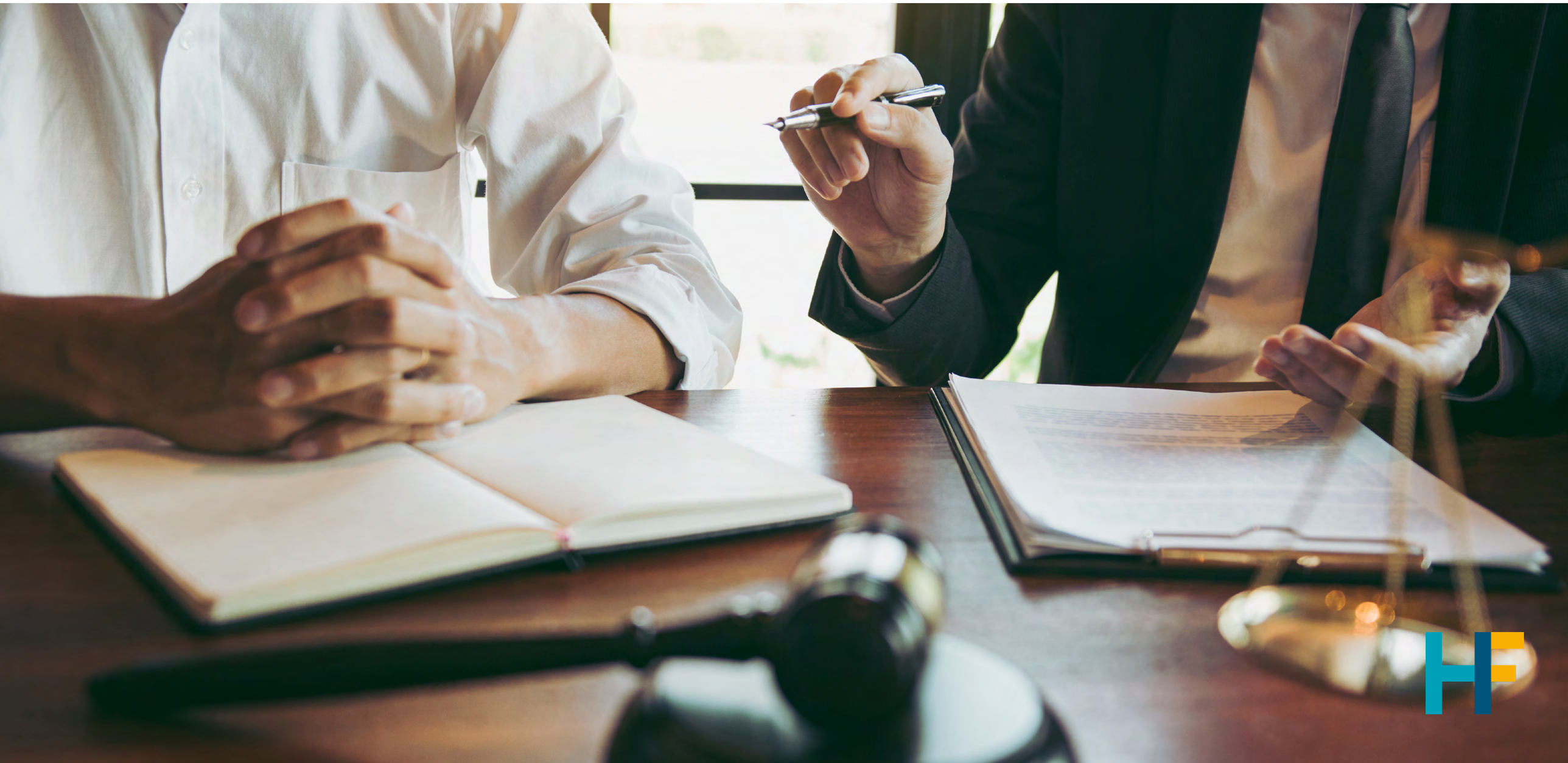
Insight

Issue 177

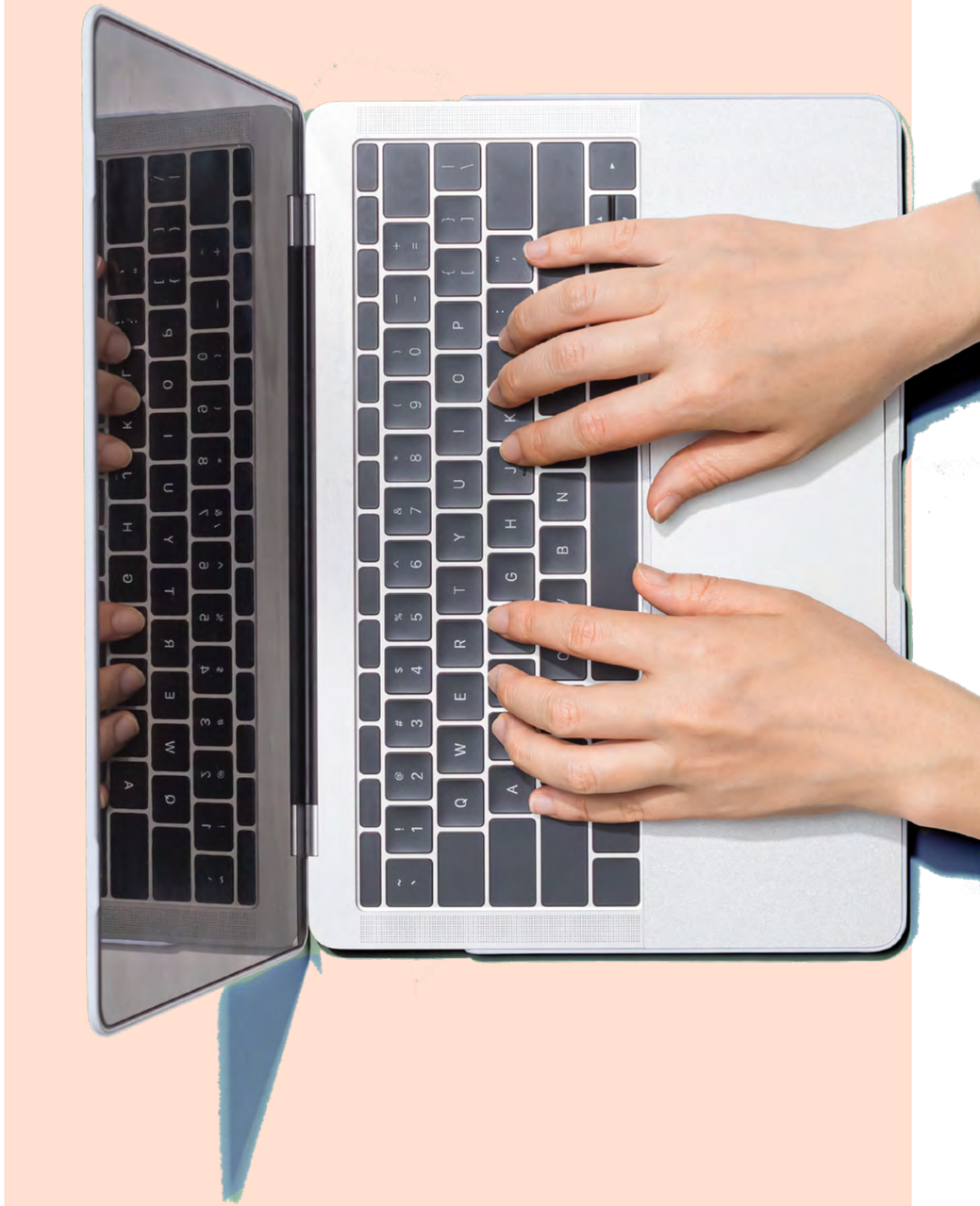


WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on cases relating to:

