QBE European Operations

Technical claims brief

Monthly update | November 2015

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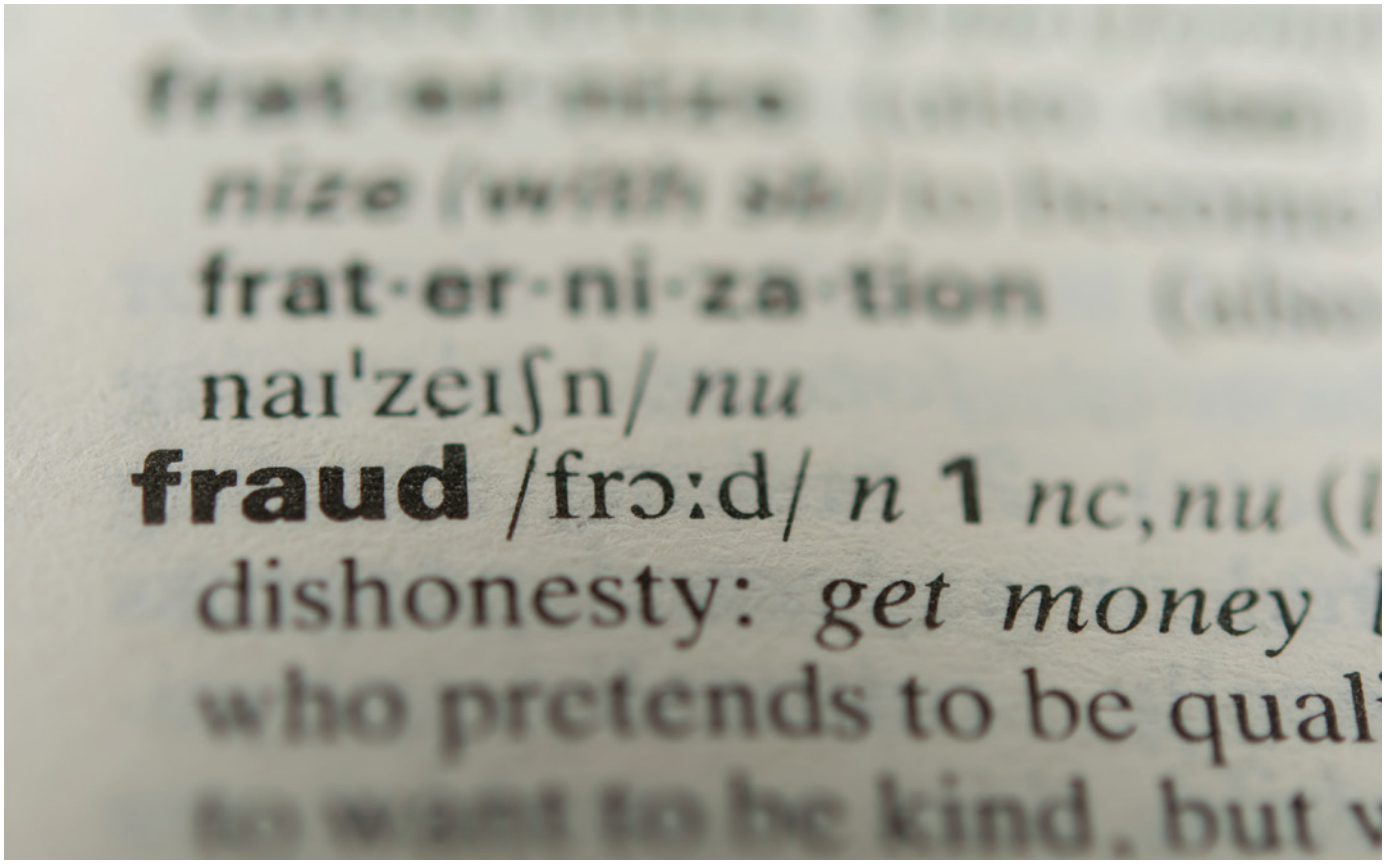
Contents



Fraud

Fundamental dishonesty and Exemplary damages

In a further example of the judiciary playing their part in the fight against fraud, two claimants have been ordered to pay £3000 in exemplary damages. The couple had claimed damages for personal injury, but their claims were found to be fundamentally dishonest. The fraudulent claimants were also ordered to pay indemnity costs after being found to be complicit in a criminal conspiracy to defraud RSA.

Exemplary damages (also referred to as punitive damages) are intended to punish rather than compensate, and to deter others from engaging in similar conduct. There are limited circumstances when the courts will award exemplary damages and this case highlights the necessary materiality of the criminal element of fraud.

Husband and wife, Parveen Akhtar and Mohammed Khan, claimed damages following a road traffic accident on 17 July 2013, after an RSA policyholder collided with the rear of a vehicle being driven by Mrs Akhtar. Legal proceedings were defended and included a counterclaim for exemplary damages. The married couple claimed Mr Khan was a passenger in the vehicle and that the collision caused injury to both claimants.

