Insight 180

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

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

- Highways authorities and trees
- When expert evidence may assist in determining liability
- How an expert should assess mental capacity
- Contempt of Court
- Occupiers' liability

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Public liability/ Highways authority

Colar and another v Highways England (Coventry County Court 25/09/2019)

This was a claim in which the claimants claimed damages for personal injury caused as a result of a tree that fell over into the path of the car in which they were travelling. The stretch of road in question was a dual carriageway, with a central reservation which was lined with tall mature trees planted by the defendant.

It was not in dispute that the defendant was a highway authority and that, in that capacity, it was responsible for maintaining the stretch of road where the accident took place. The claimants alleged that the tree in question was (and had been for some time) in a dangerous condition and by failing to remove the tree, when it had, for some time, been in that condition, the defendant had failed to comply with its obligation under S41 Highways Act 1980. Alternatively, if, as the defendant contended, the obligation in S41 did not extend to the tree, the defendant was in breach of its common law duties in negligence or nuisance by failing to take all appropriate and proper steps to remove the tree in order to guard the public against the risk of an accident occurring from the possibility that the tree might fall at some point in time.

The defendant's position was that:

(a) It accepted that the tree was in a dangerous condition at the time of the accident. The tree had fallen because it had been infected by a wood decay fungus. However, the defendant disputed that the maintenance and upkeep of the tree formed part of its duty under S41;

(b) Even if the maintenance and upkeep of the tree was part of its obligation to repair the highway under S41, it had a complete defence under S58 of the1980 Act because there was a reasonable and regular system in place for the inspection and maintenance of the carriageway and the trees along the relevant stretch of the carriageway, and the defendant fully complied with that system through the contractors which it employed;

(c) The claim for breach of the common law duty alleged by the claimants could not be made out because of the reason referred to in (b), above, i.e. because there was a reasonable and regular system in place for the inspection and maintenance of the trees along that

stretch of the carriageway, which the defendant fully complied with; and

(d) The claimants could not prove that the accident was caused by the defendant's negligent acts or omissions. That was because the tree was inspected some ten months before the accident, by an arboriculturalist employed or instructed by the contractor and it was not found to have needed any attention.

The principal legal issue which arose between the parties was whether the present claim was governed by S41. The defendant disputed that it was. If the claim was governed by S41, the claimants contended that they need only prove that the tree was in a dangerous condition. If they could do that – and they plainly could because it was common ground between the parties that at the time of the accident, the tree was in a dangerous condition – the defendant must be liable for the accident and could only escape that liability if it could avail itself of the statutory defence set out in S58. Moreover, the claimants contended that if the defendant could not make out the defence in S58, they were entitled to succeed without having to prove causation.

The judge accepted the contention advanced by the defendant that the tree did not fall within the scope of its statutory duty under S41. The trees planted in the central reservation area could not properly be said to be part of the fabric of the highway. They could only properly be regarded as part of the soft estate owned or controlled by the defendant.

It therefore became necessary for the claimants to prove the ingredients necessary to establish their claim in negligence or nuisance. This involved the claimants essentially having to prove either that there was no adequate system in place for the upkeep and maintenance of the trees in the stretch of the road where the accident took place or, if there was, the inspection was either not carried out in accordance with that system or not carried out properly.