- Guideline hourly rates for Court of Protection cases
- Vicarious liability

Malcom Henké
Partner & Head of LACIG



Court of protection guideline hourly rates

PLK and others (2020) SCCO 13080340 (and others)

These assessments concerned the method of assessment of the hourly rates claimed by deputies acting for Protected Parties in Court of Protection (COP) cases. It was the applicants' submission that the court's current approach which, broadly speaking, relied on the application of the Guidelines Hourly Rates ('GHR') approved by the Costs Committee of the Civil Justice Council was, by 2020, incorrect and unjust. Instead the assessment of COP work should be predicated on a more flexible exercise of the discretion conferred by CPR 44.3(3), whereby the GHR were utilised as merely a 'starting point' and not a 'starting and end point'.

The court had consolidated the assessments in four cases that were chosen to represent the costs claimed by deputies in different parts of England, in the management of the affairs of protected parties who had sustained significant brain or birth injuries.

PLK

The protected party was an adult male who sustained an injury at birth. He received damages of £5,649,938. The hourly rates claimed were:

A	B	C	D
£284	£252	£211	£155

Aayan Ahmed Thakur

The protected party was a nine year old boy who suffered brain damage at birth. His estate is worth in excess of £12,000,000. The hourly rates claimed were:

A	B
£350	£159

Nathanial Chapman

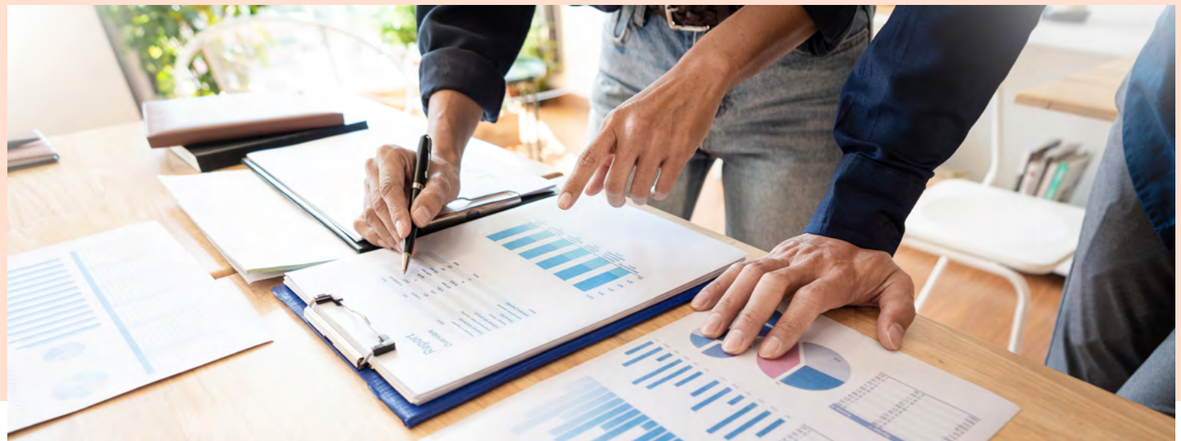
The protected party sustained a significant head injury in a cycling accident which aggravated underlying mental health issues, including schizophrenia. He received damages in 2014 of £2,325,000, plus periodical payments of £75,000 pa, which were indexed linked. The hourly rates claimed were:

A	B	C	D
£263	£232	£191	£145

Paul Nigel Tate

The protected party was 11 years old when he sustained a serious brain injury when he was hit by a bus. The hourly rates claimed were:

A	B	C	D
£284	£252	£211	£155



The GHR rates were set out in a table which |was made up of grades of fee earner and geographical bands. The rates were as follows:

Year	Guideline Hourly Rates 2010			
Bands	**A.**	**B.**	**C.**	**D.**
London	£409	£296	£226	£138
London 2	£317	£242	£196	£126
London 3	£229-267	£172-229	£165	£121
National 1	£217	£192	£161	£118
National 2	£201	£117	£146	£111

The Master observed that it was important to have both consistency and certainty in relation to the assessment of COP costs. Also, the assessment of COP costs was a role undertaken primarily by a large number of Costs Officers, whose general experience was limited necessarily, so that it could not really be said they had the broad judicial experience in applying CPR 44.4(3).

