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The FOIL Digest January '22

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FOIL (UK)

Sector Focus Teams

Fraud SFT

FOIL Technical Director Shirley Denyer had been able to discuss the issue of the late vacation of court trials with Sir Bob Neil, who is the Chair of the Justice Select Committee. Sir Bob was aware of the issue and had raised it with the Lord Chief Justice. The issue was also raised at a virtual all-party Parliamentary event hosted by Lord Hunt looking at court resource and court capability, which Shirley attended.

FOIL will continue to pursue this issue and is looking to garner support from other stakeholders. It was noted that some regions continue to do far better than others.

It was reported that in Scotland the consultation has closed and draft rules have been published which suggested that remote hearings will become the default method for trials in Scotland.

The SFT also considered the final draft of the FOIL response to the CJC review of pre-action protocols.

Motor SFT

It was noted that the CJC Advisory Board on the OIC is publishing its minutes on the gov.uk website, so they will be publicly available (see below under 'Other News').

The Board is undertaking a number of other exercises to assist in judging how well the OIC is working, how it is being used and what problems are arising.

Universal credit continues to be a problem and FOIL will be hosting an insurer and member roundtable on the topic. There are two main issues – the legal position and the practical area such as the certificates themselves being incorrect/delayed.

Public Sector and Blue Light SFT

The SFT continued with it preparations for its roundtable event on **10th March.** The topics will include Care and Safeguarding – including the Scottish redress scheme; Technology – cyber risks including 'cookie letters'; Environment – air pollution and flooding; workforce, including Covid. It is intended that this should be an in-person event.

CAT Claims SFT

This group finalised its response to the CJC review of pre-action protocols relating to high value personal injury claims.

Employers' Liability SFT

As with other SFTs, this group considered a number of issues relating to the CJC PAP review and also the problem with late and multiple adjournments of trials. The SFT will provide feedback on members' experience of both efficient and inefficient courts.

There was also discussion around the methodology for the Guideline Hourly Rate review.

It was noted that several member firms had signed-up for the Digital Claims Service Pilot and had put a lot of effort into risk assessments along with considerations around changes they would need to make to their own systems. However, no claim had been processed through it to date.

The Master of the Rolls is keen to evaluate the new system. It has been suggested that the system might soon become mandatory, which is a huge concern. FOIL is in communication with the MR and the HMCTS on the issues. Several member firms have confirmed that they would be interested in a limited pilot, looking to deal with claimant firms that they know and trust, as opposed to it being an open house.

The SFT is also concerned about the absence of a defendant representative on the CPRC working group looking at reviewing the Standard Disclosure List for workplace accidents. The first step is to review the references to outdated legislation but also to review the list considering efficiency/reduced paperwork. FOIL has raised this issue with the CPRC.

Sports SFT

The main focus of discussion was building the event to be held on the **22nd March**, which will be in-person, with a networking event over lunch. The title for the event is 'Concussion and Insurability in High-Risk Sports'.

Professional Indemnity SFT

This group reviewed its section of the FOIL response to the CJC review of pre-action protocols. One area for consideration was extending the period for replying under the pre-action protocol. The proposal is 14 days with the option for another 28 days if you requested.

It was noted that developments were still awaited in regard to the validity of the insurance of civil fines and prescription time bands in Scotland.

A meeting with the Professional Negligence Lawyers Association (PNLA) is being planned for March, to discuss dispute resolution.

There was a discussion about cladding cases. It was noted that Scotland does not have the same leasehold issues that are seen south of the border, as a party is either a short-term tenant or owns the property. The Scottish Government is looking at assessments to properties to look at issues such as cladding to offer solutions but the timeline for this is not yet clear.

The group is looking at a large case arising from the building next to Grenfell and the Government's fund for dealing with cladding.

It was also noted that an update on the first FOIL fireside chat is up on the website – around network security.

Disease SFT

The group agreed that in general terms it supported the proposals that the Disease Pre-action Protocol should comprise the three principles of:

- Disclosure
- Good Faith obligation
- Joint stocktake report

The other questions relating to disease claims were also discussed and the responses fed into the FOIL submission.

The SFT has also corresponded with the sub-group dealing with fixed recoverable costs for NIHL claims, concerning the accreditation of audiologists and Standard Directions.

