Personal Injury: Lee Walsh v CP Hart & Sons Ltd [2020] EWHC 37 (QB)

Joanna Kerr

The judgment in *Lee Walsh v CP Hart & Sons Ltd* [2020] EWHC 37 (QB) offers a reminder of the requirements of the test of reasonable practicability in accidents at work. The Claimant appealed against a decision to dismiss his claim following an accident which took place when he was working as a delivery driver's 'mate'. The vehicle which was used for deliveries had a shuttered style rear door with a tail lift which could be opened, then folded out, and raised or lowered to lift items into or out of the van. The Claimant, positioned inside the van, lowered the tail lift containing a pallet for delivery, then awaited the return of the pallet pump truck which would be raised on the tail lift to collect the next pallet from the lorry. Unfortunately, before the pallet pump truck returned and whilst the tail lift was still in the lowered position the Claimant fell out of the van sustaining a serious head injury. The Claimant's case at trial was that employees should have been trained to always return the tail lift to the raised position when anyone was positioned in the back of the van. The Defendant said such a measure was not reasonably practicable. The judge at first instance found for the Defendant, concluding that although it was for the Defendant to prove reasonable practicability, the test was a simple balancing exercise which he weighed in the Defendant's favour. The High Court disagreed. They found that the Defendant had failed to appreciate the significant risk of a fall from an exposed load bed and that the test of reasonable practicability was much more than a balancing exercise. The correct approach was to begin with the issue of practicability. If the measure is practicable, the question of reasonableness arises, and for this the Defendant must show that the cost and difficulty of the steps so substantially outweigh the quantum of risk involved as not to be reasonably practicable. It is a "*heavy burden*" which in this case was not discharged and the appeal was allowed. It did not all go the Claimant's way however – as he had opened the tail lift himself his claim was subject to a discount of 50% for contributory negligence.

Employment: BBC Sex Discrimination: another Point of View

Graeme Kirk

The success of Samira Ahmed in alleging that her employer, the BBC, discriminated against her by virtue of her sex has received a great deal of press coverage and legal comment.

After the hearing, the BBC commented: "We're sorry the tribunal didn't think the BBC provided enough evidence about specific decisions - we weren't able to call people who made decisions as far back as 2008 and have long since left the BBC."

The decision of the Employment Tribunal (London Central) was not simply a declaration that notwithstanding Ms Ahmed's protected characteristic (her sex), the BBC had discriminated against her by paying her comparator Jeremy Vine considerably more for doing essentially the same job. It modified her employment contract so as to ensure that its terms were no less favourable than his. It did so specifically because it found her work on Newswatch was similar to his on Points of View but that she was paid a fraction for similar work.

Newswatch is a BBC News programme which is similar to BBC1's Points of View, in that it offers viewers' critiques of the BBC's output, limited to news programmes. It is repeated on BBC Breakfast. The BBC argued that both POV and Mr Vine had a wider profile and level of audience recognition, and that his salary simply reflected his market value as it had been negotiated at a time when there was competition for his services.

In 2017 the BBC had published its on-air talents' salaries and 65 of the top 100 were men. It also published a Gender Pay and report and Equal Pay Audit. The National Union of Journalists lodged a grievance on behalf of 121 women.

The Tribunal first concluded here that the work done by the two presenters on POV or Newswatch was essentially the same and unaffected by the many years that POV had aired or by the (actually rather uncertain) relative viewing figures. It followed that the work was of equal value. There was therefore prima facie evidence of unlawful discrimination.

The burden therefore fell to the BBC in respect of other material factors which might have permitted it to pay Vine more and to rebut the presumption that the difference was due only to gender. Salary had been decided at the point of negotiation in each case; Vine received £3000 per episode from 2008, the Claimant just £440 in 2012. Although the Tribunal accepted that Vine's negotiations, in particular, had taken place years before, it concluded that they ought to have been transparent enough to provide justification if justification were available.

The Tribunal did not accept that the fact that one was a news programme and the other a factual programme, so as to inform the notion of 'profile' of the programmes, justified the disparity. It was unconvinced that the idea of the relative 'public profile' and 'audience recognition' levels of the two presenters was a meaningful distinction in context, not least because Vine's profile was far lower at the time when his salary was negotiated and there was no evidence that Ms Ahmed's profile had been considered at all. Neither had Ms Ahmed's own broadcast journalist experience apparently been taken into account, given that she had been paid the same as an inexperienced male, Ray Snoddy. Finally, the Tribunal was unconvinced that the disparity could be explained with reference to the 'market rate', which sought to justify Vine's salary with reference to that of his vastly more experienced predecessor at the time of negotiation, Terry Wogan, but on limited and uncertain evidence.

The Tribunal was to an extent in the unenviable position of comparing oranges and apples; the two individuals' negotiations were carried out years apart, concerning two different programmes, broadcast on different platforms about comparable but distinct subjects. However, it concluded that both were fruit, capable of relative assessment, and was unsatisfied with the alternative explanation for the discrimination advanced by the BBC.

Personal Injury: Hussain -v- EUI Ltd [2019] EWHC 2647 (QB)

Napier Miles

There has been a large increase in the number of self-employed minicab drivers over the last 10 years, many earning relatively small amounts, driving their own vehicles which are also often for some family/social use as well. When such a car is damaged in an accident what should be the measure of loss? Do you treat the case as if it was an accident to an ordinary car where the owner can hire/credit hire a replacement during the repair period and claim that hire cost as part of the loss? Or is the loss limited to the loss of profit because the car is being used as a commercial chattel? The loss of profit is often tiny in relation to the cost of credit hiring a replacement vehicle such that it does not appear to make commercial sense to hire a replacement. There have been numerous decisions both ways over the past few years in the County Courts but Hussein -v- EUI is the first High Court case. Pepperall J decided on appeal that:

The starting point is that the claim is for loss of profit but (and it is a big but) there are exceptions being:

- Where the claimant might lose valuable customers if he did not hire a replacement and keep driving. In this scenario the potential loss of profit over time is more than the actual hire cost. (Whilst this might not look a likely argument for the standard Uber driver, minicab contracts sometimes gives the company a right to terminate if the driver is not able to drive for a period and so the driver may argue he could have lost his livelihood had he not hired a replacement car.).