'It was likely that the role of Deputy had become more complicated over the years, particularly after the implementation of the Mental Capacity Act 2005.'

COP work comprised a discrete area of professional practice, so that deputies tended to work (over many years) in this area exclusively. The work was often (but not invariably) complex and the amount of money or property involved in the management of a protected party's assets was generally high. Protected parties could be difficult and time-consuming clients and this often imposed a considerable burden of responsibility on Deputies.

It was likely that the role of Deputy had become more complicated over the years, particularly after the implementation of the Mental Capacity Act 2005.

Having reviewed the available evidence, the Master held that while he could not carry out a review of GHR, it was clear that in 2020 the GHR could not be applied reasonably or equitably without some form of monetary uplift that recognised the erosive effect of inflation and other commercial pressures since the last formal review in 2010.

Costs Officers conducting COP assessments should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed.

If the hourly rates claimed fell within approximately 120% of the 2010 GHR, then they should be regarded as being prima facie reasonable. Rates claimed above this level would be correspondingly unreasonable.

To assist with the practical conduct of COP assessments, the table below demonstrates the effect of a 20% uplift of the 2010 GHR.

Guideline Hourly Rates 2010				
Bands	**A.**	**B.**	**C.**	**D.**
London	£490	£355	£271	£165
London 2	£380	£290	£235	£151
London 3	£275-320	£206-275	£198	£145
National 1	£260	£230	£193	£142
National 2	£241	£212	£175	£133

This approach should be adopted immediately and was applicable to all outstanding bills, regardless of whether the period was to 2018, 2019, 2020 or subsequently.

The Master went on to set the hourly rates in each of the four cases accordingly.

The claimant firms were represented by Clarion Solicitors Limited (t/a Clarion).

Comment

"This decision is likely to impact on both damages, in the form of increases in Court of Protection fees in applicable cases, and costs.

"We are already seeing the decision quoted in arguments that hourly rates generally should be uplifted in line with the comments of master Whalan. There is concern about the timing of the decision, given the ongoing GHR review, and also the evidential base (coming from the applicants only).

"The GHR review and any move away from thoserates should reflect the actual costs of running a law firm and that must take account of the impact of Covid-19."

Paul McCarthy,
Partner and Head of Costs

Vicarious liability

Chell v Tarmac Cement and Lime Limited (2020) EWHC 2613 (QB)

The claimant was sub-contracted by his employer to work at a site controlled and operated by the defendant. In addition, the defendant employed its own fitters to work alongside the sub-contractors.