His Honour Judge Gregory dismissed both claims found that the claimants had lied about the detail of the accident. When the parties exchanged insurance details, the innocent driver could see into Mrs Akhtar's vehicle and would have seen that Mr Khan was not in the car, neither at that stage, nor when she followed the vehicle for several miles following the collision. The claimants fraudulently alleged that Mr Khan could not be seen, due to his 5'6" stature.

The minor nature of the collision was supported by photographs taken at the scene, which showed no damage to either of the vehicles involved. The judge held that the collision was unlikely to have caused injury, that Mr Khan had not been in the car and that both claimants had lied in order to secure compensation.

> "This is a good example of an insurer, and their lawyers, utilising the different array of penalties open to the judiciary in respect of insurance fraud. Publicity, knowledge, claims culture and attitude to insurance fraud is changing, so claimants now know that they are less likely to succeed with fraudulent claims and that their crimes will not go unpunished.

Liability

Local Authority liable for the abuse of Foster carer? *NA v Nottinghamshire County Council*

The Court of Appeal has decided that a Local Authority cannot be vicariously liable for the wrongful acts of a foster parent, and nor do they owe a non-delegable duty to a child in foster care. This important decision is set against the backdrop of an area of law which has been subject to a number of significant developments in recent times and will no doubt continue to keep lawyers busy for the foreseeable future.

The claimant had been physically and sexually abused by foster parents between 1985 and 1988. On bringing a claim, the court had exercised their discretion and disapplied the limitation period, thereby allowing the claim to proceed. It was accepted by the court that there was no negligence on the part of the Local Authority social workers. At first instance, the claim failed.

The claimant appealed the key findings that:

(i) The local authority was not vicariously liable for the actions of the foster parents.

(ii) It was not "fair, just and reasonable" to impose a non-delegable duty on a Local Authority for children in foster care.

In the Court of Appeal, there was unanimous agreement that the relationship between a Local Authority and a foster parent is not "akin to employment" and therefore, they cannot be vicariously liable for the deliberate wrongful acts of foster parents.

Perhaps more importantly, the judges also agreed that the Local Authority does not owe a child in foster care a non-delegable duty, albeit the judges' reasoning was different:

(i) By arranging the foster placement, the Local Authority discharged rather than delegated its duty to provide accommodation and maintenance for the child.

(ii) A Local Authority should not be 'saddled' with a non-delegable duty, where a parent doesn't face the same duty.

(iii) It is not 'fair, just and reasonable' to impute a non-delegable duty, which would be unreasonably burdensome and contrary to the interests of the children for whom they have to care.

> "This is undoubtedly a very important decision for Local Authorities, and their insurers, as it removes the situations in which (effectively) strict liability will be imposed upon them for children in foster care. Local Authorities will continue to receive claims, but this judgment allows them to defend claims when they have not been negligent. There is a public policy argument at stake and the case may end up being appealed to the Supreme Court.

High Court limits boundary of Vicarious Liability. *GB v Stoke City FC*

The claimant, an apprentice at Stoke City FC between 1986 and 1988, alleged he was assaulted on two occasions at the training ground by the first team goalkeeper, through a practice known as 'the glove'. The claimant claimed he had suffered physical and psychiatric injury, and had lost the chance of a career as a professional footballer. He sought damages in excess of £200k.

In determining whether or not the alleged assaults had been proved, the court focused on:

- the acts alleged in the pleadings
- the existence/absence of corroborative evidence for those acts and the alleged consequences, and
- the credibility and consistency of the evidence

Ultimately, the court had to decide whether the assaults had occurred, were the football club vicariously liable and what injury or loss did the claimant suffer.

Unsurprisingly, the passage of time affected the reliability of the witnesses' memories and their credibility, to the extent that the judge was unable to make positive findings of fact necessary for the claimant to succeed. The burden of proof rests with a claimant, and the judge could not conclude that the claimant had discharged it.

The court also dismissed the vicarious liability claim (obiter), when considering the 'close connection' test – whether the wrongful conduct was so closely connected with acts the employee was authorised to do. In dismissing the claim, it was highly relevant that although the apprentices and first team players had different statuses at the club, the latter had no contractual authority to train or chastise the former. Further, the club conferred no special authority on the professional/senior players.

The court said that acceptance of the claimant's case would involve an extension to the boundaries of vicarious liability beyond the parameters of the decided authorities, albeit none of those authorities placed any focus on the duties given by the employer to the victim.

> "The judgment provides further evidence of the judiciary taking the opportunity to limit the scope and boundaries of vicarious liability, where appropriate. Most, if not all, apprentices or trainees in the workplace would be at some risk, and acceptance of the claimant's case would have been little short of holding that any employer should be vicariously liable for any assault on any apprentice/trainee by a full-time employee in all circumstances, which was clearly a step to far.

Causation, pre-existing condition & damages – *Reaney v University Hospital of North Staffordshire*

In December 2008, the claimant was diagnosed with transverse myelitis. She failed to recover and became paralysed below the mid-thoracic level. It was common ground that it was not caused by the hospital's negligence. Her resultant needs would have been met initially by the provision of a few hours care each week, rising to 31.5 hours care after the age of 75. With the benefit of such care, the claimant could have led a largely independent life.

