PERSONAL INJURY SEMINAR SERIES

Personal Injury Law Update:

Employers' and Public Liability

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3 HARE COURT

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Chambers work as advisers and as advocates across a range of civil and commercial areas of law.

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- Public law (including civil liberties and human rights)
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Our practice groups regularly publish articles and provide talks and seminars on all areas of relevance to business and commercial lawyers. Please contact Mika Thom, our Marketing Manager in this regard at **MikaThom@3harecourt.com** or 020 7415 7911.

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SPEAKER PROFILES

HAFSAH MASOOD

Year of call: 2006

Main Practice Areas

Civil Liberties and Human Rights, Employment, Personal Injury, Professional Negligence/Indemnity, Immigration, Travel Litigation

Profile

Hafsah acts in a range of civil and common law matters, with experience of appearing in the County Court and High Court in trials, applications and appeals. She also undertakes pro bono work in her local community on matters ranging from consumer credit, insurance, immigration and claims against local authorities.

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Before commencing pupillage Hafsah spent two years as a research assistant at the Law Commission working principally on a project reviewing private and public law remedies against public authorities, as well as contributing to projects on housing and adult social care. In 2008-2009 she spent two terms as Judicial Assistant to Lord Justice Dyson in the Court of Appeal.

Qualifications

BA (Law), Worcester College, University of Oxford

LLM (with Distinction), London School of Economics

Languages

Urdu, Punjabi

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ASELA WIJEYARATNE

Year of call: 2008

Main Practice Areas

Personal Injury, Professional Negligence/Indemnity, Commercial and Business Law, Property (including Landlord and Tenant),

Profile

Asela advises and acts in a broad range of civil and commercial matters with a particular focus on the areas listed below.

Personal injury and Travel Litigation

Personal injury litigation, including matters arising from accidents abroad is a major focus for Chambers, and Asela has significant experience in these areas. In travel cases he has acted for claimants, tour operators and carriers, in respect of claims arising under the Package Travel Regulations and the Athens and Montreal Conventions. Asela is regularly instructed to advise on conflict of law issues and on expert evidence as to the standards of care abroad.

Asela has experience in advising and representing both claimants and defendants in a broad range of domestic personal injury matters involving ŜYLJf2èŜNăΩ I·yŘ LJdzōfΛŎ liability. Asela has a particular interest in the multi-disciplinary approach to such litigation and has held the position of Associate Editor of the Cambridge Journal of Medicine and Law.

Property (including Landlord and Tenant)

Asela receives regular instruction in property disputes and particularly in contentious matters arising between landlords and tenants. Before the LVT, Asela has wide-ranging expertise in Right to Manage claims, including disputes arising from defective notices or articles, and claims in relation to estates. Asela also frequently appears before the LVT on service charge disputes and regularly advises landlords and tenants on the bringing and defending of applications and enforcement.

Asela also advises and acts in possession and forfeiture claims, including advising on the entitlement to possession, drafting notices and pleadings, and providing representation at hearings. He also has considerable experience in claims arising out of disrepair and dilapidation, both in the High Court and County Courts.

More generally, Asela has experience in claims involving easements, restrictive and positive covenants, nuisance and trespass, with particular interest in claims involving trespass into airspace.

Professional negligence and indemnity

Asela acts for both claimants and insurers in claims against professionals. He has experience in claims pursued against surveyors, structural engineers, valuers, solicitors and licensed conveyors. Asela gained valuable experience whilst on secondment with the London Markets team of a city firm representing professional indemnity insurers. During his time on secondment, Asela assisted with high value claims against independent financial advisors and construction professionals, as well as advising insurers on notification and coverage.

Memberships

COMBAR; ASLLUK

Qualifications

LLM (International Law) (First Class), Fitzwilliam College, Cambridge

LLB (First Class), King's College, London

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CASE LAW UPDATE

THE SUPREME COURT CONSIDERS THE POWER TO STRIKE OUT EXAGGERATED CLAIMS

Summers v Fairclough Homes Ltd [2010] EWCA Civ 1300

The Supreme Court is due shortly to deliver its long-awaited judgment in Summers v Fairclough Holmes Ltd having heard the appeal in mid-April 2012.