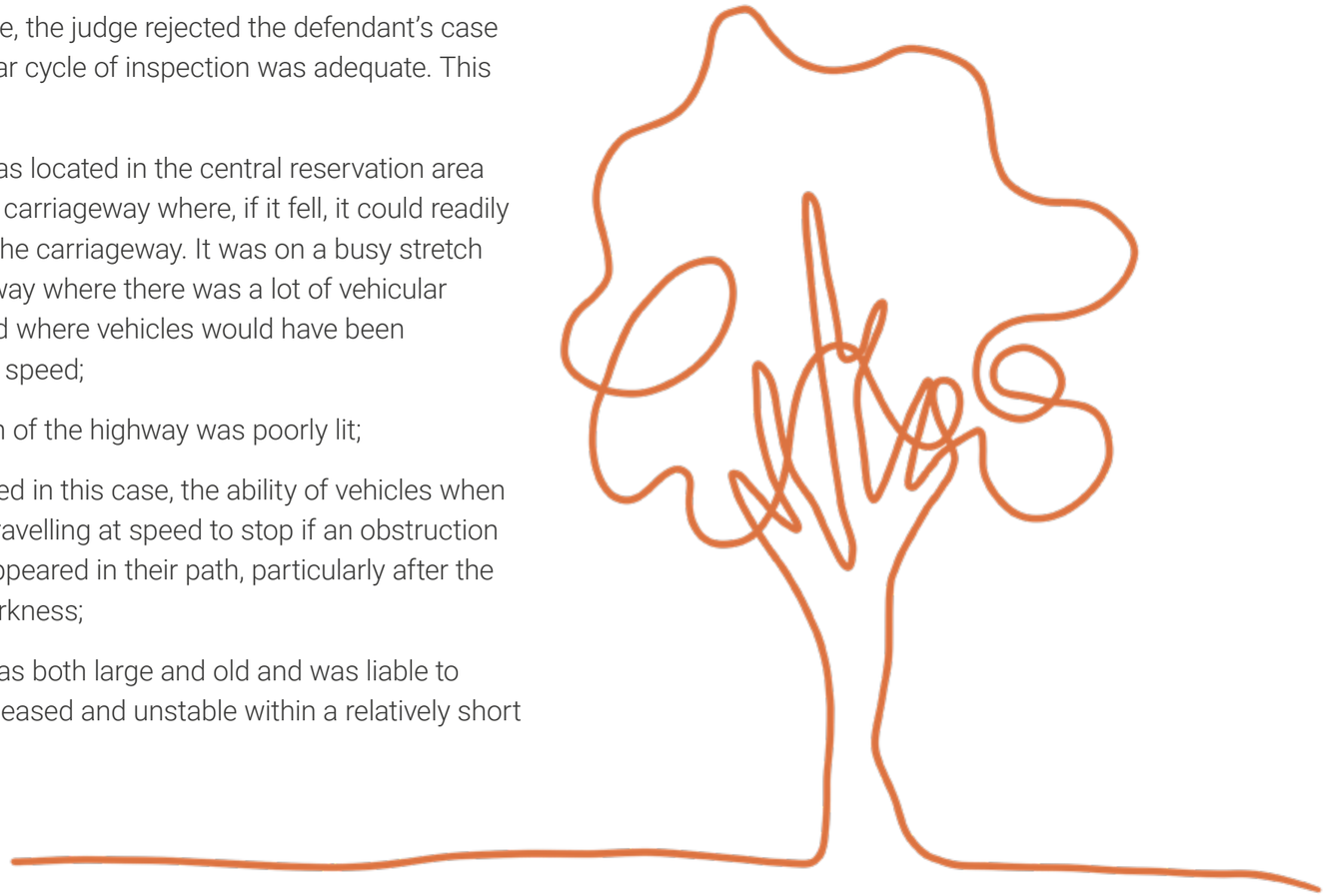
On the evidence, the judge rejected the defendant's case that a three-year cycle of inspection was adequate. This was because:

(a) The tree was located in the central reservation area of the main carriageway where, if it fell, it could readily fall across the carriageway. It was on a busy stretch of the highway where there was a lot of vehicular traffic – and where vehicles would have been travelling at speed;

(b) The stretch of the highway was poorly lit;

(c) As happened in this case, the ability of vehicles when they were travelling at speed to stop if an obstruction suddenly appeared in their path, particularly after the hours of darkness;

(d) The tree was both large and old and was liable to become diseased and unstable within a relatively short time frame;



(e) If the tree fell, it was liable to cause serious injury, as happened in the present case, or worse;

(f) While the demands made upon the resources of all public authorities were extremely high, it could not be said that |the defendant lacked the resources to carry out inspection on this stretch of the highway more regularly than every three years.

The accident occurred on 18 December 2013 and the defendant alleged that inspections had taken place in 2012 and on 19 February 2013. The judge found the evidence on these highly unsatisfactory.

He rejected the evidence that there was any inspection in 2012. No documentation whatsoever has been produced concerning that inspection. The only suggestion that there might have been an inspection was an indication from the contractor that it took place. No actual date, or even a month, in 2012 was given for the inspection and not even the email from the contractor saying that the inspection took place had been produced. How and why that inspection was carried out was a complete mystery. If an inspection was carried out, the court would have expected to see some documentation relating to it, particularly given that information about inspections was inputted electronically.

The judge's overall conclusion about the inspections which the sub-contractor undertook on behalf of the defendant, by reference solely to the inspection on 19 February 2013, was that it was not carried out by reference to anyrecognised guidelines.No relevant documents or evidence had been produced and It was not carried out in a manner which was either competent or adequate.

'Whilst a highway authority was perfectly entitled to delegate its duties to conduct inspections to a suitably-qualified independent contractor, it must exercise a sufficient amount of monitoring of the contractor to ensure that those duties were discharged'

The defendant had abrogated its responsibility for the upkeep and maintenance of its soft estate in the area where the tree had fallen completely to its contractor. Whilst a highway authority was perfectly entitled to delegate its duties to conduct inspections to a suitably qualified independent contractor, it must exercise a sufficient amount of monitoring of the contractor to ensure that those duties were discharged. The defendant exercised no such monitoring in this case. That responsibility was not, therefore, discharged properly by the defendant.

