. On the entrance side to the site there was signage affixed to the pipework warning of the danger. There was no such signage on the other side of the pipework. There were no warning signs in advance of the pipework on either side. As a result of the accident the HSE made recommendations to the first defendant, which included putting up signs in advance warning of the height restriction. However there were no HSE prosecutions arising out of the incident.

The claimant brought proceedings against the first defendant, as occupier, alleging that there was inadequate signage. The first defendant denied that the signage was inadequate and brought Part 20 proceedings against the second defendant alleging that the claimant had been inadequately trained in the use of the MEWP, and that a banksman ought to have been present for the delivery and collection.

The second defendant gave evidence that the claimant was an experienced driver. After joining the defendants in 1994 he had been trained in April 2002 on a four day course, both as an operator and demonstrator of MEWPs. The ensuing certificate was valid for five years, although at the time of the accident the certificate was about to expire.

The second defendant stated that it would not be feasible to carry out a risk assessment in individual hire contracts where 200-250 pieces of equipment were being delivered on a daily basis across the country. Drivers were expected and trained to carry out individual risk assessments.

David Pittaway QC (sitting as a Judge of the High Court) was solely concerned with the issue of contribution proceedings between the two defendants. He found the claimant was inadequately trained. He further found that the second defendant placed too much reliance on the extent of the claimant's experience and insufficient emphasis on making sure that he did not develop practices which placed him at risk whilst delivering or collecting plant. Additionally, whilst unusual, on this occasion a site inspection was conducted. The second defendant's sales manager was aware of the presence of the overhead pipework and should have noted and recorded the issue of restricted headroom. The claimant should have been warned in advance of the restricted headroom.

However, the judge also considered that the failure of the first defendant to display clear signage in advance of the overhead pipework in either direction and on the pipework for vehicles exiting the site was a breach of the duty by the first defendant to visitors to the site.

Having made the above findings he found the parties to be equally responsible for the incident and apportioned liability 50/50 accordingly.

Gabbie Ietro
Senior Associate
T: +44 (0)161 829 6426
E: gabbie.ietro@clydeco.com

Key points for defendants

- When an employee is injured on the site of a third party give careful consideration as to whether the third party has potentially breached any duties owed to the employee
- Whilst an employer's duty to an employee is non-delegable remember that this does not prevent an apportionment of liability if another culpable party can be identified
- On a practical level an employer may need to consider joining in a party as an additional defendant pursuant to Part 20. The employee may consider the employer to be the easiest target, although that was not the position in this particular case
- Occupiers should give attention to the risks presented to employees whilst they are on site

Supreme Court rules employers' liability insurance responds for mesothelioma upon fibre inhalation

Companies and local authorities will be able to seek cover from their insurers after the Supreme Court has ruled that insurance cover taken out will respond for mesothelioma. Savings of £5 billion have been mooted.

In a judgment handed down in November 2011, the Supreme Court held that policies of employers' liability insurance which respond when disease is "sustained" or "contracted" respond in mesothelioma claims upon inhalation of asbestos fibres rather than the date of manifestation of the disease.

The lead judgment of the court was given by Lord Mance. Firstly, he concluded that policies of employers' liability insurance are linked intrinsically to the period of cover. Payment is made with regard to that period and cover relates to the policy period. Thus he says that great care is taken to tie the premium to the actual employment. He says this makes the link between the policy and a later trigger unlikely.

Secondly, Mance indicated that changes in policy wording would suggest that present insurances should not be read as providing cover. Further, people will retire, companies will cease trading and insurance may not be renewed. All suggests the relevant date as being during the period of employment.

Thirdly, the excess policy is framed in respect of employees in service. As soon as a delay between employment and occurrence of symptoms is considered the policy wording would be curious, in Mance's view.

Fourthly, the Employers' Liability Compulsory Insurance Act required insurance, in Mance's view, which was only compatible with a causation worded policy. He described this as a powerful tool in the interpretation of such policies.

Turning then to the words "*contracted*" and "*sustained*" Lord Mance indicated that he had no difficulty in treating the word "*contracted*" as looking to the causation or initiation of a disease, rather than to its development or manifestation. In respect of the word "*sustained*", Mance indicated that whilst initially the word may appear to refer to the development or manifestation of a disease, the only consistent approach in line with the underlying purpose is one which looks to the initiation or causation of the disease. He concluded that the disease may properly be said to have been sustained by an employee in the period when it was caused or initiated, even though it only developed or manifested itself subsequently.

Finally, Mance turned to whether the risk of mesothelioma is the correct analysis of the Fairchild principle and whether the risk alone, with subsequent injury, can satisfy the concept of causation for the purpose of the policies of insurance.

Whilst Lord Phillips dissented on this point, Mance and the remainder of the court concluded that in light of the decisions in *Fairchild*, *Barker, Sienkiewicz* and the Compensation Act 2006, policies which cover diseases "*caused*" during the relevant period, should respond where liability for mesothelioma following exposure to asbestos created during an insurance period involved a weak or broad causal link for the disease. Mance stated that the risk of mesothelioma is no more than an element or condition necessary to establish liability for the mesothelioma and that the concept of a disease being "caused" during the policy period must be interpreted sufficiently flexibly to embrace the rules laid down in *Fairchild* and *Barker*.

In short, Mance concluded that "*if (as I have concluded) the fundamental focus of the policies is on the employment relationship and activities during the insurance period and on liability arising out of and in the course of them, then the liability for mesothelioma imposed by the rule in my opinion fulfils precisely the conditions under which these policies should and do respond.*"

Mark Hemsted, partner, acted for Babergh BC, successful appellant in the Supreme Court action.

David Knapp
Partner
T: +44 (0)20 7876 6053
E: david.knapp@clydeco.com

Mark Hemsted
Partner
T: +44 (0)161 829 6410
E: mark.hemsted@clydeco.com

Our contacts

Editors

Andrew Sheppard
Legal Director
T: +44 (0)20 7876 6078
E: andrew.sheppard@clydeco.com

Danielle Singer
Partner
T: +44 (0)20 7876 6080
E: danielle.singer@clydeco.com

Contacts for further information

Kevin Bitmead
Partner
T: +44 (0)20 7876 6007
E: kevin.bitmead@clydeco.com

Kevin Finnigan
Partner
T: +44 (0)161 240 2727
E: kevin.finnigan@clydeco.com

Danielle Singer
Partner
T: +44 (0)20 7876 6080
E: danielle.singer@clydeco.com

Andrew Sheppard
Legal Director
T: +44 (0)20 7876 6078
E: andrew.sheppard@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR
T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.

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