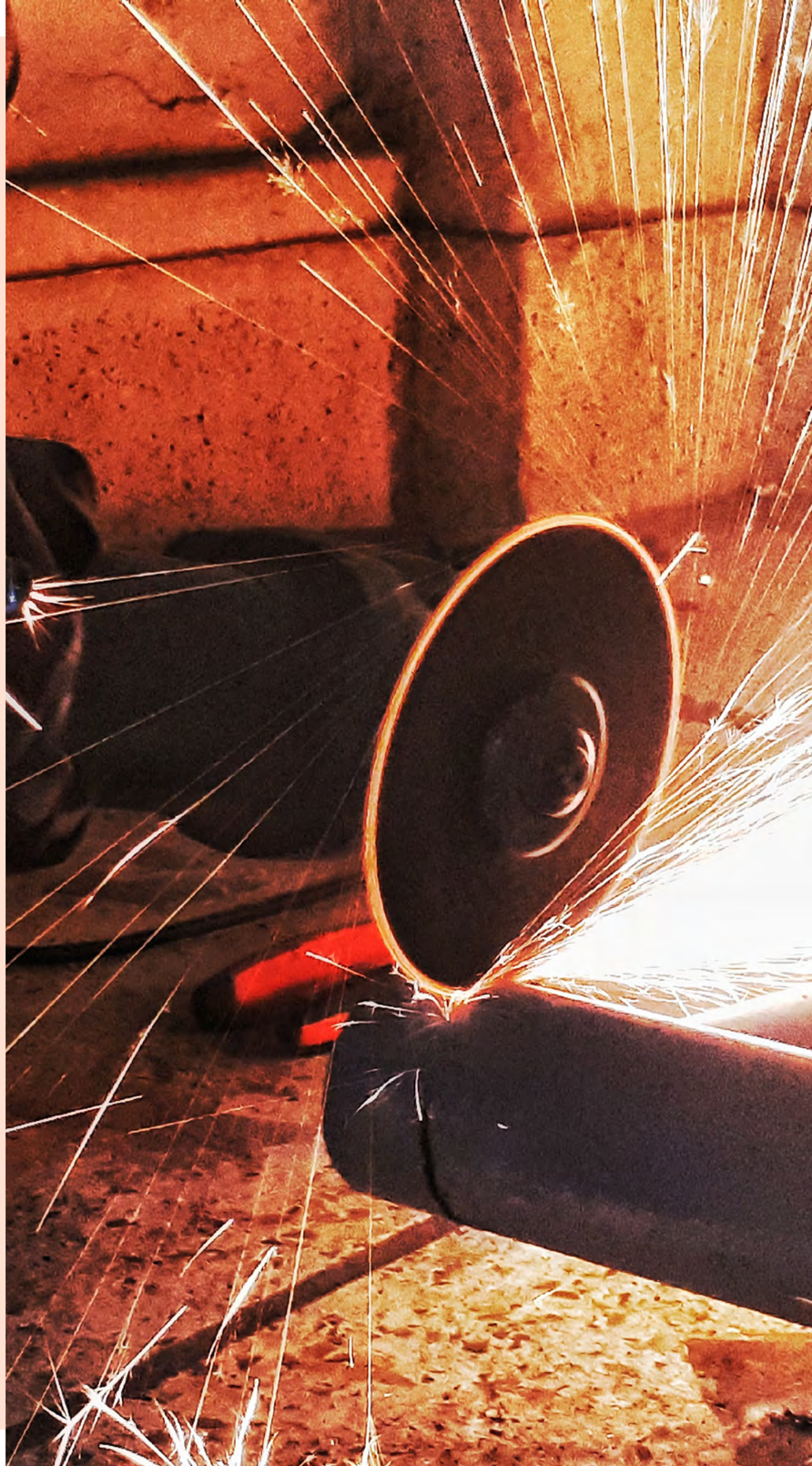
Two of the defendant's fitters, having been previously suspended for unrelated reasons, returned to the site and, according to the claimant, tensions then arose between the defendant's fitters and the sub-contractor's fitters. The incident which was the subject matter of this claim occurred when the claimant, who was working in the workshop on the site, bent down to pick up a length of cut steel.

One of the defendant's two fitters had brought two "pellet targets" with him on to the site and he put those on a bench close to the claimant's right ear. He then hit them with a hammer causing a loud explosion.

This appears to have been some form of (wholly misguided) practical joke. The claimant suffered a perforated right eardrum, noise-induced hearing loss measured at 9-10 decibels and tinnitus.

The claimant brought these proceedings alleging negligence directly against the defendant and also against the defendant as being vicariously liable for the actions of its fitter. A claim by the claimant against his own employer, as second defendant, had been discontinued.

A Circuit Judge dismissed the claim. The claimant appealed arguing that the judge erred in failing to make certain findings of fact, and that, based upon the findings of fact that he should have made, he should have found that the defendant was negligent both in its general failure to design and implement a reasonable system to maintain discipline on



site, and also in failing to react appropriately to the tensions on site between the defendant's employees and subcontract workers and the complaint of the claimant in respect thereof.