There was no adequate system in place for the upkeep and maintenance of the trees in the stretch of road where the accident took place. However, even if there was, the inspection was not carried out in accordance with that system or carried out properly.

As to causation, the judge found that just as the defendant's position on breach of duty lacked substance, its position on the issue of causation also lacked substance. It amounted to saying little more than this: *'although there is no documentary evidence at all that the tree was pruned,it was. If it was not pruned, it was subject to de-icing or drought'*. That position proceeded on a basis which was fundamentally flawed: it was clear from the evidence that the tree was not pruned, and the de-icing and drought were matters of pure conjecture. The judge found much of the defendant's witness's evidence to be unreliable, not only because it proceeded on assumptions which it was not appropriate to make but also because the witness was largely partisan and biased. He appeared to be intent throughout on supporting the defendant'sextremely weak case on causation. The judge came to the resounding conclusion that the most probable cause of the presentation of the tree was the fungal disease. The presentation of the tree should have put the defendant's inspector on enquiry that there was something wrong with it and that the matter needed further investigation. She did not take any steps to enable such an investigation to be conducted. Causation was established.

The claimants were represented by Morrish Solicitors LLP.

The defendant was represented by the Government Legal Department.

Comment

Although decided on its facts, this case provides a classic illustration of a witness reconstructing events not actually witnessed but then having an honest belief in the accuracy of their evidence.

It is also an example of how expert evidence may assist the court to determine which of two competing sets of facts is the most likely to have occurred.

RTA/Expert evidence

Robinson v Barker and another (2020) EWHC 3097 (QB)

The issue to be decided in this case was which of two competing versions of a road traffic accident was correct. The claimant's case was that he was travelling south on the main road, the first defendant failed to give way at a junction, and drove into heavy collision with the offside front corner of the claimant's car, causing the two cars to spin in the road together. The second defendant was the first defendant's insurer and as there was no issue between the defendants, the judge referred throughout the judgment simply to 'the defendant'.

The defendant's case was that he too was driving south on the main road and saw the claimant's car parked up on the side of the road ahead of him and to his nearside. The claimant's car was showing its hazard warning lights. As the defendant approached, he moved to the centre of the road to overtake but, as he did so and when he was two or three car lengths away, the claimant began to execute what looked like a U-turn in the road, cutting into the defendant's path and leading to the collision.

The parties' accident reconstruction experts agreed that on the competing versions of events there was little or nothing which the other party could have done to avoid the collision and, hence, there was no issue of contributory negligence.

'...the judge was not bound to prefer the expert evidence, agreed or otherwise, over the factual evidence if he regarded it as honest and reliable'

The Deputy High Court Judge indicated that he found that neither the claimant nor the defendant was a particularly reliable witness. Whilst he accepted that a witness put forward by the claimant as independent witness was an honest and genuine witness, her evidence was inconsistent in a number of respects with the agreed accident reconstruction expert evidence and inconsistent in a number of further respects with the evidence of the defendant's expert. Thus, the most significant issue to be resolved in this judgment was whether or not the independent witness's evidence could be treated as reliable in its essential respects, bearing in mind that the judge was not bound to prefer the expert evidence, agreed or otherwise, over the factual evidence if he regarded it as honest and reliable.

The essential gist of the witness's evidence was as follows.

'6. On 15 December 2017, I was in my flat, walking around whilst speaking to someone on my mobile telephone. As I was talking, I was leaning on the windowsill and looking outside onto Lancashire Hill. I then saw a black taxi car approaching from my right, travelling down Lancashire Hill, in an Easterly direction, in the lane closest to my flat. I then saw a white car travelling at speed, along Gordon Street, towards the junction where it meets Lancashire Hill. The white vehicle looked to be travelling at around 40mph. I can see this junction clearly from my flat window. The white car didn't stop or slow down as it approached the junction of Lancashire Hill and just drove straight across the road and into the black car. I then shouted "Oh my god!" and told my friend that I had to go and ended the call.

7. As I continued to look out of the window, as the white car hit the black taxi, the two vehicles became side by side, nose to nose,

spinning around in an anti-clockwise direction. The vehicles then separated and the black taxi ended up on the opposite side of the road, facing the opposite direction they had come from (North), stopping next to the bus stop opposite from my flat. The taxi wasn't exactly parallel to the bus stop; the front driver side was sticking out into the road a little. The white car came to a halt across both lanes of traffic, with its nose pointing towards my flat and another bus stop on the opposite side of the road.

8. *As the taxi spun, one of its wheels blew off. The sound of the collision was very loud.'*

Right at the end of her cross-examination it was suggested to the witness that the first awareness of the collision was of hearing a bang. She seemed to agree, saying *'Yes, I saw it from the window – when the noise occurred'*. When it was then put to her that she didn't actually see the collision she said that she did.