It is hoped that in Northern Ireland a new Discount Rate will be in place before the end of March 2022, when Stormont is dissolves before the election.

EU SFT

Over the past year, this group has worked with the Motor SFT and on two roundtable events covering Brexit. It has also fed its views into the CJC Review of Pre-action Protocols.

The group also considered the Private Member's Bill looking to reverse the impact of *Vnuk* (see 'Other News' below}.

The SFT looked at what is happening in the courts following Brexit. There are numerous issues before the courts including in relation to foreign non- conveniens, and the effect of Brownlee is still to be considered. It was felt that the overall effect of Brexit and then Covid is that claims volumes are down.

It was noted that, as anticipated, there had been a rush to submit applications prior to 31st December 2020 but a number were not properly prepared or supported by any evidence. As yet there had not been much consistency from the judgments.

FOIL Scotland

A number of items relating to Scotland appear above, having been raised within a SFT meeting.

In addition, there is currently a Scottish government consultation running on regulation. It is thought to be likely it will go down the SRA route, as is in England and Wales. Nothing has been heard since the consultation closed on 24th December.

Case law

TVZ and others v Manchester City Football Club Limited (2022) EWHC 7 (QB)

The claimants sought compensation for sexual abuse perpetrated by Barry Bennell ("Bennell") in the early 1980s when they were aged between 10 and 14 and playing for football teams coached by Bennell. They said Bennell was working for the defendant and that it was liable for his conduct.

On the evidence the High Court Judge held that each claimant could have brought a claim within time. Each claimant knew that he had been abused. They all knew (by the time of the expiry of the time limit) that this was wrong. None of them suffered from dissociative amnesia. There was no "date of knowledge" argument under S14 Limitation Act 1980 Act. In considering whether to disapply the limitation period under S33 of the 1980 Act, the judge held that having regard to the length of the delay and the way in which the delay had affected the available evidence, it was not fair and just to expect the defendant to meet any of the claims, even though each of the claimants had a good explanation for the delay in issuing proceedings.

Nevertheless, the judge went on to consider the issue of vicarious liability. He accepted the defendant's case that Bennell stopped being a scout in about 1978/79, and by November 1979 at the latest (which was before the period covered by any of these claims). At the material times, Bennell was not in a relationship with the defendant that was akin to employment. His relationship was that of a volunteer football coach who ran a number of junior teams (including teams with a connection to the defendant) and who, in that context, acted as a volunteer unpaid scout, recommending players to the defendant for them to consider taking on as associated schoolboys, and assisting the defendant in the conduct of

trial games. That was his enterprise, undertaken at his own risk, which the defendant did not control, but was a relationship of mutual benefit to the defendant and Bennell. Bennell was carrying on his own independent enterprise.

Again, in case he was wrong on this point, the judge considered the five incidents identified in *Barclays Bank (2020)* but found that the claimants had not established the first stage of the test for vicarious liability. So far as stage 2 of vicarious liability was concerned, the present case was akin to that of *Jacobi* and *DSN* and was materially different from *Bazley, Lister*, *Maga, BXB* and *Christian Brothers*.

For the sake of completeness, the judge then assessed quantum in each of the dismissed claims.

Hankin v Barrington and others (2022) EWHC B1 (Costs)

This judgment addressed the issue of whether it was reasonable for leading counsel to be paid a full brief fee in a case that was effectively settled two and a half weeks before a trial having undertaken no work under the same for a charge of £132,000? [£110,000 plus VAT].

The claimant conceded that the fact that the trial did not take place but counsel's brief fee had been claimed, was a good reason under CPR 3.18(b) to depart from a Master's last approved costs budget It followed that the starting point was to decide what, (if any) would be a reasonable sum to allow for the brief fee, with the parameters being £132,000 for the claimant and £0 for the defendants.

The Deputy Costs Master held that having regard to the authorities he had considered and the facts of this case, a brief fee of £125,000 plus VAT was unsupportable.

This was a difficult and complex case on liability, causation and quantum, but it was not strikingly more so in these contexts than other tragic and life changing cases which came before the courts involving personal injury and clinical negligence.

In so far as an hourly rate had been used to calculate the brief fee, it was too high and reflected a sum for pre-eminence. A brief fee of £75,000 would have been reasonable for a hypothetical leader undertaking a high value trial in 2021 such as this.