The findings of fact which, it was said, the judge should have made included that:

(i) The defendant's employee who had carried out the act had been engaged in the course of his employment immediately before the index event;

(ii) the defendant failed to risk assess issues of training and ill-discipline, and ought to have devised a substantial policy in that regard;

(iii) there was a foreseeable risk of injury through horseplay and/or ill- discipline both generally and arising out of tensions on site and the defendant's employee's past conduct;

(iv) the defendant failed to investigate or manage the claimant's complaint or respond to the tensions: had it done, concerns regarding the defendant's two fitters would have been identified;

(v) the defendant failed to provide its two fitters with suitable training or instruction regarding discipline on site;

(vi) the defendant failed to supervise or manage its two fitters at all at the material time.

Dismissing the appeal, a High Court Judge held that it was appropriate to start with the issue of vicarious liability. If, as submitted on behalf of the claimant, the judge misdirected himself as to the appropriate test to be applied, then this engaged a pure question of law which, in theory at least, was wholly suitable for consideration on appeal.

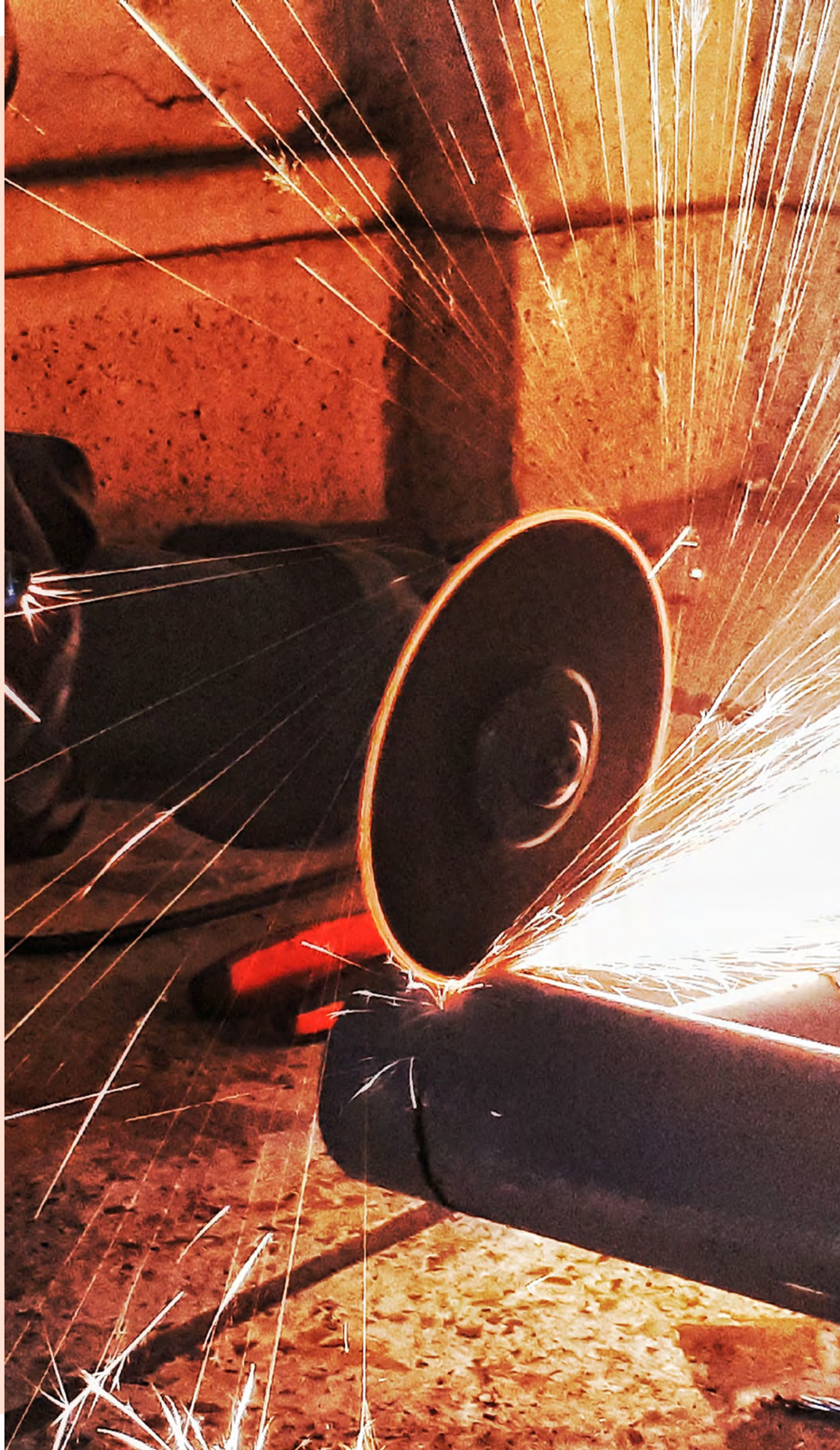
However, there was no error of law or misapplication of the relevant authorities. The judge correctly and appropriately adopted the two-stage test set out in Lister (2001).