The agreed accident reconstruction expert evidence demonstrated that the witness's account could not be accepted as wholly accurate in some important details. Specifically, the accident reconstruction experts agreed that the defendant's car could not have travelled straight out of the junction and continued laterally into full side on collision with the claimant's car. They agreed when the two vehicles collided, they were both travelling predominantly along the line of the road (to the south). This was due to the clear evidence of both vehicles moving post-impact for some distance down the road, which was plainly inconsistent with the defendant's car being driven straight out of the side road into a full sideways on collision with the claimant's car.

The judge held that it followed that the witness could not be accepted as a reliable witness in the sense that she had ever had an accurate recollection as to the precise circumstances of the collision. Nor was the judge able to place any great weight on the uncorroborated evidence of the claimant or of the defendant.

Whilst the views expressed by the experts in their joint statement and the views expressed by the defendant's expert in his evidence as to the factors militating against the claimant's version of events could not be put forward as definitive, and must be subject to proper judicial caution, nonetheless taken as a whole they provided powerful support for the proposition that it was unlikely to a significant degree that the collision could have happened as postulated by the claimant.

In all the circumstances, on the balance of probabilities, the collision occurred as alleged by the defendant and not as alleged by the claimant.

The claimant was represented by Potter Rees Dolan Solicitors, Manchester.

The first defendant was represented by Winn Solicitors, Newcastle upon Tyne.

The second defendant was represented by Ellisons Solicitors, Colchester.

Comment

Although decided on its facts, this case provides a classic illustration of a witness reconstructing events not actually witnessed but then having an honest belief in the accuracy of their evidence. It is also an example of how expert evidence may assist the court to determine which of two competing sets of facts is the most likely to have occurred.

Assessing mental capacity

AMDC v AG and another (Court of Protection 18/11/2020)

The issue in this case was whether AG lacked the capacity to make decisions as to:

a. The conduct of litigation.

b. Her place of residence.

c. Her care and support.

d. Her contact with other people.

e. Management of her property and affairs including termination of her tenancy.

f. Engagement in sexual relations.

g. Marriage.

During the course of the hearing, the parties agreed that although further delay in determining capacity was very regrettable, it was necessary for instructions to be given to a fresh expert to report to the court. Having set out the relevant provisions of the Mental Capacity Act 2005, the High Court Judge indicated that when providing written reports to the court on capacity, it would benefit the court if the expert bore in mind the following:

a. An expert report on capacity is not a clinical assessment but should seek to assist the court to determine certain identified issues. The expert should therefore pay close regard to (i) the terms of the Mental Capacity Act and Code of Practice, and (ii) the letter of instruction.

b. The letter of instruction should, as it did in this case, identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide. It will assist the court if the expert structures their report accordingly. If an expert witness is unsure what decisions they are being asked to consider, what the relevant information is in respect to those decisions, or any other matter relevant to the making of their report, they should ask for clarification.

'It is important that the parties and the court can see from their reports that the expert has understood and applied the presumption of capacity…'

c. It is important that the parties and the court can see from their reports that the expert has understood and applied the presumption of capacity and the other fundamental principles set out at S1 of the MCA 2005.

d. In cases where the expert assesses capacity in relation to more than one decision,

   i. broad-brush conclusions are unlikely to be as helpful as specific conclusions as to the capacity to make each decision;

ii. experts should ensure that their opinions in relation to each decision are consistent and coherent.

e. An expert report should not only state the expert's opinions, but also explain the basis of each opinion. The court is unlikely to give weight to an opinion unless it knows on what evidence it was based, and what reasoning led to it being formed.

f. If an expert changes their opinion on capacity following re-assessment or otherwise, they ought to provide a full explanation of why their conclusion has changed.

g. The interview with the individual concerned need not be fully transcribed in the body of the report (although it might be provided in an appendix), but if the expert relies on a particular exchange or something said by an individual during interview, then at least an account of what was said should be included.

