Personal Injury Newsletter

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CHAMBERS OF
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Farrar's Building News

Huw Davies, Editor

In this month's newsletter, **Howard Cohen** reviews the concept of foreseeability of injury in light of the recent Court of Appeal decision in **Crux v Chief Constable of Lancashire** whilst **Georgina Crawford** considers the current uncertainty created by the case of **Qader v Esure Services Ltd** as to whether fixed recoverable costs scheme may still apply to EL cases moved out of the portal.

We welcome our two new pupils to chambers, Laura Fitzgibbon and Tom Emslie-Smith. Laura has provided the case law update.

Foreseeability of injury – Keeping it real

By **Howard Cohen**

Introduction

The legal concept of foreseeability is applied in myriad situations and must therefore remain sufficiently malleable to accommodate the varying circumstances of each individual case. It was once again at the forefront of the judicial mind in the recent Court of Appeal decision in **Crux v Chief Constable of Lancashire & Anor** [2016] EWCA Civ 402 when interpreting Regulation 5 of the **Workplace (Health, Safety and Welfare) Regulations 1992**. Although the impact of the Enterprise and Regulatory Reform Act 2013 now means that breaches of these Regulations are no longer automatically actionable, the concept itself will continue to be key.

The Facts

The circumstances of the claim were as follows. The Claimant, then aged 22, was working in the cell complex at Burnley Police Station as a civil detention officer ('CDO') employed by G4S. The Defendant Chief Constable was the occupier of the police station and had control over the Claimant's workplace. One night in July 2010, C and a colleague (CDO Wilson) were required to escort a drunk and disorderly "detained person" ('DP') into one of the cells a short walk away from the custody suite. Standing on either side of the DP, and with both hands upon her, they frog-marched her along various narrow corridors and through a series of gates. As they approached their destination, they expected to find the door to cell 11 wide open and flush to the corridor wall as it usually was. On this occasion, it was only partially open, with the gap between the leading edge of the door and the opposite wall only around 13 inches, meaning that there was no room for all 3 to enter the cell.

CDO Wilson took her hands off the DP in order to fully open the door and as she did so, the DP suddenly dropped to the ground without warning, taking the Claimant's left forearm with her. Although only 5 feet 3 inches in height, the DP weighed around 13.5 stones and pulled the Claimant to the floor. As a result, the Claimant sustained a serious injury to her dominant left wrist.

At First Instance

The Claimant argued at first instance that because the cell door was not fully open and flush to the wall as it usually was, the corridor itself (forming part of the Claimant's workplace) was not maintained in an efficient state in accordance with the strict liability requirements of Regulation 5. This requires a workplace to be *"maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair."*

His Honour Judge Butler, sitting at Preston County Court, found that the partially open door presented no foreseeable risk of injury. In particular, he noted within his Judgment that:-

i. Neither the Claimant nor CDO Wilson stopped to comment on the partially open door in the moments either before or after the accident occurred;
ii. Neither of them reported the partially open door to the Custody Sergeant or to any other senior member of staff as any kind of breach of protocol, instruction or training;
iii. The CDO's dealt with the open door in an instinctive way, ie: it was open and needed to be closed and so they closed it;
iv. There was a comprehensive risk assessment in place which did not identify partially open cell doors as presenting any risk of injury;

v. In the context of the health and safety of staff (as opposed to the efficiency of detaining people), no unsuitability or insufficiency arose. Given what was known and what could have been foreseen (following the guidance on what constitutes a suitable and sufficient risk assessment from Smith LJ in **Allison v London Underground Ltd** [2008] EWCA Civ 71), a suitable and sufficient risk assessment had been performed.

On Appeal

In the Court of Appeal, Tomlinson L.J. entirely endorsed the approach taken at first instance and spoke in robust terms about this rather factually unusual case.

It was agreed between the parties that if there was no foreseeable risk of injury, then there could be no breach of Regulation 5, foreseeability being a critical ingredient. This was defined by Hale LJ in the earlier case of **Koonjul v Thameslink Healthcare Services** [2000] PIQR 123, [2000] EWCA Civ 3020 as, *"a real risk, a foreseeable possibility of injury",* although for completeness, Tomlinson LJ adopted the tighter definition of *"foreseeable material risk of relevant injury".*

He explained that any foreseeable injury had to be *"relevant"* in the sense that it had to be an injury to someone whose workplace was under consideration. A foreseeable risk of injury to a visitor to the police station would not have satisfied the conceptual requirement. Thus, the evidence that a partially open door could lead to delay in getting a drunk and disorderly arrestee into a cell (and increase her risk of injury) had *"little or no bearing"* on the question of whether the partially open door presented a foreseeable risk of injury to the CDO's. Although it was important to respect the safety of detainees throughout the duration of their incarceration and isolation, what mattered was *"whether the partially open door presented a real or material risk of injury to the CDO's….It is obviously the case that the*

longer the CDO's are required to associate at close quarters with DP's, particularly drunk and disorderly DP's, the greater is the risk that the CDO will be injured by the DP. The question however, is whether the partially open door presented a real risk of injury to the CDO's over and above that inevitably associated with the job in question."

