Personal Injury Newsletter

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Contents

CHAMBERS OF
PATRICK HARRINGTON QC
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Farrar's Building News

Nigel Spencer Ley, Editor

A Happy New Year from all at Farrar's.

As we wait with bated breath for the Lord Chancellor's announcement on the discount rate at end of this month, here is some legal reading to keep your mind occupied.

In this Newsletter **Henrietta Hughes** (who is undertaking a third six pupillage at Farrars) analyses the Court of Appeal's recent decision on vicarious liability in **Fletcher**.

Following the removal of civil liability for breaches of statutory duty (s.69 Enterprise Act 2013) the government is continuing its efforts to deregulate employment legislation. **Matt Hodson** looks at recent changes affecting the self-employed.

The Case Law Update was prepared by **Tom Emslie-Smith** (who is undertaking pupillage at Farrars).

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The Journey Continues: Vicarious Liability & Collisions

By **Henrietta Hughes**

The Court of Appeal recently found in the case of **Fletcher v Chancery Lane Supplies Ltd** [2016] EWCA Civ 1112 that an employer (the defendant) was not vicariously liable for its employee who had walked out into the road and into the path of an oncoming cyclist (the claimant).

Where have we been?

In **Crook v Derbyshire Stone Ltd & Bertie Thorpe** [1956] 1 W.L.R. 432 the second defendant, the employee of the first defendants, collided with the claimant, a motorcyclist, when crossing the road. Mr. Thorpe was a lorry driver and drove stone from the first defendants' quarries to a building site. The incident took place when he had left his lorry to go into a café for refreshment during his 4 hour journey. The first defendants impliedly authorised such practice. The plaintiff argued the first defendants were vicariously liable as well as claiming against Mr. Thorpe. It was held that at the time of the accident Mr. Thorpe '*was a stranger to his master from the moment when he left the lorry*' and therefore the first defendants were not responsible for his negligence. It is of note that the case received mixed or mildly negative judicial treatment.

'*Is a man, after he has finished his actual work, still in the course of his employment when he goes to get his wages?'.* The case of **Staton v National Coal Board** [1957] 1 W.L.R. 893 was distinguished from **Crook**. Here, the defendant employer was held liable for Mr. Harold Townsend's, their employee's, negligence. The plaintiff's husband, also an employee of the defendant, sustained fatal injuries when Mr. Townsend collided with him. At the time Mr. Townsend had finished his work and was riding his bicycle to call at the general office for his wages. The Court concluded Mr. Townsend was acting in the course of his employment.

Later the House of Lords in **Smith v Stages** [1989] A.C. 928 suggested the following propositions:

1) *'An employee travelling from his ordinary residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment, but, if he is obliged by his contract of service to use the employer's transport, he will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so.*
2) *Travelling in the employer's time between workplaces (one of which may be the regular workplace) or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces (as an inspector of gas meters might do), will be in the course of the employment.*
3) *Receipt of wages (though not receipt of a travelling allowance) will indicate that the employee is travelling in the employer's time and for his benefit and is acting in the course of his employment, and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course of his employment.*
4) *An employee travelling in the employer's time from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to the scene of an emergency (such as a fire, an accident or a mechanical breakdown of plant) will be acting in the course of his employment.*
5) *A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of his employment.*
6) *Return journeys are to be treated on the same footing as outward journeys.'*

Are we there yet?

Lister v Hesley Hall Ltd [2002] 1 A.C. 215 followed. The **Lister** approach of course requires consideration as to whether an employee's torts are so closely connected with their employment that it is fair and just to hold the employer vicariously liable. In **Mohamud v William Morrison Supermarkets Plc** [2016] A.C. 677, the Supreme Court declined the opportunity to broaden the test for vicarious liability, but instead re-stated it. **Fletcher** sees the application of **Mohamud** in a case involving a collision.

The facts of **Fletcher** are as follows**.** On 18th June 2011 at around 12:45 the claimant, a police officer, was riding an electric power-assisted police mountain bike along a cycle lane of the eastbound carriageway of Liverpool Rd, Eccles. Mr. Derek Traynor was crossing the road on foot whilst the traffic in the carriageway was slow moving or stationary. Mr. Traynor emerged from behind a transit van and collided with the claimant in the cycle lane. The claimant fell to the floor and sustained injury.