The issue before the Supreme Court is this: should a claimant who fraudulently exaggerates his claim have his claim struck out in its entirety even if he has suffered genuine injury/some genuine loss as a result of the negligence of the defendant?

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Facts and background to the appeal

The facts of the case are unremarkable. Mr Summers suffered an accident at work when he slipped from the step of a fork lift truck. He sustained fractures to his wrist and ankle and brought a claim for damages against his employers, Fairclough Homes Ltd. This included a substantial sum for future loss of earnings λű ōŜλyE aN {dzYYŜNăΩ ŏI·ăŜ úKI·ú úKŜ λydzNλŜă LJNŜØŜyűŜŘ KλY ŦN2Y ø2N]λyE I·yŘ limited his future employment prospects. The schedule of loss served on behalf of Mr Summers totalled £838,000.

Following a trial in 2007, at which Mr Summers successfully established liability, and pending assessment of damages Fairclough Homes obtained surveillance evidence which clearly showed Mr Summers mobile and working contrary to his assertions. At the assessment hearing HHJ Tetlow found that Mr Summers had exaggerated his claim and assessed his actual losses at a mere £88,000. CI·λNŏf2dzEK I2YŜă I·LJLJfλŜŘ dzyãdzŏŏŜăăŦdzffè ű2 ăúNλ]Ŝ 2dzű aN {dzYYŜNăΩ ŏfI·λY λyλűă entirety on the grounds of his fraud. Mr Summers was awarded £88,000 and Fairclough Homes appealed.

The decision of the Court of Appeal

Ward LJ gave the judgment of the Court dismissing the appeal. In a judgment of just nine paragraphs, he began by observing that a[{dzYYŜ[ă ø[ă ća*n out-and-out liar, who quite fraudulently exaggerated his claim to a vast extent*¢é [Ŝ nevertheless felt bound by the decision in Shah v Ul Haq [2009] EWCA Civ 542 in which the same issue had arisen for determination.

The claim in Shah v Ul Haq arose out of an RTA. It was found that one of the claimants had not been in the car at the time of the accident and the other claimants had conspired to support her fraudulent claim. At trial the defendant applied unsuccessfully for the genuine claims to be struck out pursuant to CPR 3.4(1) on the grounds that their complicit in the fraudulent claim was an abuse of process. On appeal, the Court of Appeal affirmed that:

- There was no general rule at common law that the dishonest exaggeration of a genuine claim would result in the dismissal of the whole claim. The invariable rule was that the judge would award the limited damages appropriate to his findings. The policy of the law had not been to shut a dishonest claimant out of justice altogether.

- The position was so well established that it would not be right to change it by judicial intervention. Such a change would be a matter for Parliament.

- Further, the power to strike out a statement of case pursuant to CPR 3.4(2) did not provide a power to strike out a claim at the end of a hearing where there was no suggestion that it had not been possible to hold a fair hearing or to do justice. The court did not consider this to be an appropriate use of a case management power.

- Disapproval of a claimants conduct could be marked by imposing costs sanctions.

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Arguments before the Supreme Court

It was submitted on behalf of Fairclough Homes that the court has a power to strike out a claim as an abuse of process under CPR 3.4(2) in cases where there KI·ă ōŜŜy I· áădzōăűI·yűλI·f ŦNI·dzŘ℗€ Lű ø I·ă I·№ƎdzŜŘ űKI·ű {KI·K Ø ¦f I I·Ij ø I·ă ø№2yƎfè decided, in particular, that the Court of Appeal had focussed too narrowly on what was just as between the parties and failed to give sufficient weight to øλŘŜ№ λăădzŜă λyŎftdzŘλyƎ LJ№2űŜŎűλyƎ űKŜ λyűŜƎ№λűè 2Ŧ űKŜ Ŏ2dz№úΩă LJ№2ŎŜăă℗

On behalf of Mr Summers it was submitted that striking out a genuine claim was a draconian and disproportionate response with human rights implications. Alternative ways of dealing with the problem of fraudulent claims were emphasised including costs penalties, contempt proceedings and the use of Calderbank offers (the acceptance of which do not have the same costs consequences as Part 36).