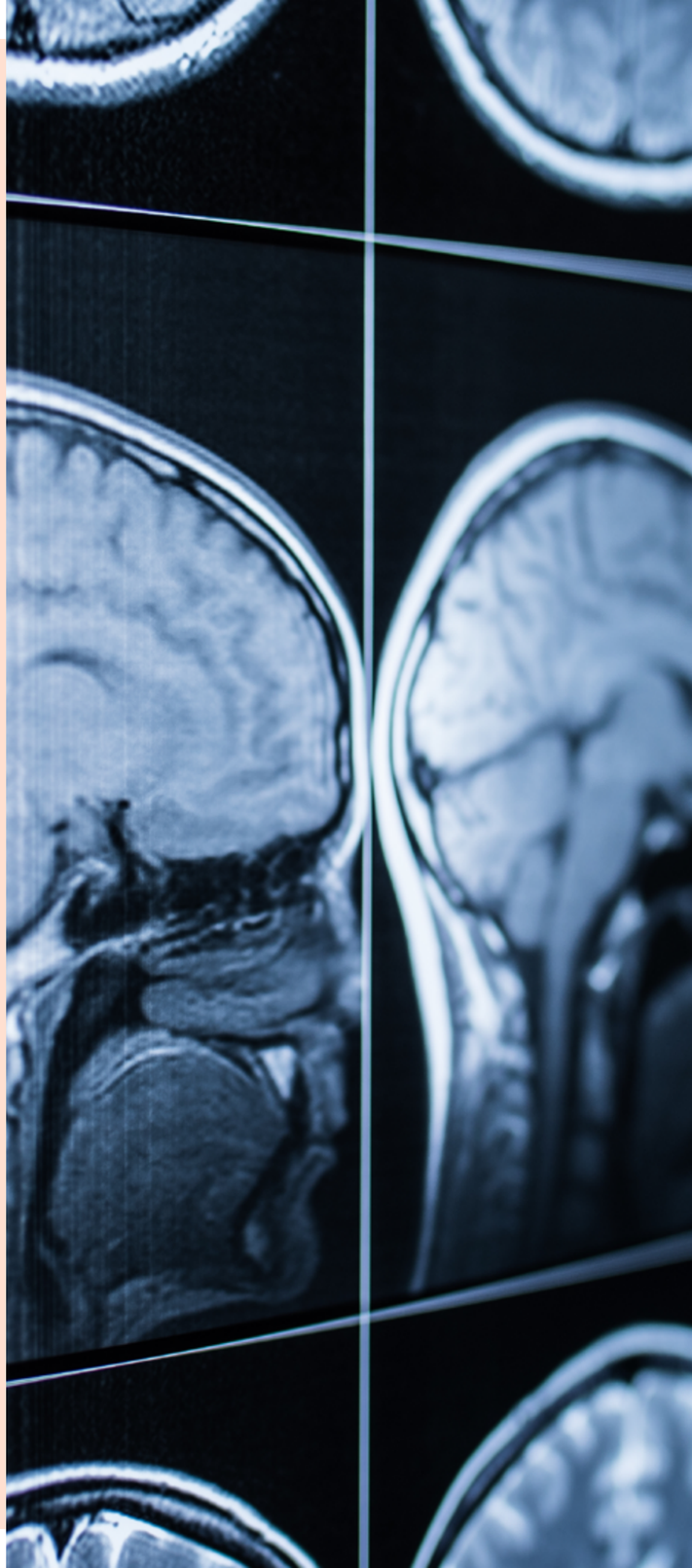
h. If on assessment the individual does not engage with the expert, then the expert is not required mechanically to ask him or her about each and every piece of relevant information if to do so would be obviously futile or even aggravating. However, the report should record what attempts were made to assist the individual to engage and what alternative strategies were used. If an expert
hits a 'brick wall' with the individual then they might want to liaise with others to formulate alternative strategies
to engage him or her. The expert might consider what further bespoke education or support can be given to the individual to promote his or her capacity or their engagement in the decisions which may have to be taken on their behalf. Failure to take steps to assist the individual to engage and to support her in her decision-making would be contrary to the fundamental principles of the Mental Capacity Act 2005 Ss1(3) and 3(2).

The applicant was represented by its in-house solicitor.

The first respondent AG was represented by Switalskis Solicitors.

Comment

Although this application was made in the context of a local authority's responsibility for the first respondent's care, it offers a useful insight into the care that should be taken by all experts when opining on capacity.



Contempt of court

Zurich Insurance Plc v Barnicoat and another (2020) EWHC 3127 (QB)

This was an application brought by the insurer to commit the two respondents to prison for contempt of court for making or causing to be made false statements in Particulars of Claim, supported by Statements of Truth, and in witness statements they made in connection with a personal injury claim for damages brought by them against the insurer's insured, Cornwall Housing Limited (CHL).

The respondent/claimants in the proceedings alleged that they were injured as a result of falling into a manhole which was located on a footpath on land managed by CHL. The respondents alleged that, shortly after midnight, they were walking together along the footpath on the way back to one of their flats after posting a letter when they were both injured.

However, those who attended the scene on the night of this incident saw matters very differently from the respondents, including a paramedic who attended the scene and a police officer, both of whom raised questions at the time as to whether the respondents were being truthful in their account of events.