At the time of the incident Mr. Traynor was employed by PBT Builders, the trading name of the defendant. They owned a shop at 432 Liverpool Rd, the same side as the cycle lane, as well as an office at 405 Liverpool Rd, on the opposite side.

There was evidence that Mr. Traynor was due to finish his shift at 12. There was no evidence as to why Mr. Traynor was crossing the road towards 432. In August 2011 Mr. Traynor left his employment with the defendant and he did not give evidence at trial.

At first instance, Mr. Recorder Sephton held that Mr. Traynor had been negligent. He also found Chancery Lane Supplies Ltd to be vicariously liable for Mr. Traynor's negligence since:

1) Mr. Traynor gave 432 as his address despite living 10 minutes away;
2) He said to the officer he had attempted to cross the road to where his shop was at 432; and

3) At the time of the accident Mr. Traynor was wearing his work boots with a golf shirt carrying Chancery Lane Supplies Ltd's logo.

Chancery Lane Supplies Ltd appealed on the following grounds. Firstly, the judge was wrong as a matter of fact to conclude Mr. Traynor was at work at the time of the accident as there was no evidence to support this. Secondly, the judge failed to consider how the act of crossing the road was *in the course of employment* even if Mr. Traynor was on duty at 12:45.

The Court of Appeal held that the above 3 factors did not amount to evidence from which it was legitimate to infer that Mr. Traynor was working for his employer at the time and they did not point to him extending his normal working hours. **Mohamud** was applied and paragraphs 44-45 of the judgment reiterated:

'The first question is what functions or "field of activities" have been entrusted by the employer to the employee ... what was the nature of his job ...
... Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice ...'.

The appeal was allowed. Mr. Traynor was an assistant in a shop and it was impossible to know whether him crossing the road at around 12:45 was *'sufficiently connected'* with his work to make it right for his employer to be held liable under principles of social, or other form, of justice.

Conclusion

Each case still turns on its own facts and the importance of considering all the evidence cannot be over-emphasised.

Deregulation of Health and Safety Law for the Self-Employed

By Matthew Hodson

The Health and Safety at Work etc. Act 1974 ('HSWA') has been amended by:

- The Deregulation Act 2015, which came into force on 26th March 2015; and,
- The Health and Safety at Work etc. Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015, which came into force on 1st October 2015 ('the Regulations').

These amendments affect the responsibilities of the self-employed for those who are not their employees but might nonetheless be affected by their work.

Prior to the changes s.3(2) HSWA had required self-employed persons to ensure so far as reasonably practicable that persons other than their employees should not be exposed to risks to their health and safety.

Following the amendments, the duty is restricted to those whose self-employed work is on a prescribed list set out in the Regulations (reg. 2(a) and the Schedule), or those carrying out and activity which (reg. 2(b)):

> "may pose a risk to the health and safety of another person"

The Schedule of prescribed activities covers all those self-employed persons whose work includes: agriculture; asbestos; construction; gas; genetically modified organisms and railways.

It might be difficult to immediately see what significant difference there is between the old and the new, particularly given the reference in the old to 'exposure to risk' and the reference in the new to activities which 'may pose a risk'.

The government certainly believes there will be a difference.

The changes result from a 2011 report entitled "Reclaiming Health and Safety for All: an independent review of health and safety legislation", authored by Professor Löfsted. That report broadly commended the existing legislation but criticised the excessive 'red tape' and bureaucracy that could strangle smaller businesses.

The Regulations are accompanied by an Explanatory Memorandum that references the Löfsted report. The memorandum puts the consequence of the Regulations bluntly:

> "A self-employed person who does not conduct an undertaking prescribed in these Regulations and who is not an employer will have no duties under HSWA in relation to themselves or other persons in how they conduct their undertaking."

Under the heading 'Impact' the memorandum indicates that the changes should save £930,000 per year for over a million self-employed persons who "would otherwise have spent time keeping up-to-date with their health and safety duties" but no longer need to.

For many the changes may make little difference, but it may cut down on red tape for those in self-employed professions such as journalism, accountancy, creative industries, financial advice and perhaps even law.

The difference may be most noticed in health and safety prosecutions, where the conviction rate of cases is extremely high and fines average upwards of £30,000. Sometimes these

prosecutions may arise from poor record keeping alone, rather than actual incident. The burden and worry that the prospect of such prosecutions place onto the self-employed may be alleviated.