Having heard argument in April, the Supreme Court is due to deliver its judgment in the next few months. If the appeal is upheld this will mark a significant change in the law. However, in the event that the Supreme Court recognises a power to strike out genuine claims, a high threshold is likely to be imposed to trigger the strike out (most likely a requirement that there be a áădzōăűI·yűλI·f ŦNI·dzŘ€ú℗ Lű λă λYLJ2№űI·yű ű2]ŜŜLJ λy YλyŘ űKI·ű I·yề ăI·yŎűλ2y øλff I·LJLJfè not only to claims but also to fraudulent defences and counterclaims.

EMPLOYERS' COMMON LAW DUTY OF CARE TO KEEP EMPLOYEES SAFE

Mitchell & Others v Co-operatives Ltd [2012] EWCA Civ 348

This case serves as a useful reminder of the proper approach when assessing whether an employer has breached its common law duty of care, in particular, the need to balance competing considerations.

The claimants (Mrs Mitchell, Mrs Benton and Mrs Goodwin) were employed as shop assistants at a Co-operative located in small parade of shops just off the main road linking Stockport and Manchester. The location of the store made it particularly vulnerable to robberies. There were two robberies at the store in

the eleven years before the Co-op acquired the store in 1999, and ten robberies between 2000 and 2005.

On three occasions between 2004 and 2005 the claimants variously found themselves the victims of robberies whilst working at the store. As Ward LJ ƨōăŜℕØŜŘ ƛƴ˝ƛă ƨdzŘƎ˝Ŝƴű ćλű ǿŀ·ă ădzǾK ŀ· ăKƨǾ˾ƛyƎ ŜÈLJŜℕƛŜyǾŜ Ŧƨℕ űKŜăŜ fŀ·ŘƛŜă űKŀ·ű they suffered post-traumatic stress disorder and developed an anxiety state as a ℕŜădzfűȹé ¢KŜè Ǿfŀ·ƛ˝ŜŘ Řŀ·˝ŀ·ƎŜă Ŧℕƨƴ˝ űKŜℕ ŜƴLJfƨèŜℕΣ űKŜ /ƨ-op, for the psychiatric injury they suffered as a result of their ordeal.

¢KŜ Ǿfŀ·ƛ˝ŀ·yűăΩ Ǿƨ˝LJfŀ·ƛyű ǿŀ·ă ŜăăŜyűλŀ·ftè űKŀ·ű űKŜ /ƨ-op had not done enough to keep them safe. The Co-op had introduced a series of measures to reduce the incidence of robbery at the store following risk assessments made in 2002 and 2003. These measures included CCTV monitoring, panic alarms, video surveillance, fob operated lock doors, minimising the amount of cash in till, LJℕƨǿλăƛƨ˝ƴŦ ΨăƴƨƛŜ yƨűŜăΩΣ űℕŀ·ƛyƛyƎ ƨŦ ăűŀ·ŦŦ ű2 ŀ·Ø2ƛŘ Ǿ2yFℕ2yűŀ·űƛ2˝ ǿλűK ℕƨōōŜℕăΣ provision of a part-time security guard for a limited period after a robbery and the provision of a mobile security response team. The Ǿfŀ·ƛ˝ŀ·yűăΩ Ǿŀ·ăŜ ǿŀ·ă űKŀ·ű the Co-op should have gone further, in particular:

1) security screens should have been installed around the till and the areas containing goods of high value/portability. Under previous ownership the cash tills at the store and staff operating them were behind a glass screen. When the Co-op acquired the premises the layout of the store was changed the screens were removed.

2) a security guard should have been provided at the store.

