RPC

General liability newsletter

April 2019

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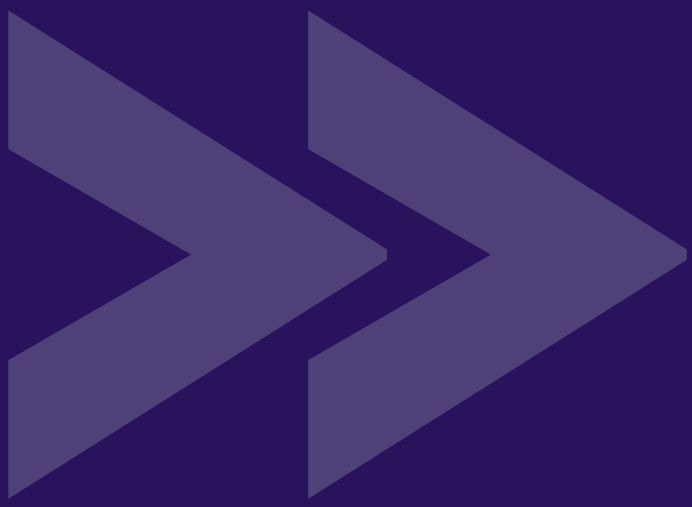

Discount rate reform

The first review of the discount rate under the Civil Liability Act 2018 began on 19 March 2019.

The Act requires the Lord Chancellor to conduct the review and determine whether the rate should be changed within 140 days. His decision will therefore come by 5 August 2019.

In February 2017 the then Lord Chancellor, Liz Truss, amended the discount rate from 2.5% (the level at which it had stood since 2001) to minus 0.75%. Whilst a review of the rate had been a long time coming, such a drastic alteration had not been expected. The reaction to the change led to a review of the entire rate-setting system by the Government, culminating in the Civil Liability Act.

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Royal Opera House fails in hearing loss appeal

The Royal Opera House (ROH) failed in its appeal against a decision that it was liable for breach of statutory duty causing injury to the hearing of a viola player in its orchestra.

The critical issue was whether the ROH had reduced exposure to as low a level as reasonably practicable, and in particular whether it had taken all reasonable steps to reduce the level to below 85dB, that being the statutory upper occupational exposure limit (EAV).

The orchestra had occupied a pit with viola players positioned directly in front of the brass section. Despite using earplugs, the lack of space and proximity of trumpets to him meant the Claimant found the sound to be loud and painful. Following complaints the noise level was recorded at 91db.

After three days of rehearsals the Claimant had suffered such injury to his hearing that it ended his professional career.

At subsequent rehearsals the orchestra was rearranged and noise levels of 83bd were recorded.

The comparison between the two levels recorded proved to be fatal to the appeal.

The reconfiguration of the pit had not caused any reduction in the artistic standard of the performance and whilst alterations made after a workplace accident do not necessarily demonstrate liability retrospectively, in this case they made it difficult for the Defendant to prove that all reasonably practicable steps had been taken beforehand.

Additionally, although it was not foreseen that exposure to noise levels at 92db would cause sudden injury, the Court held that was irrelevant in law. The ROH had failed to show that it reduced the noise exposure to as low a level as was reasonably practicable and/or that it had taken all reasonably practicable steps to reduce it to 85db. As such, the fact that the foreseeable risk was of long term rather than traumatic injury was irrelevant.

The ROH, supported by the Association of British Orchestras, the Society of London Theatre and the UK Theatre Association, took the claim to appeal arguing that the decision could have "disturbing implications" for all live music performances.

The Court held that these concerns reflected a misunderstanding of the consequences of their decision. For most musical venues, space was not the problem that it was at the ROH. Even there, a comparatively small repositioning of the layout of the orchestra pit gave a marked reduction in the sound pressure.

The decision therefore emphasises the obligation on venues to comply with the requirements of the relevant legislation, namely the Control of Noise at Work Regulations 2005.

The Court did accept the Defendant's contention that the wearing of hearing protection at all times was not practicable, overturning the original decision in that regard.

Withdrawing an admission of liability – two recent examples

As we have commented in previous bulletins, persuading the Court to agree to reverse an admission of liability can be extremely difficult.

However, the Defendant was able to do just that in *Wharfside Regeneration (Ipswich) v Laing O'Rourke and others* [2018] EWHC 3858 (TCC) the Judgment for which has recently become available.

In Wharfside the Defendants were responsible for cladding on several blocks of flats which was alleged to be inadequate. The Defendants initially alleged that the defects could be remedied whilst the Claimant said that replacement was necessary. In 2017 the parties obtained estimates. The Defendant's repair estimate and Claimant's replacement estimate were not dissimilar, and as such the Defendant pleaded within their Defence that it no longer maintained its position that replacement was unsuitable. However, in May 2018 the Claimant's produced a new Schedule of Loss and the replacement costs had risen from £3million to £9million. The Defendant therefore applied to withdraw their admission.

The Court found that the Defendant had made the sensible admission in their Defence that replacement rather than repair was the more suitable option. However, the costs then rose enormously and the Defendant was facing a claim of millions of pounds more than they had thought. The commercial usefulness of making the admission had therefore disappeared.

Whilst the application to withdraw the admission had not been made late, it would be disruptive and likely to produce additional work for the Claimant. However, given that the experts had considered the repair option, it was questionable how much additional work would be created if the application was allowed.