The next point was to decide the level of abatement to take account of the fact that the trial did not take place. The case settled at a mediation, without the trial bundles having been agreed, and with the experts then being stood down. To all intents and purposes, the action was at an end and it was not suggested that leading counsel was involved in work preparing for trial which could reasonably be laid at the door of the defendants. The point made on his behalf was simply that the case could not be removed from his diary until the final order was agrees, which was different.

Against that, there was the point that leading counsel had booked out time from his busy diary to accommodate the case, and as a matter of principle, he was entitled to be paid for the loss of the chance to appear at the trial and for the fact that he turned away other

remunerative work in order to take the case. That is correct so far as it went, but the time scale between the date of delivery of the brief and the expected trial date was about three weeks, and there must be an abatement. An abatement of 50% of the brief fee would be appropriate here, meaning the allowance, subject to what is said below, should be £37,500, plus VAT.

What of mitigation of loss? Leading counsel had undertaken other work and had earned around £11,000. Credit must be given for those sums and looking at matters in the round, £10,000 should be attributed to mitigation. The Deputy Master allowed £27,500 plus VAT.

O'Grady v B15 Group Limited (2022) EWHC 67 (QB)

In this claim arising out of a fatal road traffic accident, liability was in issue but (following a Part 36 offer by the defendant) the claimant made a Part 36 offer in the following terms:

"The Claimant offers to resolve the issue of liability of on 80/20 basis. For the avoidance of doubt if the Defendant accepts this offer it will only be required to pay 20% of the Claimant's damages."

Having received the claimant's offer by e-mail at 15.51 on 23 February, the defendant's solicitor accepted it by e-mail at 10.02 on 24 February. On 24 February 2021, the claimant's solicitor replied by e-mail at 10.12 to make clear that the offer that he intended to make on behalf of the Claimant was 80/20 in the claimant's favour.

The claimant subsequently issued an application for permission to withdraw her offer or to change its terms under CPR 36.10(2)(b). Witness statements were exchanged and, in consequence, the claimant felt obliged to issue a subsequent application for permission to call the defendant's solicitor and cross-examine him on the contents of his witness statement. In particular, whether the defendant's solicitor knew or suspected that the claimant's offer had been made in error by her solicitors.

Very shortly before the hearing, the defendant conceded that the mistake relied upon by the claimant's solicitor in formulating the offer was of a kind that would render any agreement void if the court were to accept that the common law doctrine of mistake was relevant when considering Part 36 offers.

The Master concluded that the doctrine of common law mistake could apply to a Part 36 offer in circumstances where a clear and obvious mistake had been made and this was appreciated by the Part 36 offeree at the point of acceptance. Authority was entirely in support with the application of the doctrine. Nothing about Part 36 being a self-contained code excluded it. On the particular facts of this case, it was entirely compatible with a procedural code that was intended to have clear and binding effect but not at the expense of obvious injustice and the Overriding Objective still had application.

On the facts of this case the Overriding Objective was entirely consistent with the merits of the claimant's application and it should be granted. Conversely, the Overriding Objective provided little support for the defendant's position once mistake was accepted as in issue.

Indeed, it was difficult to think how the Overriding Objective would support the defendant's position at all. Plainly, "saving expense" [r.1.1(2)(b)] did not have as its primary aim the substantial reduction of a party's liability for damages owing to the mistake of another "of a kind which in law would render the agreement void".

AB (Protected Party) v Worcestershire County Council and another (2022) EWHC 115 QB

AB lived in within the two defendant local authority areas between July 2005 and January 2016. He alleged that he was abused and neglected whilst in the care of his mother and he alleged the second defendant should have applied for a care order around or shortly before July 2008 and that the first defendant should have similarly applied from about April 2012 and that by failing to take this step by these dates the defendants had breached his ECHR Article 3 and 6 Rights.

AB relied on a series of reports in the Social Services' records throughout 2005 to 2009 and between 2013 and June 2014, which were critical of AB's living conditions and his care. The Defendants applied for strike out and summary judgment on the basis that on the authorities the claims under both Article 3 and 6 had no realistic prospect of success.

