# Liability Round Up of 2012



QBE

# Contents

**Liability Round Up of 2012**





QBE

# 2012 – Highs and Lows

It was the second wettest year since UK records began and the economy remained sluggish but events like the London Olympics and the Queen's Diamond Jubilee provided some relief from the gloom and contributed to patchy economic growth in 2012.

Reducing the burden of litigation and regulation on business has been much on the Government's mind and claims, especially small claims, have been much in the news. Progress on reforming litigation funding in England and Wales was mixed. The Jackson reforms are largely on course for April 2013 but the timing of the extension of the Ministry of Justice's claims portal to encompass motor injury claims up to £25,000 in value and for the first time to include liability injury claims (from £1,000 to £25,000 in value) is now in doubt.

The *Enterprise and Regulatory Reform Bill* will not just remove strict civil liability for breach of health and safety regulation by employers, as recommended in Professor Lofstedt's 2011 report but will remove all civil liability for a breach. This should lead to fewer claims. By the end of 2012, this Bill had made it as far as the House of Lords.

In the Courts, 2012 saw some encouraging decisions on fraud, the liability of local authorities for children and on occupiers' liabilities. There were some less welcome developments on vicarious liability.

# Jackson Reforms

*The Legal Aid Sentencing and Punishment of Offenders* (LASPO) Act gained royal assent on 1 May 2012. With the exception of Mesothelioma claims, LAPSO will end the recoverability of After the Event (ATE) insurance premiums and Conditional Fee Agreement (CFA) success fees from defendants in England and Wales. CFAs and ATEs were cited by Lord Justice Jackson as being the primary causes of a disproportionally heavy costs burden on defendants, which was distorting the whole litigation process in England and Wales.

The end of ATE and CFA recoverability will certainly assist defendants but these are just two aspects of an interlocking package of measures. In order to compensate injured claimants for having to pay up to 25% of their damages to their solicitors for success fees, the Court of Appeal has introduced a 10% uplift in General Damages for cases heard after 1 April 2013 (excluding those cases where ATEs were signed prior to then).

LASPO also introduces a ban on referral fee payments by solicitors for new cases, which have been blamed for encouraging claims. The MOJ see the ban as leading to a reduction in claims numbers but many commentators have questioned how effective this will be given the many potential ways of circumventing the Act.

To safeguard access to justice and remove the need for ATE insurance protection, the Civil Procedure Rules Committee is introducing Qualified One Way Costs Shifting (QOCS) from 1 April. This will mean that barring the consequences of Part 36 offers, a claimant who brings an honest, properly founded claim will not have to pay the defendant's costs if the claimant loses whereas a losing defendant will have to pay the claimant's costs.

Where a claimant is obliged to pay costs, having failed to beat a defendant's Part 36 offer, their liability for costs will be limited to the amount of their damages unless they are shown to have been dishonest.

The Jackson reforms are intended to reduce the burden of litigation on defendants without penalising claimants. Lord Justice Jackson is reported as saying that he believes that claimants will actually be slightly better off and that claimants' solicitors are expected to be the losers financially.

# The Portal

The extension of the Ministry of Justice's (MOJ) claims portal scheme was planned for April 2013 but at the time of writing, the Justice Secretary is reconsidering the timing of the extension. The Association of Personal Injury Lawyers (APIL) have been in discussion with the MOJ after seeking a judicial review of the extension which they say is being implemented without proper consultation having taken place. Delays in finalising the rules for the scheme and in constructing the new electronic portal, which will handle liability claims, have strengthened the position of those arguing that the changes are being brought in too quickly. No new implementation date has yet been announced but the 1 April 2013 date has been abandoned.

In addition to the extension of the portal scheme from covering just motor injury claims of £1,000 to £10,000 in value to motor and liability injury claims up to £25,000 in value, the MOJ plan to introduce a predictive costs regime to run alongside it.

The portal costs and rules are not yet fixed but the costs figures proposed in the recent MOJ consultation for both the portal and the predictive costs scheme promise significant savings. The downside for defendants is that to keep claims within the scheme they must acknowledge claims and concede liability in full within very short time scales. The current proposals are for acknowledgement of a new claims the next working day and admission of liability within 30 working days for Employer's liability claims and 40 for Public Liability.

This will obviously reduce time for investigation and could increase fraud.

# Fraud

There were some encouraging judgments from the courts in England and Wales on fraud in 2012.