Further, just as Hale LJ had pointed out in **Koonjul** that in drafting risk assessments, there had to be an element of realism, so Tomlinson LJ noted that Courts had to be realistic when assessing whether specified risks of injury were foreseeable or not. *"That is why the risk must be real or material, although it does not have to approach a probability."* In terse dicta, he argued that the lower Court's conclusion that the partially open door presented no real risk of relevant injury was *"obviously correct"* and that the notion that a material risk of injury arose every time a door was inadvertently left partially open *"lacks all reality."*

Given the lack of any prior incidents indicating a risk of injury, the fact that on the night in question neither CDO thought anything of the open door, the evidence of police superiors that the good sense of leaving doors fully open related to operational efficiency rather than the health and safety of the workforce and the fact that the Defendant's risk assessment raised no issue of unsuitability or insufficiency, Tomlinson LJ dismissed the Claimant's appeal.

Summary

Although applied to a very specific set of facts (with only one outcome ever arguably likely), the Court of Appeal has again sought to clarify the parameters of the concept of foreseeability. In adopting the phraseology, *"foreseeable material risk of relevant injury",* Tomlinson LJ has provided a useful reminder of the salient factors to bear in mind when considering and assessing this critical, but movable concept.

Fixed costs regime and the multi-track: does the rational of Qader apply to Employer's Liability claims as well?

By Georgina Crawford

Qader & Ors v Esure Services Ltd [2015] EWHC B18 (TCC); It started off like thousands of other claims in October 2013; a road traffic accident occurred with multiple occupants in one vehicle, of whom three became Claimants claiming damages against the Defendant who drove into the back of them. The Defendant alleged that this was a staged accident caused by the Claimant driver who braked for no apparent reason on a slip road. The claim was commenced in the RTA portal on account of the value being pleaded at £5,000 to £15,000. The claim fell out of the portal and by reason of the allegations of fraud, it was duly allocated to the multi-track. Things became difficult when the question of costs was raised by the Defendant, who sought to argue that the fixed costs regime more commonly applied to fast track matters was on proper construction of the rules, applicable.

Going back to basics, the protocol applies where either;

(a) the claim arises from an accident occurring on or after 31 July 2013; or

(b) in a disease claim, no letter of claim has been sent to the defendant before 31 July 2013;

(2) the claim includes damages in respect of personal injury;

(3) the claimant values the claim at not more than £25,000 on a full liability basis including pecuniary losses but excluding interest ('the upper limit'); and

(4) if proceedings were started the small claims track would not be the normal track for that claim.

CPR 45.29A states that fixed recoverable costs apply to a claim which is started under the RTA Protocol or the EL/PL Protocol but no longer continues under the relevant Protocol/Stage 3. Allocation to the multi-track will normally engage the costs budgeting procedure in Section II of Part 3 but CPR 3.12(1)(c) excludes claims *where the proceedings are the subject of fixed costs or scale costs or where the court otherwise orders.*

The Defendant's position was that these rules leave no room for doubt; where a claim is started in the protocol, with the CNF submitted post 31 July 2013, the parties can only recover fixed costs, without reference to allocation to track. The alarming consequence of that argument is of course that any RTA, EL or PL matter which starts in the portal can only carry fixed costs, regardless of its eventual value, complexity, level of judicial allocation, expert attendance and length of final hearing.

The appeal from first instance was heard by His Honour Judge David Grant, whose judgment resulted in two key points being upheld; CPR 45.29 is not restricted to fast track cases and there is no mention of allocation affecting the fixed costs regime, and CPR 3.12(1)(c) specifically excludes the rules on costs budgeting from those cases to which the fixed costs regime already applies. The claimant had unsuccessfully argued that the lower court was wrong to apply fixed costs because the scheme was only intended to be applied to the fast track on the recommendation of Jackson LJ.