The Deputy High Court Judge accepted the defendants' submissions that the underlying basis of the Article 6 claim was inherently flawed and the claim doomed to fail and she struck out the Article 6 claim. *Re S (2002)* established that a child had no right to seek a Care Order or to have one made in respect of their care.

The Article 3 claim required AB to prove that he was subjected to treatment of sufficient severity to cross the Article 3 threshold and that there were steps which the defendants should have taken which had a reasonable prospect of preventing such treatment.

After reviewing the authorities on this issue, the judge held that whilst AB was at risk of being subjected to poor and inconsistent parenting and neglect, there was no realistic prospect of establishing that any aspects of the disorderly and unstable family situation should have led Social Services to conclude that an application for a Care Order was required. The investigative duty as described in *D (2019)* referred to a criminal investigation discharged by the Police and prosecuting authorities. The investigative duty did not apply to a local authority social services department undertaking. for example, child protection investigations. In any event, the complaints to the defendants had been investigated and AB had no realistic prospect of success on this issue.

Nor was there any applicable operational duty under Article 3. The second defendant did not have care and control of AB while he was living in its area and the operational duty was therefore not engaged. If there was no operational duty in place, there could be no breach of it.

ABA (Protected Party) v University Hospitals Coventry and Warwickshire NHS Trust (2022) EWHC B4 (Costs)

Following the trial of the preliminary issues of liability and causation in a claim for personal injury, a High Court Judge (HCJ) gave judgment for the claimant against the defendant for 65% of damages to be assessed. His order, made by consent, made the following provision for costs:

"the Defendant do pay the Claimant's costs of and incidental to the issue of liability on the standard basis such costs to be the subject of a detailed assessment, if not agreed…"

Subsequently a Master made an order incorporating this provision:

"The Claim remains allocated to the Multi -Track and is assigned to Master Cook for case management".

The Master gave directions for the steps to be taken leading to a trial of quantum.

In the meantime, the claimant served, in respect of the costs of the liability issue, notice of commencement of detailed assessment proceedings, citing as the authority for assessment the HCJ's order and enclosing a bill of costs in the sum of £827,406.85. The defendant applied for the notice of commencement to be set aside on the grounds that, in the absence of an order for immediate detailed assessment, it was premature.

Setting aside the claimant's notice of commencement, a Costs Judge held that the position both under the CPR (and, previously, under the Rules of the Supreme Court) was that, absent an order for immediate detailed assessment, the costs of a preliminary issue could not be assessed until the proceedings as a whole had concluded.

It was, nonetheless, not uncommon for receiving parties in such cases to commence detailed assessment proceedings, or even for paying parties to serve Points of Dispute, without realising that under CPR 47.1, detailed assessment was premature because all the matters in issue in the proceedings had not yet been determined.

Ali v Luton Borough Council (2022) EWHC 132 (QB)

In this case it was not in dispute that an employee of the defendant, RB, breached the rights of the claimant by accessing and disclosing to the claimant's husband information about the claimant (and also the two young children of the family) which was stored on the defendant's IT system. The issue was whether the defendant was vicariously liable for RB's admittedly wrongful, and indeed criminal, acts. It was common ground that this issue fell to be determined by applying the law as declared by the Supreme Court in *Various Claimants v Wm Morrison Supermarkets plc (2020).*

Dismissing the claim, a Deputy High Court Judge held that:

(a) The defendant did afford RB the opportunity to abuse her position. However, that was almost always the case in any instance of employee abuse of position; it was not sufficient by itself to give rise to vicarious liability; and, on the unchallenged evidence the defendant could not have done otherwise.

(b) RB's wrongful acts did not in any way further the employer's aims. They were not more likely to have been committed by the employee for this reason.

(c) RB's wrongful acts were not related to friction, confrontation or intimacy inherent in the defendant's enterprise. This factor seemed most readily applicable in cases of physical interaction between employees or interaction between the individual tortfeasor and a third party or third parties, such as occurred in (but may not be limited to) the sexual abuse cases, and this was not such a case.

(d) Like considerations applied to the question of the extent of power conferred on the employee in relation to the victim. This seemed most readily applicable in cases involving (typically physical) interaction with the victim. If and to the extent that it applied to the employer permitting the employee to access information relating to a victim, the defendant did not confer power on RB to access the claimant's information: RB took advantage of the opportunity which the defendant's working practices necessarily afforded to her to do that improperly, surreptitiously and for her own purposes, which had nothing to do with any role or authority which the defendant assigned to her vis-à-vis the claimant.