In *Tariq v Ali* the Court of Appeal ruled that the High Court had jurisdiction to commit fraudsters to prison. Prior to this decision, defendants wishing to have fraudsters committed were obliged to refer the case to the Divisional Court, an expensive and lengthy process. The Court of Appeal's ruling means that contempt committals can be brought far more cheaply and quickly and greatly increases the chances of the same judge who has heard the claimant's fraudulent evidence, hearing the committal proceedings.

The case of *Summers v Fairclough Homes Ltd* concerned a former employee of the defendants who had been genuinely injured at work. Mr Summers however had greatly exaggerated his claim saying that he could not work again and seeking nearly £800,000 in damages. He was filmed working and this evidence enabled the defendants to reduce the claim to £88,000.

The defendants applied to have the case struck out in its entirety for abuse of process but the judge at first instance and later the Court of Appeal held that the court did not have the power to strike out genuine claims even when associated with dishonesty.

The defendants appealed to the UK Supreme Court who held that the courts could strike out a grossly exaggerated claim for abuse of process at any stage even, in exceptional circumstances, post trial. They declined to strike out Mr Summers' claim however perhaps taking into account that after costs penalties he would receive no damages anyway.

It did not take long for another case to come before the courts to test how judges would interpret the *Summers* ruling. In *Fari v Homes for Haringey* the claimant had suffered an injury, which based on medical and surveillance evidence the judge held was worth only about £1,500 whereas the claimant sought £740,000 for alleged life-long disability. The judge in the Central London County Court struck the claim out in its entirety and transferred the case to the High Court for contempt proceedings.

Mr John Machin had the dubious privilege of becoming the first person to be successfully prosecuted by the Insurance Fraud Enforcement Department, the specialist police unit funded by insurers to tackle insurance fraud.

Mr Machin rang his motor insurers to report a fraudulent motor claim but forgot to hang up afterwards and was taped by his insurers boasting to a friend about how much money the fraud would get them. He was tried at Leeds Crown Court and given a one year suspended sentence. He also suffered the embarrassment of having the telephone call to his insurers broadcast on Radio 4 and of the story being widely reported, even internationally.

# Vicarious Liability

The time was when an employer would not be held vicariously liable for the criminal acts of an employee but this is no longer the case. The House of Lords decision in *Lister v Hesley Hall* back in 2001 was the first of many subsequent child abuse cases where employers were held to be vicariously liable for their employees' misdeeds. The scope of vicarious liability continued to expand in 2012.

In the conjoined cases of *Waddell v Barchester Healthcare Ltd* and *Wallbank v Wallbank Fox Designs Ltd* the Court of Appeal had to consider whether employers were liable for assaults on managers by employees.

In the first case, a drunken employee cycled into work and assaulted his manager after being telephoned at home on his day off and asked to work an additional shift. In the second case a young employee lost his temper and assaulted the claimant in the work place after taking offence at being asked to work faster.

The legal test is one of the closeness of the connection of the employee's duties and his wrongdoings. In the *Waddell* case the Court of Appeal held that the connection was not close enough. There was too long a gap between the request to work longer hours and the assault and the location of the assault at the work place was to some extent coincidental. The employee was likely to have assaulted the claimant wherever he had seen him.

In the *Wallbank* case the employee had reacted immediately if unreasonably to an instruction from his employer and there was sufficient closeness of the assault to the employee's duties for liability to attach to the employer.

In *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* the Court of Appeal had to decide as a preliminary issue whether the local diocese was vicariously liable for alleged sexual abuse committed by a priest. A priest is not an employee of the diocese but the Court of Appeal held that the relationship was akin to employment and sufficiently close for vicariously liability to attach. The decision has serious implications for all unincorporated associations where individuals have roles akin to employment.

Another troubling case in this area of law is that of *Vaickuvienne and Others v J.Sainsbury*. The family of a man murdered at work by a racist colleague, brought a claim for damages against Sainsbury who employed both men.

Mr Romasov was subjected to racial harassment by Mr McCulloch who worked with him at a Sainsbury's store. Mr Romasov complained to his employers about McCulloch's conduct but they took no immediate action.

Two days later McCulloch tried to persuade Romasov to withdraw the complaint. When Romasov refused, an argument broke out culminating in McCulloch stabbing Romasov to death with a kitchen knife taken from one of the shop's shelves. McCulloch was subsequently convicted of murder and given a life sentence.

J.Sainsbury tried to have the claim struck out on the basis that it was impossible for the claimants to establish a close connection between the murder and McCulloch's duties. The judge disagreed and permitted the case to proceed.