The decision of HHJ Grant is of itself the subject of appeal, currently listed in the floating list on 20th October in the Court of Appeal. Bearing in mind that over a year has elapsed since the findings of HHJ Grant, this has been a year of significant uncertainty. It is worth remembering that the court can be invited to exercise its power to award costs exceeding the fixed recoverable costs, under 45.29J(1): *If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred*

to in rules 45.29B to 45.29H. HHJ Grant made it clear that a mere allegation of fraud will not be sufficient;

> "*It is perhaps permissible to observe that the nature and ambit of the allegations of fraud which are made in the present case are discernibly of a different nature from the types of allegations often made in cases of commercial fraud in proceedings in the Chancery Division, the Commercial Court or the TCC. Such cases often involve the examination and consideration of considerable volumes of documents, analysis of legal principles of fiduciary duty and consideration of often complex commercial factual matrices. In contrast, the central factual issue in the present case is simply whether the First Claimant applied the brakes in such a manner that he induced a relatively minor road traffic accident to occur.*"

The reason this all came to my attention was as a result of a seemingly innocuous CCMC in an EL matter, worth on current evidence in the order of tens of thousands. The claim was started in the portal largely on account of the full extent of the Claimant's injury being unknown at that stage, but which fell out of the portal owing to liability being disputed. The claim form then carried a value in excess of £25,000 and the court duly issued notice of its intention to allocate to the multi- track, and listed the matter for directions and costs budgeting. The case is clearly not on all fours with Qader and the run of the mill RTA fraud type scenarios, but with some reluctance, the judge at the CCMC had to defer to the higher court and effectively stay the costs budgeting exercise, on account of the identical portal and CPR 45.29 provisions for RTA and EL/PL matters.

Logic dictates that this sort of case would better fit the bill of 'exceptional circumstances' as indeed would other multi track claims carrying significant quantum value; it cannot surely be right that budgets running to tens if not more than a hundred thousand pounds are

simply cast aside on a black letter approach to the rules. Equally unappealing is the prospect of claims which never come within the portal on account of being issue in excess of £25,000 settling for lower than that sum, but attracting costs awards in the tens of thousands. Can the former example properly be categorised as 'exceptional', and what do the rules say about the latter? Can it really be sound to say that a claim carries fixed costs regardless of its value and allocation to track? Would it not be more appropriate to redress the difficulty created by the strict provisions of the CPR by substituting language which affords a greater degree of latitude? The unhappy and ironic consequence is that for the past year at least, there must have been a multitude of abortive CCMC's or at the very least contingent costs budgeting exercises, whilst we await the decision of the Court of Appeal.

Case Law Update

By Laura Fitzgibbon

HAYWARD v ZURICH INSURANCE CO PLC [2016] UKSC 48

(Lord Neuberger PSC, Lady Hale DPSC, Lord Clarke JSC, Lord Reed JSC, Lord Toulson JSC)

SIGNIFICANCE: Insurers who settled a personal injury claim when they suspected fraud would be entitled to set aside the settlement if they later discovered proof of fraud. When seeking to set aside the settlement on the basis of fraudulent misrepresentation, it need not be proved that the insurer believed the misrepresentations to be true, but only that the insurer was 'influenced by' the claimant's misrepresentations.

FACTS: The claimant brought proceedings against his employers in respect of a back injury suffered at his workplace. Liability was admitted but quantum disputed on the basis that the extent of the ongoing injury was exaggerated, which was supported by video evidence. The claim settled before the quantum trial, and the terms of the agreement were recorded in a settlement agreement.

Two years later, the claimant's neighbour provided the insurer with further evidence that the claimant had exaggerated his injuries. The evidence suggested that the claimant had recovered fully from his injuries a year prior to settlement. The defendant sought rescission of the settlement agreement (or damages for deceit in the alternative) on the basis that they had been induced to enter into the settlement agreement on the basis of the claimant's fraudulent misrepresentations.

HELD: (1) It was not necessary, as a matter of law, to prove that the insurer believed the claimant's misrepresentations to be true in order for the settlement to be set aside. The correct test is whether the defendant was 'influenced by' the claimant's misrepresentations.

This will be a question of fact in each case. The fact that the insurer did not believe the representations does not lead to the conclusion that they were not influenced by the misrepresentations; the question is not what view the party itself takes, but what view they believe the court may take in due course.

(2) Where proof of fraud is later established through new evidence, a previous suspicion of fraud does not preclude the unravelling of the settlement agreement.

MOTOR INSURER'S BUREAU v MORENO [2016] UKSC 52

(Lord Mance JSC, Lord Clarke JSC, Lord Sumption JSC, Lord Toulson JSC, Lord Hodge JSC)

SINGNFICANCE: The compensation due under the **Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 reg.13** to a UK resident who had been injured in a road traffic accident in another Member State should be assessed by reference to the law of that state, not by reference to English law.