There does not yet appear to have been a case challenging the types of work that "may pose a risk". It therefore remains to be seen whether the changes will really alter the legal substance of the duties of self-employed persons, or whether this is simply another signal of a change in attitude to health and safety law generally, in the wake of the Enterprise and Regulatory Reform Act 2013.

Case Law Update

By Tom Emslie-Smith

Qader v Esure Services [2016] EWCA Civ 1109, Court of Appeal

Significance: The fixed costs regime for claims that start within the Road Traffic Accidents Portal but no longer continue under it is to be automatically dis-applied in any case allocated to the multi-track.

Facts: Two claims that began within the RTA Portal were subsequently allocated to the multi-track because the Defendants made allegations of fraud. In each, the issue arose as to whether the fixed costs provisions would continue to apply.

Held: The ordinary language of the fixed costs provisions in CPR 45.29A and B leads clearly to the conclusion that fixed costs apply to all cases started within the RTA protocol but continuing outside it, including those allocated to the multi-track. However, it was not the intention of the drafters that fixed costs were to apply to the multi-track. Such a conclusion must therefore have been the result of a drafting mistake.

The Court could then apply its power to correct the mistake by reading words into the rule. Part 45.29B is to be read as if the phrase "…and for so long as the claim is not allocated to the multi-track…" is added after the reference to 42.29J.

Bird v Acorn Group [2016] EWCA Civ 1096, Court of Appeal

Significance: Where claims originating under the EL/PL portal settle after the claim is listed for a disposal hearing but prior to the date of the hearing, the applicable costs

consequences will be those in the third column, rather than the first column of Part B, Table 6C or D under CPR 45.29E. This also applies to the equivalent table for RTA protocol claims in CPR 45.29C.

Facts: Mr Bird issued a claim through the online EL/PL after a spanner fell on his hand at a car garage. Default judgment was obtained against Acorn Group and a disposal hearing was listed for assessment of damages. Prior to the hearing a settlement was reached, but Mr Bird appealed on the costs issue.

Held: Listing a case for a disposal hearing is "listing for trial" for the purposes of CPR 45.29E. A disposal hearing meets the definition of "trial" provided in CPR 45.29E(1)(c), which is "the final contested hearing."

If at the disposal hearing the case is allocated to the fast track, there is no need to "back-track" and apply the costs consequences of the second column. By that stage, the Claimant would have done all the work necessary to obtain finality at the disposal hearing, and it would be proportionate to apply the column 3 costs figures.

Louise Ursula Watt v ABC & the Official Solicitor [2016] EWHC 2523, Court of Protection

Significance: In the Court of Protection, when deciding whether a personal injury award should be administered by means of a deputyship or held on trust, the Court must weigh all the factors in favour of the competing options. There is no presumption in favour of the appointment of a deputy.

Facts: A substantial award of damages for personal injury was made to ABC, a protected party. The parties settled and a deputy was appointed by an authorised officer. The extent of ABC's ability to manage his financial affairs with appropriate support was therefore not

determined in Court. Charles J was concerned that not enough consideration had been to the merits of a personal injury trust as an alternative to the appointment of a deputy.

Held: It would not be in ABC's best interests to change the mode of administering his financial affairs at this stage. However, the parties had taken the wrong approach in deciding between the two options. In particular, Charles J held that *HM v SM* had been misinterpreted in the Queen's Bench proceedings, to argue that there was a presumption that a deputy should be appointed. While Charles J accepted that the appointment of a deputy was the norm, he stated that no presumption is implied by the Mental Capacity Act 2005. The decision has to be made by weighing the relative merits of the options.

Watts v Secretary of State for Health [2016] EWHC 2835 (QB), Judge Peter Hughes QC

Significance: Medical evidence showed that obstetric brachial plexus injury sustained in birth can occur due to maternal forces and does not on its own imply excessive force by midwives. The Claimant would need to demonstrate factual evidence of excessive force.

Facts: The Claimant's birth was complicated by shoulder dystocia during labour and she sustained a brachial plexus injury that led to Erb's Palsy. Her case was that this was due to excessive pulling or traction to free the shoulder.

Held: The claim failed as the Claimant failed to show evidence of excessive force in pulling. Serious criticisms were made of the Claimant's gynaecological expert, who among other things failed to appreciate the importance of basing her opinions on medical practice at the time of the birth rather than on current practice.

R (on the application of CICA) v First-Tier Tribunal (CIC) & MB [2016] EWHC 2745 (Admin), Kerr J

Significance: It was not wrong for a judge in the Criminal Injuries Compensation Authority First-Tier Tribunal to allow a victim of sexual assault to appeal out of time a 1997 decision denying compensation.