The case is being brought in the Scottish jurisdiction and at the time of writing, has not yet been resolved but the judge did refer to previous judgments in England and Wales where the courts held that there were good public policy reasons for extending the scope of vicarious liability to cover harassment cases. If the Scottish Court of Session does eventually find the employer vicariously liable, the judgment will be persuasive in other UK jurisdictions.

# Schools

Perhaps one of the most important cases of 2012 for schools and indeed for anyone dealing with children and other vulnerable people was that of *Woodland v Essex County Council*.

The claimant was a pupil of a school run by Essex County Council. During a swimming lesson organised by her school she came close to drowning and was left with severe brain damage.

The accident occurred in a swimming pool run by another local authority, the lesson itself was supervised by a teacher and a lifeguard both employed by a private company. The claimant's legal team argued that the council were *in loco-parentis* for the claimant and as such had a non-delegable duty to ensure that reasonable care was taken to ensure her safety.

The council succeeded in striking out the claim at first instance on the basis that it could not succeed. The claimant appealed to the Court of Appeal but they too supported the strike out.

The Court held that it was inappropriate to extend the local authority's duty of care to include activities outside of the school premises, which were also outside of the control of the school or its teachers.

To extend the law, as the claimant argued would discourage education authorities from providing "valuable educational experiences" such as external swimming lessons. The decision maintains the status quo. Local authorities and other bodies entrusted with the safety of vulnerable individuals can discharge their duty of care by ensuring that suitable and competent service providers are used.

# Occupiers

In *Stannard t/as Wyvern Tyres v Gore* a fire spread from burning tyres on land used by a tyre fitter to the claimant's neighbouring premises which were burnt to the ground.

The judge at first instance found that the defendant had not been negligent. The fire had started accidentally through no fault of his but he was strictly liable under the rule in *Ryalnds v Fletcher*. The defendant should have realised that several thousand tyres once alight would burn fiercely and be difficult to extinguish, posing an exceptionally high risk to neighbours. The storage of so many tyres was an unnatural use of the land.

The Court of Appeal held that the rule in *Rylands* did not apply. The "thing" brought on to the land were tyres and these were not of themselves dangerous or mischievous. There was no evidence that Stannard should have been aware of an exceptionally high risk if the tyres escaped. In any event, the tyres did not escape, the fire did! For a tyre fitter to store tyres on his land could not be said to be an extraordinary or unusual use.

The decision brings useful clarity to the principle in *Rylands* and arguably reduces its scope; at least as far as fire claims are concerned.

# Scottish Jury Awards

The very large and unpredictable awards made by Scottish juries have long been a cause of concern for defenders in the Scottish jurisdiction. Jury awards have pushed up damages especially in fatal accident cases, with awards for 'loss of society' in some cases exceeding £100,000 per bereaved relative (compared to a statutory bereavement award in England and Wales capped at £11,800 split amongst qualifying individuals).

Historically, neither counsel nor judge was allowed to make reference to any past awards made by judges or juries meaning that the only information the jury was given was the amount sued for (i.e. what the pursuer wanted) and the heads of damages (contained in a document called the *Issue* lodged by the pursuer with the court).

In the conjoined appeals of *Hamilton and Anr v Ferguson Transport (Spean Bridge) Ltd* and *Thomson v Dennis Thomson Ltd* the Inner House of the Court of Session not only granted a re-trial of the jury awards of damages in two fatal accident cases but also approved a new process suggested by the defenders in the case.

In future judges will hear the views of the opposing counsel on the value of the claim (based on case law) and then give the juries a range of values. The juries will be free to disregard this advice but if they do, it should be easier for a defender to argue that the award was excessive and obtain a retrial.

# Looking Forward

Lord Justice Jackson's package of reforms and the extension of the MOJ's claims portal scheme promise some savings for defendants in 2013 but the reforms are not all to defendants' benefit. The 10% increases in General Damages awards will add to rising claims inflation as will the ever-rising costs of medical aids, treatment and care regimes. The campaign by the Association of Personal Injury Lawyers and others to reduce the discount rate has not gone away and any reduction in the rate would have a significant inflationary effect on settlements.

There are reasons for cautious optimism in 2013. Making the most of potential savings from costs and other reforms however will require maximum effort from businesses and their insurers and there is the risk that these could be largely offset by other factors.

**Completed 14 January 2013 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272756, e-mail john.tutton@uk.qbe.com).**

## Disclaimer

**QBE European Operations**

Plantation Place
30 Fenchurch Street
London
EC3M 3BD

tel +44 (0)20 7105 4000
fax +44 (0)20 7105 4019

enquiries@uk.qbe.com
www.QBEeurope.com


XXXX/LIABILITYROUNDUPOF2012/JAN2013