FACTS: An English national was seriously injured in a road traffic accident in Greece with an uninsured driver. Compensation due to the claimant under Greek law would have been less than the compensation due to her under English law. The question was which law compensation should be assessed under.

HELD: The starting point in construing the 2003 Regulations is that they should, so far as is possible, be interpreted in a sense which is not in any way inconsistent with the Directives. There was no suggestion in the 2003 Regulations or the Explanatory Note or anywhere else of an intention by the domestic legislator to do anything other than give effect to the Directives.

It was held that the Directives provided for compensation in accordance with the law of the state of the accident and did not leave it to individual member states to provide for compensation in accordance with domestic law. Further, that the 2003 Regulations are to be read as giving effect to this scheme, overruling *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208 and *Bloy v Motor Insurers' Bureau* [2013] EWCA Civ 1543 in relation to the meaning of regulation 13(2)(b).

XP v COMPENSA TOWARZYSTWO SA v PRZEYSLAW BEJGER [2016] EWHC 1728 (QB)

(Whipple J)

SIGNIFICANCE: A claimant who had suffered a miscarriage as a result of a road traffic accident was entitled to recover from the negligent driver the cost of fertility treatment as part of her future losses.

FACTS: A 40 year old woman was involved in two separate road traffic accidents. After the first, she suffered a miscarriage and psychiatric injury. Liability was admitted and the issues concerned quantum and causation. One issue was the first defendant's liability as to fertility treatment. The claimant successfully claimed three rounds of fertility treatment, which would, on the balance of probabilities, result in her becoming pregnant.

HELD: The claim for fertility treatment was fundamentally to put the claimant back in the position she would have been but for the first accident. The miscarriage was a physical injury suffered as a consequence of the first accident and the claimant was entitled to fertility treatment by way of restoration.

KAI SURREY (A CHILD & PROTECTED PARTY BY HIS LITIGATION FRIEND AMY SURREY) v BARNET & CHASE FARM HOSPITALS NHS TRUST [2016] EWHC 1598 (QB)

(Foskett J, Costs Judge Gordon-Saker)

SIGNIFICANCE: In cases where a claimant has been advised to switch to a CFA from legal aid shortly before 1 April 2013, they should be able to recover the success fee and ATE premium so long as the decision to switch was a reasonable decision to take at the time, having regard to all of the circumstances of the case.

FACTS: The appeal concerned three claimants who had been advised to switch from legal aid to a conditional fee agreement shortly before 1 April 2013. A costs judge had decided that the decision to switch had not been reasonable, and as such the success fee and ATE premium were not recoverable. It was argued by the respondents that the failure of the solicitors to advise that switching to a CFA would result in the loss of the 10% Simmons and Castle uplift meant that the decision to switch funding arrangements was based on materially unreasonable advice.

HELD: The question was whether the additional liabilities were reasonably or unreasonably incurred. This is an objective test to be assessed with reference to all the circumstances existing at the time. In the majority of cases, the failure of the solicitors to advise that switching to a CFA would result in a loss of the 10% Simmons and Castle uplift would not have made a material difference to the decision of the claimant to switch to a CFA.

JACQUELINE ANN SMITH v (1) LANCASHIRE TEACHING HOSPITALS NHS TRUST (2) LANCASHIRE CARE NHS FOUNDATION TRUST (3) SECRETARY OF STATE FOR JUSTICE [2016] EWHC 2208 (QB)

(Edis J)

SIGNIFICANCE: The fact that s 1A(2)(a) of the Fatal Accidents Act 1976 does not permit cohabitees of more than 2 years to recover bereavement damages does not engage Article 8. However, it was recommended that consideration should be given to reforming the law as the effect of the section is unjust.

FACTS: The claimant had cohabited with the deceased for more than two years before he died as a result of the negligence of the first and second defendants. She brought a successful claim for dependency under the Fatal Accident Act s1 but was unable to recover bereavement damages under s1A(2)(a), which applied only to spouses and civil partners. A declaration was sought about the interpretation of bereavement damages under s1A(2)(a) or a declaration that it was incompatible with the Human Rights Act.

HELD: It was held that the claimant was unable to show that article 8 was directly engaged by her inability to claim bereavement damages, nor that it fell within the ambit of article 8 since the ability to claim compensation from the defendants for her grief was only tenuously linked to her family life and not linked to her private life.