At the trial of the action, the District Judge found that the defendant's case that this was a '*fabricated and dishonest claim*' was made out. She said:

'I regret to say very clearly, I have no hesitation in finding that this claim, both of these claims, are fundamentally dishonest'

The insurer was granted permission to bring these proceedings and directions were made, including providing the respondents the opportunity to file evidence in response to the application by way of witness statements. No such evidence was filed. On the available evidence, the Deputy High Court Judge made the following findings:

i) The respondents had been properly served with the application, including being notified about the hearing;

ii) The respondents had had more than sufficient notice to enable them to prepare for the hearing;

iii) No reasons had been advanced by them or by anyone on their behalf to explain their non-appearance;

iv) It was not clear why the respondents had not engaged in the process but no adverse inference could be drawn because they had waived their right to be present. It was probably more accurate to say that they have had every opportunity to take part and have chosen not to do so;

v) There was nothing in any of the material before the court to suggest that, if the case was adjourned for a short period, either of the respondents would be likely to attend a resumed hearing. Accordingly, there was no doubt that the court would be in no different position in the future if this matter were to be adjourned;

vi) It would clearly be better for the respondents if they were to attend, but the level of prejudice caused to them by their non-attendance might be limited as they had given evidence in full about the relevant events and been thoroughly cross-examined. A respondent to a committal application was not obliged to give evidence. Even if the respondents had attended and had given evidence, it was hard to see that there was any additional evidence they could give which was not given to the District Judge or that, in giving evidence, they would be in a better position than they were before the District Judge.

vii) There would be a measure of prejudice caused to the applicant by any delay in that it would incur additional costs which, in all probability, it would never recover whatever the outcome of these proceedings;

viii) There would be no real undue prejudice to the forensic process if the application was to proceed in the absence of the respondents; and

ix) Given that the respondents had been served but had taken the decision not to be involved in these proceedings, it seemed consistent with the overriding objective in CPR 1 for the case to proceed in the absence of the respondents.

The insurer accepted that it was required to prove each element of the case to the criminal standard, namely to prove the facts of its case beyond reasonable doubt.

With considerable reluctance, the judge concluded that the evidence that the insurer had been able to lead did not go far enough to demonstrate to the criminal standard that the second respondent did have any form of incident with the manhole that night and that any stumble he suffered did not have the effect of bringing the first respondent to the ground. It seemed highly unlikely but it could not be said that it was proven beyond reasonable doubt that these men were not involved in any incident in the vicinity of the manhole.

'…even if there was some form of minor incident involving the manhole, it did not result in either respondent suffering any form of significant injury and certainly did not lead to the injuries which both claimed that they had suffered…'

However, even if there was some form of minor incident involving the manhole, it did not result in either respondent suffering any form of significant injury and certainly did not lead to the injuries which both claimed that they had suffered as a result of any incident, as described in the Particulars of Claim. The judge was satisfied to the criminal standard that, in the aftermath of whatever had led to the respondents finding themselves on the ground, they quickly saw the capacity to use that incident as a way of seeking to make money for themselves by pretending that they had suffered injuries which they knew they had not suffered.

Regardless as to what happened on that night:

i) Both respondents made false statements about the injuries that they claimed to have sustained;

