BRIEFING

PERSONAL INJURY

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INTRODUCTION

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This last week has been interesting for personal Injury lawyers, not only because of the continuing effects of the Coronavirus public health emergency, but also because the Supreme Court has handed down several long awaited judgments that have clarified and developed important aspects of the law of tort.

Members of 1 Chancery Lane acted in two of the three important cases of *Barclays Bank v Various Claimants* [2020] UKSC 13, *WM Morrisons Supermarkets v Various Claimants* [2020] UKSC 12 and *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

1 Chancery Lane has prepared briefings discussing the decisions in Barclays, XX and an update of abuse cases that have been handed down this year. For a detailed analysis of these decisions please follow the links, check out our website or email ewilliams@1chancerylane.com who will be happy to send you copies.

This briefing considers some other interesting issues that have detained the courts in 2020. It discusses recent cases in the areas of fundamental dishonesty, causation and contributory negligence and motor insurance. We hope that you enjoy reading about matters that are not concerned with Covid19.

For regular updates addressing the effect of the national emergency on the work that we do please email ewilliams@1chancerylane.com and request to be added to our mailing lists. Alternatively keep an eye on the 1 Chancery Lane website, blog, twitter feed and LinkedIn pages, which offer regular updates by our leading Barristers. Current articles cover procedural updates and changes to the Court Service, the impact the crisis is having on the travel industry and recent guidance on inquests.

All members of 1 Chancery Lane and our clerks room continue to work remotely. We offer our full range of services and are happy to provide telephone and video conferencing services for court hearings, conferences and settlement meetings. We are business as usual and look forward to supporting you during these difficult months and beyond.

We send our best wishes to our clients and friends and hope that you all stay safe.

FUNDAMENTAL DISHONESTY CASE LAW UPDATE

RICHARD COLLIER

The cases below bear out three particularly useful points:
1) A claim can be dismissed under section 57 of the Criminal Justice and Courts Act 2015 even where the dishonesty was not persisted with at trial.
2) Surveillance evidence showing the claimant to have exaggerated their symptoms can form the basis of a section 57 finding.
3) Investigations and surveillance are VERY important for defendants.

JASON ROBERTS v (1) ALAN KESSON (2) TESCO UNDERWRITING LTD [2020] 2 WLUK 519

C is a taxi driver who was involved in a road traffic accident in 2017. He brought a claim for general damages for personal injury, as well as for special damages including a claim for the difference between the pre-accident value of his damaged vehicle and its subsequent salvage value ("the Car Claim"). In his witness statement C said he used the salvage value of this damaged vehicle to purchase a new one. However D2 conducted investigations which revealed C's vehicle passed its MOT the day prior to C signing his witness statement, as well as various social media entries in which C sought to sell the vehicle in a roadworthy condition. C produced a second witness statement changing his story, though at trial during cross-examination he accepted the first statement was untrue.

At trial D2 submitted that C's first statement and the Car Claim were dishonest and as such – irrespective of whether C succeeded on the rest of the claim e.g. for personal injury - the whole claim should be dismissed under section 57. The first instance judge disagreed on the basis that although there had been dishonesty C did not persist with this dishonesty at trial. D2 appealed this decision.

On appeal Mr Justice Jay said this: "The real question is whether the Claimant has been fundamentally dishonest and not whether he has persisted in that dishonesty. The only permissible conclusion on all the available evidence is that the Claimant has been fundamentally dishonest in advancing a false claim in a schedule of loss and a false claim in his first witness statement." It was tolerably clear that if C had not been 'flushed out' he would have persisted with this dishonest claim. It was sufficiently fundamental to the claim as a whole hence section 57 was engaged and the appeal was allowed.

JACQUELINE GRANT v NEWPORT CITY COUNCIL [2020] 2 WLUK 94

C was employed by D as a cleaner at a school. In 2014 she slipped and fell while emptying a bucket of water, causing significant injury to her knee. She sued D in negligence and for breach of statutory duty. It was accepted that C suffered considerable injury and that for 12 months at least, until she had reconstructive surgery and a period thereafter, she was significant disabled. In dispute was the extent of C's recovery thereafter; C alleged she was left disabled on the labour market and unable to return to work as a cleaner, and required care, which D disputed.