The claimants contended that these measures would have deterred the robbers and prevented their injuries.

Duty of care and breach

It was accepted by the Co-op that it owed its employees the common law duty of reasonable care to keep them safe.

Ward LJ noted that the relevant test, expressed in Stokes v Guest, Keene and Nettlefield (Bolts and Nuts) Ltd [1968] 1 WLR 1776 and recently approved by Lord Mance in Baker v Quantum Clothing Group [2011] UKSC 17, was as follows:

"He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent." (emphasis added)

The decision

The claims were dismissed at first instance. HHJ Armitage found that although a screen may well have had some deterrent effect it carried risks for the staff which outweighed any benefit. The expert evidence had been that the trauma of a robber breaking through the screen can be far more traumatic than the robbery itself if staff have no easy escape route from behind the counter. As for the provision of a security guard, the judge found that a part-time guard would not have sufficient deterrent value; while a full time guard may have had some deterrent effects, it had not been tested, and the judge was satisfied that the failure to provide one did not amount to a failure to take reasonable care.

On appeal, Ward LJ gave judgment for the Court and the appeal. He concluded:

- As to the security screens, the question was not only what deterrent effect the screens would have upon a robbery taking place, but also what effect the presence of the screens would have to guard against employees against psychiatric injury. The judge was entitled to conclude that although a screen might have some deterrent effect, it carried risks for staff which far outweighed that benefit.

- As to the provision of a security guard, the cost implications of a full time security guard were a relevant factor. There was some evidence that the business was running at a loss of £60,000 pa and a full time guard would have

cost £30,000 pa. Ward LJ ŜYLJKI·ăλăŜŘ űKI·ű ά*a proper approach requires a balance to be struck against the probable effectiveness of the precaution that can be taken and the expense that it involves*Φέ ¢KŜ Ŏ2dzNűI·fă2 y2ûŜŘ űKI·ű űKŜ ăű2NŜΩă LJNI·ŎűλŎŜ ₮2N NλăϤ Y I·yI·ΞŜYŜyű ø I·ă ăűI·yŘI·NŘ LJNI·ctice for retail outlets of this kind ς there was no evidence to suggest that small convenience stores in a suburban area should be equipped with a security guard on the door during all opening hours.

SCOPE OF REGULATION 12 OF THE PROVISION AND USE OF WORK EQUIPMENT REGULATIONS 1998

Whitehead v Trustees of the Chatsworth Settlement [2012] EWCA Civ 263

In this recent case the Court of Appeal considered the scope of the duty imposed by regulation 12 of the Provision and Use of Work Equipment Regulations 1998 όάt ¦ ² 9wέú ű2 LJN2ûŜŎű ŜYLJf2èŜŜă I·ΞI·λyãű ălJŜŎλ₮λŜŘ KI·Î I·NŘăΦ

Mr Whitehead was employed by the agent of the Bolton Abbey Estate as a water ōI·λfλ₮₮ I·yŘ ΞI·YŜϤŜŜLJŜNΦ Iλă NŜălJ2yãλōλfλűλŜă λyŎfdzŘŜŘ LJI·úN2ftλyΞ űKŜ ŜăűI·úŜΩă NλØŜN waters and keeping down vermin. For this purpose Mr Whitehead carried a shotgun supplied by his employer. By the time of his accident he had become experienced in the use of shotguns.

On 8 February 2006, Mr Whitehead was engaged alone in river duty. He was carrying the shotgun broken over his arm (meaning that the safety catch was automatically engaged). The gun was loaded with cartridges in the breach of each barrel. As Mr Whitehead climbed a low stone wall it crumbled causing him to fall. As he fell the gun discharged both cartridges into his right calf.

Mr Whitehead brought a claim against his employers for negligence and breach of statutory duty. His principal allegation was that the defendant was in breach of regulation 12 of PUWER which imposes a duty on employers to protect employers from specified hazards including the unintended discharge of any article used or stored in work equipment. It was common ground that the shotgun was work equipment within the meaning of PUWER and that the duty