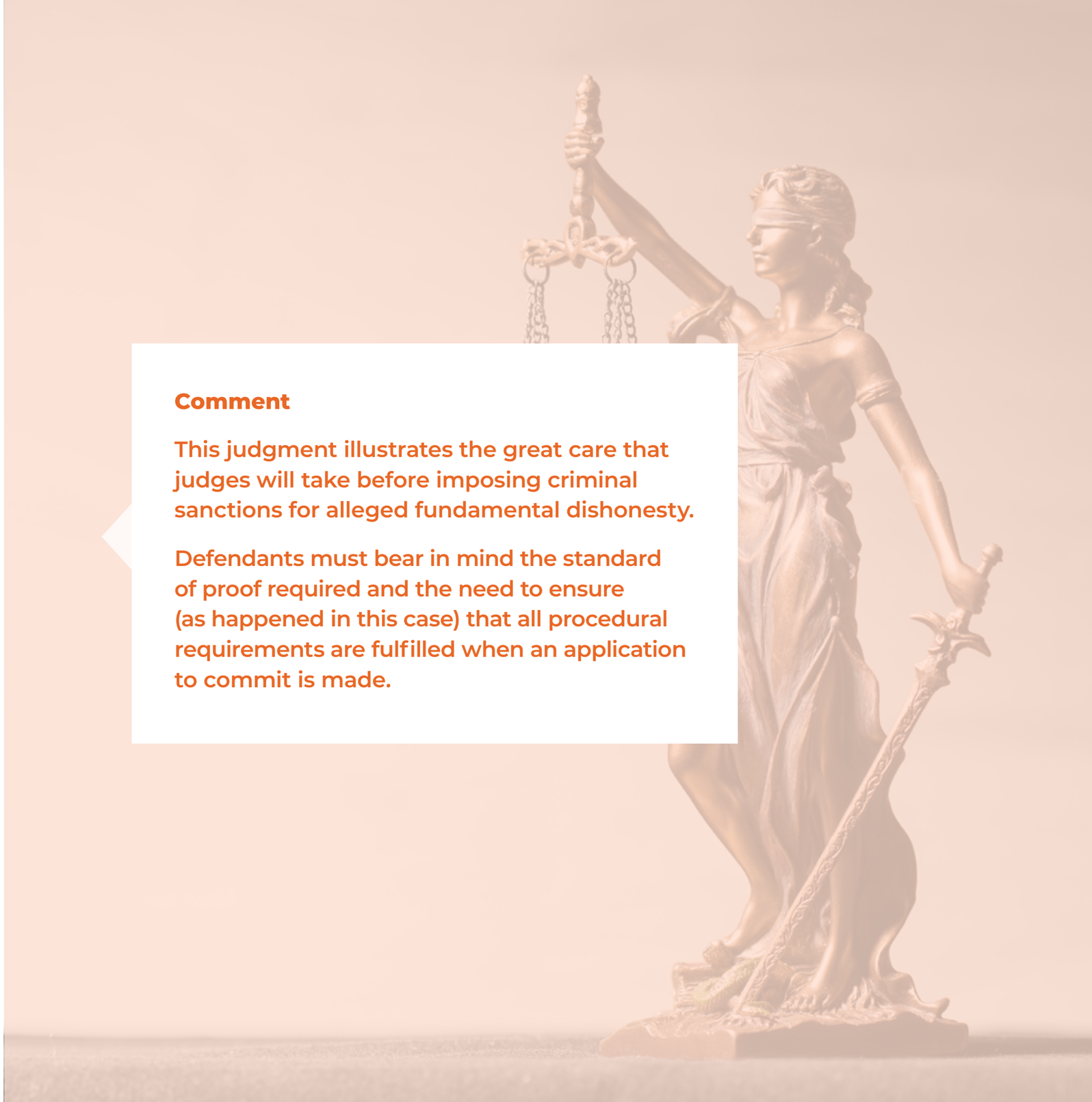
ii) They made those false statements for the purpose of improperly seeking financial compensation from CHL (or in practice their insurers) as damages for injuries that they never sustained;

iii) That when they signed the Particulars of Claim and made witness statements, both respondents knew that they were telling lies about the alleged injuries, and that they did so in order to seek to persuade CHL to pay them damages for injuries that they never sustained.

Whilst this was only a relatively modest damages claim, it nonetheless involved a serious and extended level of deception. Nonetheless, it would not be appropriate to sentence the respondents without giving them an opportunity to seek legal advice about the serious situation they found themselves in and, if they were so minded, to apply to the court to purge their contempt.

Irrespective as to whether or not the respondents attended the adjourned hearing, it was to be used to fix the punishment for the grounds found proven.

The applicant was represented by DAC Beachcroft.



Comment

This judgment illustrates the great care that judges will take before imposing criminal sanctions for alleged fundamental dishonesty.

Defendants must bear in mind the standard of proof required and the need to ensure (as happened in this case) that all procedural requirements are fulfilled when an application to commit is made.

Occupier's liability

Mathewson v Crump and another (2020) EWHC 3167 (QB)

This was a claim for breach of the Occupiers Liability Act 1957 (OLA 1957) and negligence. It arose from an accident which occurred at a domestic property. The claimant, a plasterer, went to the property to quote for plastering work. The property was in the process of being converted from a bungalow to a two-storey house, and the claimant fell through chipboard on the first floor where the stairwell was being cut through. He fell to the ground floor and fractured his wrist.

The property was owned by the first defendant. At the time of the accident she was not living in the property and had not done so at any time between its purchase and the accident. From the time of the purchase until well after the accident, the property was essentially a building site while the substantial construction work was undertaken to convert the house. The work was undertaken by a construction company, CK2 Construction Limited (CK2). The second defendant now jointly owned the property where the accident occurred, but at the time of the accident he had no legal interest in it or rights to it.

The claimant's case was that the first and/or second defendant were 'occupiers' of the property within the meaning of the OLA 1957 at the time of the accident, and that they failed, as required of them by the Act, to take the care that was reasonable to ensure he, as a visitor to the property, was reasonably safe in using the premises. He also brought a claim in negligence, but it was not developed and largely overlapped with the OLA claim.

'…the key issue on occupation was whether the first defendant and/or second defendant were in sufficient control of the property on the day in question…'

For present purposes the key issue on occupation was whether the first defendant and/or second defendant were in sufficient control of the property on the day in question to be 'occupiers'? Whether a person was an 'occupier' within the meaning of the OLA 1957 depended on whether they had sufficient control over premises for it to be reasonable to expect them to appreciate potential risks on the premises and to take reasonable care to protect those coming to the premises from such risks. It was clearly possible for a builder undertaking construction work on premises to become the 'occupier' of the premises, in addition to or instead of the owner. The question would ultimately be one of fact and degree as to the extent of control the builder and/or the owner are exercising.