Facts: MB was sexually abused between the ages of 10 and 14. In 1997, his claim for compensation before the then Criminal Injuries Compensation Board was refused on the grounds that he had not taken reasonable steps to help bring the offender to justice. A 2015 CICA Tribunal refused to reopen the case on the basis of fresh evidence, but allowed an application to appeal the 1997 decision out of time. The judge considered the up-to-date jurisprudence on sexual abuse claims, which takes into account that delay can be caused by the psychological impact on the victim. The CICA sought judicial review.

Held: The claim for judicial review was dismissed. The judge had appropriately weighed the prejudice caused by delay to the CICA, and correctly focussed on the key issue, which was that of non-cooperation in bringing the perpetrator to justice. She was correct to take into account the up to date jurisprudence when considering this issue.

Worall v Antoniadou [2016] EWCA Civ 1219, Court of Appeal

Significance: Where a patient has not been given negligent advice, but nevertheless has been allowed to leave a consultation with a misapprehension as to the material risks of her treatment, this will not necessarily constitute negligence. It should be asked whether anything said or done by the doctor would have been reasonably understood by a reasonable patient in the position of the Claimant in such a way as to create the misapprehension.

A medical professional ought not to be liable in such circumstances "unless she is responsible for the patient getting hold of the wrong end of the stick", or where she realises or ought to have realised that the patient may have got hold of the wrong end of the stick, and fails to take steps to dispel the misapprehension.

Facts: The Claimant was determined to have breast augmentation, but also sure that she did not at the present stage want a mastopexy, which is a more invasive form of breast enlargement surgery. The trial judge found that she had left a consultation with the Defendant under the impression that if she had the breast augmentation, she would not need a mastopexy for at least 5 years. The Defendant did not give specific advice to this effect, but the trial judge found that when the Claimant pressed for an indication of the time scale, and suggested that it might be five or ten years, the Defendant gave a non-committal answer. On this basis, the Defendant was found to be negligent.

Held: The Court of Appeal overturned the finding of negligence, holding that the Defendant could not, by giving a non-committal answer to the Claimant's question, be held responsible for creating the false impression that the Claimant said she took from the consultation.

OH (a minor by his litigation friend TA) v Susan Craven and AKB (a protected person by his litigation friend JB) v Christopher Willerton [2016] EWHC 3146 (QB), Norris J

Significance: The High Court gave guidance as to the procedure to be followed where a litigation firm proposes to establish a personal injury trust for settlements exceeding £1 million where its in-house trust corporation would be a trustee.

Facts: Both Claimants had received settlements in personal injury proceedings, and applied for the sums paid into the Court Funds Office to be paid out to trustees of private personal

injury trusts. In both cases the proposed trustees were corporations connected with the Claimants' litigation solicitors.

A was treated as lacking capacity throughout the proceedings due to cognitive impairment. When evidence was sought as to his capacity for the purposes of applying to the Court of Protection for appointment of a deputy, it became clear that A was in fact capable of making decisions and managing his own financial affairs with support.

O lacked capacity on account of being a minor, and applied for the money to be paid out to be held on trust "on an administrative basis." From the conduct of the litigation, the judge noted that the litigation friend appeared to be surprised that the Court should have any role to play as she was simply asking the Court to do what she had been advised by her solicitors was in the best interests of O.

Held: Vesting a large sum of money to which the settlor has recently become entitled in the settlor's solicitor upon a bare trust for the settlor is a transaction that gives rise to a rebuttable presumption that the solicitor's influence has been undue. The Court requires evidence that the settlor has had independent advice and has set up the trust according to her own free will.

Mr Justice Norris was able to communicate with A, and was satisfied that he had considered the appropriate factors and made the decision accordingly. The payment was therefore sanctioned.

In O's case, Mr Justice Norris could not be satisfied that the litigation friend had made a free choice as to the identity of the trustee and the exact terms of the trust. He refused to sanction the payment and ordered that the matter should be restored for directions after the following procedure was followed:

- A separate partner in the firm should instruct Chancery Counsel of not less than five years standing to advise the client of the advantages and disadvantages of the proposed trust and as to trusteeship arrangements.

The instructions to Counsel and the Opinion should be put in evidence when the approval of a compromise incorporating such a proposal is sought, or when an application is made to pay funds out of the Court Funds Office.

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