- Where the claimant used the car for private and family use as well as business the replacement cost would usually be recoverable if a private motorist would have been entitled to recover the costs. (This is going to cover a large number of standard situations)

- It might be reasonable for an impecunious driver to hire a replacement because he simply could not afford not to work. Impecunious professional drivers should not be forced to look to the state to provide for their families whilst they wait for a defendant payment for loss of profit.

Hussain gives some welcome certainly in this area. In Hussain itself the claimant was limited to loss of profit because he was debarred from arguing impecuniosity and it was found he did not need his vehicle for private use. But in the majority of cases, the claimant is likely to benefit from the exceptions set out by Pepperall J.

Personal Injury and Overseas Jurisdictions: Attorney General of St Helena v AB & Ors (St Helena) [2020] UKPC 1

Dominic Bright

Are the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* ("the JC Guidelines") the starting point (or the end point) for the quantification of pain, suffering and loss of amenity ("PSLA") damages in overseas jurisdictions?

Facts

There were two claims.

In the first, a doctor – employed by the Government of St Helena and acting in the course of his employment – negligently performed a caesarean section, and, without the mother's knowledge or consent, sterilised her by tubal ligation. The baby died.

In the second, the same doctor performed a caesarean section, and, without the mother's knowledge or consent, sterilised her by tubal ligation.

Issue

The issue was whether any adjustment should be made to the rates of PSLA damages to be derived from the JC Guidelines, so as to render them appropriate in St Helena. An overseas jurisdiction with a very small, isolated community of less than 5,000 people, who live on a tiny island in the middle of the South Atlantic.

First instance

At first instance, the Chief Justice applied the JC Guidelines without any discount.

Appeal

The Court of Appeal concluded that there was no justification for a departure from the JC Guidelines by way adjustment to take into account local conditions and expectations.

Adapting English common law for overseas jurisdictions

To use the language of Lord Briggs, who gave the judgment of the Board:

> "In St Helena … the relevant common law is English common law save where it is wholly inapplicable or unsuitable to local circumstances or where it is only applicable with modifications, adaptations, qualifications and exceptions rendered necessary by local circumstances."

Where it is asserted that English common law requires adaptation for use in an overseas jurisdiction, argument and evidence must be provided to discharge the burden of proof. Local courts (as opposed to the Board) are best placed to hear this submission, evaluate, and give a ruling upon it:

> "In a tiny community … an experienced local judge may properly conclude that he or she knows enough about local circumstances for some particular aspect of them not to need to be proved by the potentially disproportionate and expensive processes of the preparation and forensic testing of the evidence of expert witnesses."

> *Judicial College Guidelines: "a main source of the common law"*

Lord Briggs gave the following general guidance on the JC Guidelines:

> "[The] guidelines have come to be a substitute for contemporary judicial law-making, and the main changes to be found in them reflect changes in the value of money (ie inflation) and the impact of specific statutory reforms upon the general level of damages, such as the Jackson Costs Reforms. They are not of course binding on a judge, but their success in originally distilling and latterly replacing a stream of decided cases means that, in practice, judges have little else upon which to base a current quantification of PSLA damages, in the rare cases where it has not already been agreed between the parties. They have become, in other words, not merely a distillation but a main source of the common law in relation to the quantification of PSLA damages."

Fairness to defendants: "pure common law, in which equity plays no part"

Lord Briggs continued by noting that the quantification of PSLA damages must be fair, or at least not unjust, to defendants:

> "Fairness or justice to defendants is not about an individual defendant, but about defendants as a whole. They may be governmental, they may be multinational corporations or private individuals, insured or uninsured, rich or poor, solvent or insolvent. The cost to society of a fault-based system of defendant liability for causing pain and suffering may well have a bearing upon the level of compensation for PSLA which society may regard as fair, just and reasonable,

> but the concept of fairness to defendants does not require a form of equitable balancing … This is an aspect of pure common law, in which equity plays no part."

Average earnings

Lord Briggs expressed the view of the Board on the importance of average earnings:

> "Pain and suffering is experienced equally by the wealthy and the poor, and the application of the same guidelines across the whole of England and Wales leaves no room for the notion that differential average earnings in a particular locality can be a determinant of a just level of compensation.
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> … [In] reality a particular sum of money, such as £100,000, may have a radically greater potential effect in improving the life of a poor person than it would in improving the life of a multi-millionaire. But the common law treats each of them equally when quantifying damages for PSLA."

Lord Briggs considered the relative importance and reliability of average earnings, the cost of living and GDP per capita as part of a judicial approach towards the identification of levels of PSLA damages suitable for local conditions and expectations. He concluded that "there is no single solution to the problem of choosing among or between these different indicia and weighing their relative importance, as a matter of law."

Outcome

The Board "cannot fault" the conclusion of the Court of Appeal – which upheld the same conclusion as the Chief Justice – albeit for different reasons:

> "[A] current disparity in average earnings was in effect cancelled out by the higher cost of living in St Helena … and that, coupled with the likely expectation of equal treatment, there was therefore no case for concluding that a downward adjustment of the JC Guidelines for use in St Helena was rendered necessary by local circumstances."

Disposal

The Board advised the Queen to dismiss the appeal.