Turning to the first defendant, it was clear she was not the 'occupier' at the time of the accident. It was true that she was the owner of the property, having purchased it. At no stage between that date and the accident, however, did she live in the property. It was not disputed that she rarely visited the property while the building work was being undertaken, and when she visited it was only to make limited decisions about details of decoration, kitchen lay out, etc. She did not have sufficient control over the premises while the property was being converted, and specifically at the time of the accident, for it to be reasonable to expect her to appreciate potential risks on the premises and to protect visitors from those risks. She was not therefore the 'occupier' of the property at the material time for the purposes of the OLA 1957.

It was not surprising that the first defendant was not the 'occupier'. The scale of the building work required to convert a bungalow into a two-storey house was not much different from the building of a new house. The first defendant left that building work, and control

of the premises, to professional builders. While they were in the process of undertaking the conversion of the property, she did not have sufficient control or supervision over the property to ensure that sub-contractors or other visitors were safe, and could not reasonably be expected to ensure their safety. That responsibility lay with CK2.

As to the second defendant, he was not at the material time the owner of the property and had no legal rights in relation to it. Unlike the first defendant he did regularly visit the property in order to undertake building work, and was present at the time of the accident. Nevertheless, he was not to be considered an 'occupier' of the property.

It was apparent from the evidence that responsibility for the management and supervision of the building work lay with CK2. CK2 liaised with the architects, arranged and paid for delivery of materials, had their builder's sign at the premises and engaged and paid sub-contractors. CK2 had the keys to the property and control over who entered. Ultimately, the second defendant's role was that of a sub-contractor. He may have had a greater involvement in the project than other sub-contractors, given that the property was owned by his girlfriend and then wife, and there may have been times when he worked on the property on his own. That did not, however, mean that he became the 'occupier' of the premises. He did not have sufficient control over the property to owe a duty to keep visitors safe.

In the light of the conclusion above that neither of the defendants were occupiers at the material time, it was not strictly necessary to determine the question of breach. However, as evidence had been heard on the issue, the judge did so in case he was wrong on the question of occupation.

On the evidence, it was likely that the claimant was warned about the risk of ascending the ladder though the hatch to the first floor when he arrived on the morning in question, and, furthermore, the risk would have been obvious to someone with the claimant's skill, expertise and experience.

Both the provision of a warning and the claimant's particular professional skills were matters the court was entitled to consider in determining whether sufficient care had been taken to see that the claimant was reasonably safe (see OLA 1957 ss 2(3)(b) and 2(4)(a)). It would have been obvious to the claimant when he arrived that the stairwell between the floors was in the middle of being cut through and that it was not safe to stand on the chipboard in that area.

The defendants were not obliged to do more. They were not obliged physically to stop the claimant ascending or take further steps to block off the area. The accident had not happened because of a breach of any duty owed by the defendants. It happened because the claimant, having moved off the ladder in the correct direction when he ascended to the first floor, allowed the obvious risks to slip his mind or was not concentrating sufficiently when he came to descend. He placed his weight on the chipboard when it was not safe to do so.

In the light of the above the defendants had a defence pursuant to OLA 1957 s 2(5) on the basis that the claimant willingly accepted the risks inherent in ascending the ladder to the first floor. When he ascended the ladder, the claimant was aware of the risk if he were to place his weight on the chipboard in the stairwell area. He wished to give the quote for plastering and did not want to have to return at some later time. He chose to take the risk believing he would be able to avoid it.

The claim was pleaded in negligence as well as for breach of the OLA 1957. It was, however, primarily argued pursuant to the latter, and very little was said by either party about negligence.

In principle it might be possible for the claimant to succeed in negligence even if he could not establish that either defendant was an ‘occupier’ within the meaning of the OLA 1957. That would, however, require him overcoming the considerable hurdles to establish a duty of care for a failure to warn, i.e. for a pure omission. Given the conclusions that, even if one or both of the defendants were ‘occupiers’ there was no breach of the duty imposed under the OLA 1957, it was unnecessary to consider whether a duty of care was owed at common law. Even if such a duty were owed, it would not have been breached for the same reasons found in relation to breach of any duty owed under the OLA 1957.

The defendant’s argument that the claim was fundamentally dishonest was rejected.

The claimant appeared in person.

The defendants were represented by Bosley & Co.

Comment

This judgment contains no surprises, save perhaps the claimant’s choice of parties to sue. It will be noted, however, that he was a litigant in person.

Horwich Farrelly

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