D obtained surveillance evidence, namely video footage, showing C walking without the aid of a stick (which she told her medical expert she required much of the time) and then cleaning her car for 2.5 hours (whereas in her witness statement C said walking was restricted to 15 minutes) involving bending, carrying buckets of water and carrying various other equipment. She is then seen manoeuvring and carrying two wheelie bins, and twisting her body in doing so. All of this was done walking at "a normal pace with nothing obviously impeding her". The next day she is seen walking once again without a stick and carrying a dining chair down steps, and similar things on another occasions (including carrying a clearly heavy box). This footage was inconsistent with her alleged symptoms, and as such D asserted she had consciously and dishonestly exaggerated her symptoms.

Her Honour Judge Howells found for C on liability. Though she accepted C had significantly and dishonestly exaggerated the extent of injury symptoms. C had been further dishonest in respect of her loss of earnings claim; she claimed she was unable to work, but there was evidence she worked for her friend's

wedding business and was paid £150-£200 per year. Despite C having suffered a genuine injury, and being entitled to considerable damages for the 'honest part' of her claim (which the Judge assessed at £83,500), the whole claim was dismissed under section 57 and C received nothing.

BACK TO BASICS: HIGH COURT AFFIRMS THE KEY PRINCIPLES IN ROAD TRAFFIC ACCIDENT CLAIMS

SUSANNA BENNETT

Two new High Court decisions address liability arising from collisions between motor vehicles and pedestrians: *Warsama v LFB* and *Bonsor v Bio Collectors Limited*.

The two decisions

In *Sagal Adam Warsama v London Fire Brigade* [2020] EWHC 718 (QB) Ms Warsama walked quickly and erratically into the offside lane of Commercial Road at 3am on 30 December 2014. She was struck by the nearside wing mirror of a fire engine which was on an emergency call and suffered very serious injury.

Multiple criticisms were made of the driving by Mr O'Kane of the fire engine. Commercial Road eastbound comprises two lanes, one a bus lane and one a lane for other traffic. It is enclosed by a raised central reservation separating it from Commercial Road westbound. Mr O'Kane was found to have been driving at 45mph in the offside of the two lanes. He spotted Ms Warsama emerging from between two cars parked in the bus lane, and in response he eased off on the accelerator and moved slightly to the right. When she was firmly established in the offside lane he braked his vehicle. Whyte J found that he had been driving too fast (bearing in mind especially that he was hemmed in to the right, and that Commercial Road was busy at all times) and that he ought to have braked as soon as he saw Ms Warsama emerging. Had he done so, the collision would have been prevented.

Whyte J found that Ms Warsama had been under the influence of alcohol and cannabis and in an agitated state at the time. She had become involved in an argument with some youths, as a result of which she had called the police. Her recollection was that she had mistaken the fire engine for a police vehicle, and had stepped out into the road to flag the vehicle down.

Whyte J concluded that Ms Warsama had placed herself in an obviously dangerous situation. She reasoned at [73]:

> *"In terms of blameworthiness, there is little to add. The complication of drink and drugs goes against the Claimant. Her conduct impeded the legitimate and important public work of those tasked with attending the emergency call out. As I have observed – one has every sympathy with Mr O'Kane's assumption that no adult would be careless enough to place themselves in the path of this vehicle, even when positioned between parked cars in a bus lane."*

She determined that liability should be apportioned on a 50:50 basis between the two parties.

In *Camilla Bonsor v Bio Collectors Limited* [2020] EWHC 669 (QB) Ms Bonsor, a pedestrian, was crossing the mouth of Young Street and was struck by the front nearside wheel of a lorry driven by Mr Rodrigues, an employee of the Defendant, as it turned into Young Street. She suffered significant injuries. The High Court considered whether either party had been negligent: it determined that Mr Rodrigues alone had been negligent, and that the Defendant was therefore 100% liable.

Both Ms Bonsor on foot and Mr Rodrigues in his lorry were travelling in the same direction (west) on Kensington High Street. Just before Mr Rodrigues turned left into Young Street, Ms Bonsor was in the blind spot created by the left A Pillar of his lorry (the opaque vertical pillar on the left side of his windscreen). Much turned upon what Mr Rodrigues did, and ought to have done, before he began the turn. He did not give oral evidence, and the Court found that he had not paused and leaned forward to check the blind spot before making the turning. If he had done so, Ms Bonsor would have been visible, whether because of her stepping out of the blind spot or him leaning forward: para 77.

The Judge accepted Ms Bonsor's evidence that she had looked to her right and behind her when she started to

cross the road.