'…work merely provided an opportunity to carry out the prank that he played, rather than the prank… being in the field of activities that the defendant had assigned to its fitter'

The judge at first instance had found that the following factors did not support a finding that the defendant's fitter's actions in hitting the two pellet targets with a hammer were within the field of activities assigned to him by the defendant:

a) The pellet target was brought on to the site, either by the defendant's fitter or one of his colleagues – it was not work equipment;

b) It formed no part of the defendant's fitter's work to use let alone hit pellet targets with a hammer at work;



c) What he did was unconnected to any instruction given to him in connection with his work;

d) The defendant's fitter had no supervisory role in relation to the claimant's work and at the index time he was meant to be working on another job in another part of the site;

e) The striking of the pellet targets with a hammer did not in any way advance the purposes of the defendant; and

f) In all those circumstances, work merely provided an opportunity to carry out the prank that he played, rather than the prank in any sense being in the field of activities that the defendant had assigned to its fitter.

So far as the allegations of direct breach of duty against the defendant were concerned, the judge was right where he stated that "horseplay, ill-discipline and malice were not matters that I would expect to be included within a risk assessment."

The defendant's General Site Rules showed that this defendant was an organisation that took health and safety matters seriously. It was expecting too much of an employer to devise and implement a policy or site rules which descended to the level of horseplay or the playing of practical jokes. On the evidence, the judge was wholly entitled to come to the conclusions that he did, namely that

(i) The existing site health and safety procedures which included a section on general conduct stating "no-one shall intentionally or recklessly misuse any equipment" was sufficient given the multifarious ways in which employees could engage in horseplay, ill-discipline or malice and nothing more specific could reasonably be expected; and

(ii) Increased supervision to prevent horseplay, ill-discipline or malice was not a reasonable step to expect this employer to have identified and taken.

So far as the specific risk arising from the tensions between the two sets of employees was concerned, the criticisms of the defendant were very much made with the benefit of hindsight, and the judge was right to view the matter from the defendant's perspective, prospectively. It was true that the defendant was aware of tensions between the two sets of employees and it was true that there was no evidence from the defendant as to the steps it had taken to avoid or reduce those tensions.

The situation as presented to the defendant did not merit specific action in relation to the defendant's fitter where there was no foreseeable risk of injury to the claimant at his hands. Furthermore, the judge's findings in relation to vicarious liability impinged on this aspect too: if the defendant's fitter was acting in a way wholly unconnected with his employment, but for his own purposes and "on a frolic of his own", then it was more difficult to argue that the employer should have taken steps to avoid such behaviour.

The claimant was represented by Imperium Law.

The defendant was represented by CMS Cameron McKenna Nabarro Olswang LLP.

Comment

This is yet another example of a court reining back in what was otherwise a steady extension of the scope of vicarious liability.

Horwich Farrelly

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