The fact that the Claimant proceeded on the admission for six months was not sufficient to disallow it to be withdrawn. Nor did its withdrawal make settlement of the claim less likely. The prejudice to the Defendant if the admission was not withdrawn would be substantial because it could now only meet a case for compensation far in excess at what its expert had valued it at.

In contrast, the Defendant in *Royal Automobile Club Ltd v Wright* [2019] EWHC 913 (QB) was not so successful.

The Claimant in that case had been employed by the Defendant. In June 2015 she was injured when she fell down a flight of stairs at work. She asserted that the accident had been caused by the lack of handrails on the staircase. She gave details of her injuries, including two breaks in her right leg and chronic pain, and indicated that she would be seeking evidence from a number of medical experts. The Defendant had advised the Claimant that the claim should proceed through the online claims portal. The Claimant disagreed, advising that the value of the claim exceeded the £25,000 limit. The Defendant admitted liability in September 2016.

In August 2017 the Claimant provided a schedule of loss totalling around £1million. The Defendant responded by stating that they were reopening their investigation into liability and would be alleging contributory negligence. They invited the Claimant to consent to this. The Claimant declined and issued proceedings in reliance upon the Defendant's admission.

The Defendant applied to withdraw the admission under CPR 14, on the basis that the increased value of the claim amounted to a material change of circumstances. The Master rejected that argument, concentrating on the relative prospects of success. The Defendant asserted that the absence of a handrail on the stairs was not causative of the accident, but the Master found that the accident was of the kind which a handrail was intended to prevent, and said he had no doubt that the issue would be resolved against the Defendant at trial. The Master concluded that there was no proper basis on which to permit the appellant to withdraw its pre-action admission, noting that the Defendant remained in a position to raise the issues of contributory negligence and as to the extent of the Claimant's injuries.

The Practice Direction to CPR14 sets out:

7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –

a. the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
b. the conduct of the parties, including any conduct which led the party making the admission to do so;
c. the prejudice that may be caused to any person if the admission is withdrawn;
d. the prejudice that may be caused to any person if the application is refused;
e. the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
f. the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
g. the interests of the administration of justice.

Vicarious liability – Court finds for Defendant after accident at Christmas party

In *Shelbourne v Cancer Research UK* [2019] EWHC 842 (QB) the Claimant was injured when she was lifted and accidentally dropped at a work Christmas party organised by the Defendant, her employer, by a visiting scientist, Robert Beilik.

The Claimant argued that the Defendant should have taken steps to prevent the accident occurring, including securing a written declaration from attendees that they would not behave inappropriately, drafting a risk assessment to deal with such behaviour, and training staff.

The Court examined the test established by the Supreme Court in *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11 with regard to establishing vicarious liability, namely: (a) What functions or "field of activities" were entrusted by the employer to the employee (in this case Mr Beilik) and (b) was there a "sufficient connection" between the position in which that person was employed and his wrongful conduct to make it right for the employer to be held liable for reasons of social justice?

The Court found that Mr Beilik's presence at the party was not within the functions entrusted to him by the Defendant. He was not doing his laboratory work when he attempted to lift the Claimant and he had not been required to attend the party. Mr Beilik's field of activities "was not sufficiently concerned with what happened at the party to give rise to vicarious liability." Mr Beilik was engaged in a frolic of his own, unrelated to his employment, and as such the Claimant's claim failed.

The Court also held that in organising the party the Defendant was only responding to the expectation of its members of staff that this is what an employer does for them at Christmas.

The Court made a clear distinction between this case and the case of *Bellman v Northampton Recruitment* [2018] Civ 2214 where a company was held to be vicariously liable for an assault committed by its managing director on an employee following their Christmas party.

In that case, whilst the assault took place not only outside of work, but also outside of the organised Christmas party, it had occurred as a result of the managing director's perceived challenge to his authority as a director, which the Court held was something which fell within the field of activities entrusted to him.

Fixed costs awarded in settlements exceeding £25,000

In *Ferri v Gill* [2019] EWHC 952 (QB) the Claimant settled his claim for £42,000. The claim had started in the online claims portal (as submitted by his former solicitor). At first instance Master McCloud ruled that the Claimant's costs should be subject to detailed assessment. The Master said that the value of the settlement was considerably outside the boundaries of applying fixed costs and she was setting a "low bar" because the portal was intended to deal with simple cases which would typically be fast track.

On appeal Mr Justice Stewart said that the Master had erred in law.

Fixed costs apply to claims starting in the portal that have an expected upper limit of £25,000. However, Section IIIA CPR 45 provides that claims which grow in value and leave the protocol are still subject to fixed costs for as long as the case is not allocated to the multi-track, save in "exceptional circumstances".

Mr Justice Stewart said the Master's error was on the construction of exceptionality. The judge added: "The authorities already cited make clear the policy reasons behind this fixed costs regime in particular, and other similar fixed costs regimes. Exceptionality should not be a low bar".

Similarly in *Lovatt v LEW Diecastings Ltd* [2019] the Claimant settled his claim for £29,000. The parties could not agree whether fixed costs applied. The District Judge held that because the figure exceeded £25,000 the Protocol ceased to apply.

On the Defendant's appeal, however, HHJ Sephton QC held that the Claimant was entitled to fixed costs.

It is important to note that these claims started in the portal and were settled prior to allocation. Once a claim is allocated to the multi-track, fixed costs shall cease to apply.

It is therefore important that Defendants make any offers they might wish to make as soon as possible, in order to avoid allocation and benefit from the fixed cost regime.

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