Discussion

The case of *Warsama* is preceded by a long line of Court of Appeal decisions regarding the responsibility of careless pedestrians for collisions with road vehicles. The rule arising from the case law is that there is a high burden on motorists given the greater destructive capacity of a motor vehicle when compared to a pedestrian. Accordingly motorists will generally bear a greater responsibility for road traffic accidents than careless pedestrians.

Encapsulating this principle, the Court of Appeal in *Eagle v Chambers* [2003] EWCA Civ 1107 states at [15]-[16]:

> *"…A car can do so much more damage to a person than a person can do to a car... The potential "destructive disparity" between the parties can readily be taken into account as an aspect of blameworthiness... It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle..."*

Warsama was not a case in which the pedestrian suddenly moved into the path of an oncoming vehicle (confirmed at para 74). An apportionment of 50% for contributory liability is therefore high. It can be compared with the cases of *Widdowson v Newgate Meat Corp* [1998] P.I.Q.R. P138, in which the Claimant was walking in the middle of the road at night on a dual carriageway, and of *Belka v Prosperini* [2011] EWCA Civ 623, in which the Claimant ran across the road in front of a motorist at an unregulated crossing, where the same apportionment was made.

Warsama indicates the approach that Courts are likely to take when considering collisions with emergency vehicles: while motorists will still be required to take reasonable care, pedestrians will be expected to recognise emergency vehicles and not place themselves in their path.

What can we learn from *Bonsor*? It illustrates the handicap a Defendant faces if its driver does not attend trial to give oral evidence. Otherwise it is a reminder, as we should all already know, that one should look both ways before crossing a road, pause before making a turning, and remember to check the blind spot!

THE LIMITS OF ROAD TRAFFIC INSURANCE

ANDREW SPENCER

Motor insurance is required to cover liability for death, personal injury and property damage "caused by, *or arising out of*, the use of the vehicle on a road or other public place in Great Britain…" (Section 145(3) of the Road Traffic Act 1988). The question what "arising out of" (as opposed to "caused by") means was considered by Tipples J earlier this year in *Carroll v Taylor and Others* [2020] EWHC 153 (QB).

The facts of the case are striking – the Claimant hailed a taxi to take him home at the end of a night out. The taxi driver took advantage of the Claimant (who was under the influence of alcohol) and robbed him, before leaving him around 3 miles away from his home. The Claimant attempted to walk home. Doing so, he started to walk on a motorway bridge, but fell off and suffered severe brain injuries. Did this injury arise out of the use of the taxi?

The Court of Appeal addressed the principles in *Dunthorne v Bentley* [1996] RTR 428, CA[1]. In that case, a driver caused an accident when she ran out into the road to obtain assistance restarting her car. This was held to be conduct "arising out of" the use of the car. The principles from that case were summarised by *Silber J in AXN v Worboys* [2012] EWHC 1730 (the case of the 'Black Cab Rapist') as follows: "arising out of" is a wider concept than "caused by"; the focus of the inquiry is whether the injuries were matters "arising out of the use of the car" and that it is necessary to consider whether the driver's actions, at the time of the injury, "arose out of the use of" the car. All the material circumstances should be considered, and the question addressed at the time of the injury as opposed to the start of the journey.

The judge found that the Claimant's injuries did not "arise out of" the use of the taxi. Although it was

foreseeable that a drunk or otherwise vulnerable person abandoned by a taxi driver short of his destination might come to harm, this was not the legal test. The taxi journey had come to an end by the time of the accident. There was no evidence about what the taxi driver was doing at the time of the accident and he could have been anywhere in the area: this, in the judge's view, made it clear that the injury did not arise out of the use of the taxi. The injuries had nothing to do with "the use of the vehicle on a road" and occurred because the Claimant decided to walk home, and were not closely linked with the use of the taxi.

[1] Which was approved last year by the Supreme Court in *Pilling v UK Insurance* [2019[2 WLR 1015, SC

ABOUT US

1 Chancery Lane is a leading set for personal injury and fatal claims and has been at the forefront of personal injury law for decades.

Acting for both claimants and defendants members of chambers have appeared in many of the leading cases that have shaped the law of tort. Our Members have expertise in the most sensitive, complex and high value claims, as well as providing high quality representation in County Court cases.We have renowned expertise in the areas of public authority liability, abuse, education, social services, occupational stress, discrimination and product liability and are highly sought after for our work in road traffic (including motor fraud and credit hire), public liability and sports law. We offer advocates skilled in Inquest and Inquiry work and benefit from the cross border expertise of our travel team who are leaders in the field of overseas claims.

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