(e) The vulnerability of potential victims to wrongful exercise of the employee's power could be relevant with regard to someone like RB if she was put in charge of dealing with a particular service user, perhaps in the context of arranging contact. Such service users, or at least some of them, might well be vulnerable in this way. However, RB was never put in charge of any aspect of the affairs of the claimant (or the children), or indeed information relating to them.

FOIL Updates

For more information on the issues below please go to the Updates section of our website.

Paul and another v The Royal Wolverhampton NHS Trust (and related appeals) (2022) EWCA Civ 12

The Court of Appeal dismissed the claims of three secondary victims of psychiatric injury, who had witnessed the death of a close relative. In each case the death followed an act of clinical negligence by one of the defendants.

Ideal Shopping Direct Limited and others v Mastercard Incorporated and others (and related appeals) (2022) EWCA Civ 14

The Court of Appeal upheld the decision of a High Court Judge that service of an unsealed claim form did not constitute good service.

Moreover, the defect could not be remedied under CPR 3.10.

Brown and others v South West Lakes Trust and others (2022) EWCA Civ 18

The Court of Appeal upheld a judge's finding that claims under the Occupiers' Liability Act 1984 against the occupiers of a reservoir and a highways authority could not proceed.

However, even though badly pleaded, claims against the highway authority in negligence could be pursued.

Tindall and another v Chief Constable of Thames Valley Police and another (2022) EWCA Civ 25

The Court of Appeal held that an appreciation by the police that a road was dangerous because of ice did not impose on them a duty to act to prevent the danger.

Following their attendance at a road traffic accident, the police had no liability for failing to take steps which may have prevented the deceased's subsequent accident at the same location.

Revised Highway Code

From Saturday 29th January, the Highway Code is updated to introduce a hierarchy of road users and seven other categories of changes.

These changes focus primarily on the more vulnerable road users: pedestrians and cyclists but stress that everyone is expected to behave responsibly.

Chell v Tarmac Cement and Lime Limited (2022) EWCA Civ 7

The Court of Appeal dismissed the claimant's appeal against decisions in the courts below that the defendant was not vicariously liable or liable in negligence for the actions of its employee.

In an act of horseplay, the defendant's employee had hit two pellet targets close to the claimant's ear, resulting in hearing loss.

Other news

Reversing out of *Vnuk*

On 5 January the Motor Vehicles (Compulsory Insurance) Bill passed the Committee Stage in the House of Commons, unopposed and seemingly with government support. The Bill has now moved on to the Report Stage.

The purpose of this private member's Bill is to amend S156 Road Traffic Act 1988 and end the effect of the *Vnuk* decision in retained EU law, and that of related retained case law; and also end any associated liability for insurance claims against the Motor Insurers' Bureau (MIB) in respect of accidents on private land and for vehicles not constructed for road use

The Bill has now gone for further consideration at the Report Stage.

The Bill is relevant to England and Wales and Scotland.

Official Injury Claims (OIC) Update

On 14 January, the OIC published the minutes of a meeting of its advisory committee, on which FOIL is represented. The committee considered the OIC operational data for the second quarter of service operation.

Among the issues considered were:

- The continued lack of CMC activity on the OIC portal.
- The extent to which unrepresented claimants may be receiving additional advice 'in the background' and if this might be having an impact on settlement figures.
- Why so few litigants in person (Lips) are using the system, with concern that there may be an issue relating to awareness of the process.
- The evolution of the Portal Support Centre (PSC) to support Lips through their journey through the process.
- The functioning of the online booking system for medical appointments.
- What additional data might be made available to the committee by the MIB, to assist the committee's work in the future.

Legal Reforms for Automated Vehicles

On 26th January, the Law Commission of England and Wales and the Scottish Law Commission published a joint report making recommendations for 'the safe and responsible introduction of self-driving vehicles'.

The report recommends introducing a new Automated Vehicles Act, to regulate vehicles that can drive themselves. It recommends drawing a clear distinction between features which just assist drivers, such as adaptive cruise control, and those that are self-driving.

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