During an extended period of hospitalisation, the claimant developed a number of deep pressure sores (grade 4), with consequent infection of the bone marrow, hip dislocation, serious contractures of the lower limbs and increased lower limb spasticity. The claimant brought proceedings, alleging negligence in relation to the pressure sores.

The hospital admitted liability and the issues for determination were causation and the quantification of damages. The judge concluded that the negligence had made the claimant's position materially and significantly worse than it would have been but for that negligence. She would not have required the significant care package (and the accommodation consequent upon it), but for the negligence. In his supplemental judgment, the judge held that the requirement of 24/7 care from two carers for the rest of her life was 'materially different from what she would have required but for the development of the pressure sores and their sequelae'. The judge concluded that the claimant was entitled to full compensation of all care, physiotherapy and accommodation costs. The hospital appealed.

They submitted that the judge should have awarded the claimant the cost of meeting her needs, but only to the extent that the needs had been increased as a result of the negligence. The claimant submitted that the judge had found that the care required as a result of the negligence had been 'qualitatively' different from the care that would have been required but for the negligence. Accordingly, there was no basis for disturbing his overall conclusion on the issue of causation.

The Court of Appeal decided that a tortfeasor had to compensate the claimant for her condition only to the extent that it had been worsened by the negligence. The judge's conclusion that all of the claimant's care and physiotherapy needs had been caused by the hospital's negligence could not stand. The same applied to the judge's decision in relation to accommodation, equipment, transport and holidays.

> This is an important judgment, and one which supports a common sense approach to quantification of damages and medical causation. Whilst a defendant must take the claimant as they find them, it is an important distinction for the court to address, and insist the claimant give credit for, care and treatment already required pre-accident.

Liability for road accidents involving pedestrians. *Horner v Norman* [2015]

On 12 January 2010, Mr Horner was knocked down by a car driven by Miss Norman, as he was crossing the west-bound carriageway of the A4 (near Heathrow airport). It is a dual-carriageway road, with two lanes in each direction separated by a central reservation covered with grass and shrubs. Mr Horner had been staying at the Sheraton Heathrow Hotel and at about 6pm he walked to a garage in order to buy some alcohol. On his return, he dashed across the west-bound carriageway and was struck by Miss Norman's car just before he reached the central reservation. As a result of the collision Mr. Horner suffered significant injuries, which led him to bring these proceedings against Miss Norman.

Mr Horner had no recollection of the accident, but there were two witnesses, Miss Norman herself and the driver of the following car. At the time of the accident, Miss Norman was travelling at about 30 mph (the speed limit was 50 mph) in the right-hand lane. Both Miss Norman and Mr Patel saw Mr Horner step off the kerb as if starting to cross the road. She applied her brakes in case he continued to do so, but saw him step back onto the verge. Having seen him do so, Miss Norman moved her foot from the brake back to the accelerator, at which point Mr Horner dashed across the road. The resultant police report commented upon ice on the road, which meant they did not undertake skid tests. Expert evidence was submitted in relation to the road coefficient of friction and mathematical analysis.

Mr Horner's case was that Miss Norman's failure to avoid the collision was itself evidence of negligence, as she had failed to brake soon enough or hard enough. The question the court had to determine was whether Miss Norman had failed to act in accordance with the standards to be expected of a reasonably competent and careful driver. The judge accepted the accounts given by Miss Norman and Mr Patel and was satisfied that she had done all that she could to avoid hitting Mr Horner.

The judge also had to consider the party's expert reconstruction evidence and viewed it with some scepticism, where there was little objective forensic material for the experts to use when applying their expertise to reach conclusions. If there is little or no such material then they will be either analysing the factual evidence (which is not their role) or making a series of assumptions (that may or may not be supported by the factual evidence).

The judge's finding that there were patches of ice on the road was an important, if not critical, element in the case. It made sense to say that the collision occurred, notwithstanding Miss Norman's best efforts, because there were patches of ice on the road. The judge quite properly considered the evidence in the round and was alive to the importance of not imposing an unrealistic level of duty on motorists and he had the benefit of clear and reliable accounts from two eye witnesses which indicated that Miss Norman had behaved entirely reasonably. The police reports indicated the presence of frost and ice on the road.

The Court of Appeal dismissed the appeal and found that the judge was entitled to hold that Miss Norman was not liable. They also indicated that they would not have interfered with his finding of a 75% deduction for contributory negligence, had liability been established.

> The decision shows it does not automatically follow that a motorist is always at least as much to blame as a pedestrian *(Eagle v Chambers & Lunt v Khelifa)*. Defendants should be ready to argue for a higher degree of contributory negligence in appropriate cases, where a pedestrian has run out into the road into the path of an approaching motorist. Additionally, there is a tendency to rely on expert accident reconstruction evidence in large value cases, especially in cases where the claimant may not have any independent recollection of the accident. This case might lead to a closer focus on whether such evidence can be justified and whether there is sufficient material for an expert to analyse, thereby allowing him to prepare his report and reach his opinions.

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