ALBERT VICTOR CARDER v UNIVERSITY OF EXETER [2016] EWCA Civ 790

(Lord Dyson , Gross LJ, Christopher Clarke LJ)

SIGNIFICANCE: An employee was entitled to damages from a former employer who had been responsible for 2.3% of his total asbestos exposure. The employer made a material contribution to the claimant's condition, and was not de minimis, despite the fact that the contribution was very small.

FACTS: The respondent was 87 years old and had worked as an electrician. Over the course of his employment he had been negligently exposed to asbestos by a number of employers. As a result, he developed asbestosis. The appellant company was responsible for 2.3% of the respondent's total exposure to asbestos. At first instance the Judge held that the appellant was to pay 2.3% of the respondent's full damages. On appeal, the appellant argued that, since their contribution did not make the respondent's symptoms any worse, they should not be held liable for damages. However, they accepted that the 2.3% contribution to the asbestos dust was material to the respondent's overall exposure to asbestos.

HELD: The only relevant question was whether a Claimant was materially worse off as a result of an alleged tort. The respondent's exposure to asbestos by the appellant company increased the severity of his medical condition by a small, albeit not measureable, extent; the respondent was slightly worse off due to his exposure to asbestos by the appellant. It was held that since this increase was material, and not de minimis, the judge at first instance had been right to hold that the appellant was liable for 2.3% of the respondent's full damages.

(1) JOSEPH THOMAS BEAUMONT (2) LEWIS O'NEILL v DAVID FERRER [2016] EWCA Civ 768

(Moore-Bick LJ, Longmore LJ, Beaton LJ)

SIGNIFICANCE: A taxi driver who chose to drive on when he realised his passengers did not intend to pay was prima facie liable in negligence for the injuries of his passengers when they jumped from the moving taxi. However, the passengers were precluded from recovering damages by the principle of ex turpi causa.

FACTS: The appellants, both aged 17, along with four other youths planned to take a taxi from Salford to Manchester City Centre without paying the fare. When they arrived at the city center three of the youths jumped out of the taxi, while it was stationary at traffic lights, without paying. The taxi driver then proceeded to drive off at 20 mph, knowing that the door was open and the remaining youths in the taxi were not wearing seatbelts. The remaining youths exited the taxi as it was moving and fell, sustaining serious injuries.

HELD: The taxi driver was prima facie liable in negligence. He had breached his duty of care to the youths by driving off when he knew that the doors were open and the youths not wearing seatbelts. It was reasonably foreseeably that the youths remaining in the taxi would follow the three that had already exited.

The question as to whether the maxim of ex turpi causa applies is one of causation. It was held that although it could be said that the damage would not have happened but for the tortious act of the respondent, it was in reality caused by the appellant's own criminal act. Therefore, the youths were precluded from recovering damages by the ex turpi causa principle.

BRIGHTHOUSE LTD v TAZEGUL [2016] EWHC 2277 (QB)

(Spencer J)

SIGNIFICANCE: Upon receiving fresh evidence of a prima facie case of fraud relating to an independent witness, a county court judgment in a personal injury trial arising from an RTA was referred back to the trial judge for determination as to whether the judgement should be set aside.

FACTS: The respondent and a lorry driver, who was employed by the appellant company, were involved in a road traffic accident on a motorway. The respondent's witness was put forward as an independent witness, saying that he had only met the respondent when they met in a car park after the accident and recognised the respondent's car. However, at trial, evidence was adduced that the respondent and his witness knew each other prior to the accident: the respondent's wife and the witness's partner were friends on Facebook and there were pictures of the witness and his partner socialising at the bar where the respondent worked. The judge at first instance decided that the evidence showed an insufficient connection between them to undermine the witness's evidence. He found in favour of the respondent in the trial.

Fresh evidence came to light which the appellant submitted was strong evidence of a previous friendly relationship between the respondent and the witness, suggesting that the witness had perjured himself.

HELD: Where there was fresh evidence of fraud adduced, the Court of Appeal would only allow an appeal and permit a re-trial where fraud was either admitted or the evidence of it was incontrovertible, *Noble v Owens* [2010] EWCA Civ 224 followed. Fraud was not

admitted and the court was not satisfied that threshold for incontrovertible evidence had been met and so the judgment could not be set aside.

However, the new evidence strongly showed a prima facie case of fraud. The test was whether there was evidence to show that the trial judge had been deliberately misled. If the respondent and his witness had deliberately suppressed their relationship, then it would be for the trial judge to decide if the inevitable inference was that they had lied about the circumstances of the accident. The matter should be referred back to the trial judge for determination on the new evidence as to whether there was fraud. If he was satisfied that there had been fraud, then it was open for him to proceed to set aside the judgment.

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