



Review of the year (2008): liability and procedure



Steven's practice is almost exclusively in the areas of personal injuries and industrial disease, with some associated insurance and professional negligence work. Within those areas he regularly deals with aspects of procedure and costs.

His practice involves a substantial amount of court work, appearing in cases which range from maximum severity claims of the highest value down to modest multi-track claims. He acts for claimants and defendants, and he enjoys cases with technical medical and engineering aspects.



Rosanna's practice predominantly covers a wide range of personal injury cases including employers' and occupiers' liability, industrial disease claims, deafness and upper limb disorder claims, claims against local authorities and the Prison Service, harassment and trespass claims, claims under the Fatal Accidents Act, and road traffic accidents, including both fraudulent claims and low velocity impact cases.

In addition to her drafting and advisory work, she acts for both claimants and defendants in multi and fast track trials, on appeal and for interlocutory hearings, appearing in the County and High Court. She also has experience of a wide range of tribunals, including the Coroner's Court, Magistrates Courts and CRU tribunals.

Steven Snowden and Rosanna Hellebronth of Crown Office Chambers pick their "Top 40" cases of 2008 in the areas of PI liability and procedure.

Note that this is no more than a survey of what we believe to have been some of the most important decisions. It is not intended to be a complete list of every decision in those areas, and should not be read as such. It comes with the caveat that the summaries set out our understanding of the cases, but the judgments themselves should be read in full.

LIABILITY

Road traffic

Smyly v Agheampong v Allied Manufacturing (London) Ltd [2008] LTL 1.9.08 – *ex turpi causa*

C's car was hit by a lorry whilst parked and unoccupied. C had no insurance. D admitted liability and paid the pre-accident value of the car. C tried to recover 341 days of hire charges. D argued that C would have continued to drive his vehicle without insurance for 341 days after the accident in any event and therefore his claim should be defeated by *ex turpi causa non oritur actio*. HHJ Dean QC agreed. C had deliberately set out to mislead the court about his lack of insurance. The evidence supported the inference that he intended to continue driving without insurance. His case fell within the ambit of the *ex turpi causa* principle.

Wasim Ul-Haq (2) Samara Khatoon (3) Zahida Parveen v Anita Shah [2008] EWHC 1896 (QB) - fraud

C1, 2 and 3 brought personal injury claims against D arising out of an RTA. D admitted liability for the collision but counter-claimed for a declaration that C2 had not been in the car, damages for deceit from C1 and C3 and the strike out of C1 and C3's claims because they were complicit in C2's fraudulent assertion that she had been a passenger. The trial judge found C2's claim was fraudulent but that the judgment for C1 and C3 was safe. The counter-claim was dismissed and awarded damages to C1 and C3. However he ordered that they pay 2/3 of D's costs of defending their claims due to their deceitful conduct. The result was that they had to pay a balance to D. D appealed, saying that C1 and C3's claims should have been struck out. Walker J held that given all the factors, including the fact that a fair trial of all relevant issues had taken place, and that the order left them with a significant net liability for costs, there was no additional need to strike out their claims.

Smith v Skanska [2008] EWHC 1776 (QB) - agency

C brought a personal injury claim against D, his employer. After a Christmas Eve party, C had been involved in a RTA in one of D's cars that killed three people. C was badly injured. He claimed that the son of another employee (P) had been driving. There was a factual dispute as to whether or not D's project manager (M) had authorized P to drive the company car that night. D did not accept that P was driving or that P was D's agent. Ouseley J held that P was driving, authorized by C. M had not authorized P to drive. C was therefore responsible for taking the car and permitting P to drive without the necessary authorization from M. D was therefore not vicariously liable to C.

Corbett v Gaskin [2008] CC LTL 20.6.08 – credit hire agreement - interest

C claimed interest on damages awarded for the cost of a hire car after a road traffic accident caused by D and costs on an indemnity basis. He had entered into a credit hire agreement for a substitute premium sports car and sought the cost of it. One of the issues was whether interest was payable. Held: if the damages had been paid to C promptly he would not have retained it or had the use of it but would have forwarded it to the credit hire company. Even though the agreement provided for interest on the hire charges to be paid by C at the end of the credit period, and the credit hire company had no intention of enforcing that obligation against C. C had not been kept out of money he would have had use of and had sustained no loss which required interest to compensate him. *Giles v Thompson* [1994] 1 AC 142 HL applied.

Occupiers' liability

Trustees of the Portsmouth Youth Activities Committee (a charity) v Poppleton [2008] EWCA Civ 646 – occupiers' – duty of care

The claimant/respondent was an inexperienced climber who did simulated rock climbing without ropes at the defendant/appellant's indoor climbing premises. He attempted to leap from the back wall to a buttress on the opposite wall. He lost his grip and landed on his head, and was rendered tetraplegic. He brought a claim for damages on the grounds that the appellant had failed to provide sufficient supervision and had breached its duty under section 2 of the Occupiers' Liability Act 1957. The judge found that the appellant was in breach of its duty of care by failing to warn the respondent that the thick safety matting did not make a climbing wall safe but found him 75% contributory negligent. The Court of Appeal allowed the appeal and held that it was quite obvious that no amount of matting would avoid the possibility of injury from an awkward fall. There was an inherent risk that the respondent voluntarily undertook. It was extremely rare for an occupier to be under a duty to prevent people from taking risks which were inherent in the activities they freely chose to undertake *Tomlinson v Congleton BC* [2003] UKHL 47 applied.

(1) *Timothy Perry* (2) *Catherine Perry v Samuel Harris (a minor)* [2008] EWCA Civ 907 – occupiers' duty of care

The appellants had hired a bouncy castle for their children's birthday party. The respondent, H, was not invited to the party but had been given permission by Mrs Perry to play on the castle. While playing, he had been struck on the head by the heel of a much taller and older boy performing a somersault. He suffered head injuries. The accident happened whilst Mrs Perry's back was turned, helping another child. The judge found that her duty of care required her to maintain uninterrupted supervision of the castle and that if she had not done she would have prevented the somersault and therefore the accident. He also held that she should not have allowed other bigger children to use the castle at the same time. The Court of Appeal held that it was impossible to preclude the risk that children might injure themselves or each other whilst playing. The standard of care required was that of a reasonably careful parent for her own children. It was not reasonably foreseeable that boisterous behaviour might lead to serious or severe injury. There was no duty to watch the children continuously. Further, it was doubtful whether the accident could have been prevented by constant supervision.

Employers' liability

Allison v London Underground Ltd [2008] EWCA Civ 71, [2008] PIQR P10 – work equipment

C suffered tenosynovitis as a result of operating one of the controls of a tube train. Her use was prolonged and she had small hands. She alleged inadequate risk assessment under Reg 3 of the Management of Health and Safety at Work Regs 1999 and also breaches of Regs 4 and 9 of PUWER 1998. The trial judge dismissed the claim, finding no breaches and that injury was not foreseeable, based on no history of similar incidents and D's lack of awareness of risk. The CA held that the duty on D to ensure that training was adequate meant that the test of adequacy of training should be judged against what D ought to have known about the risks from a proper risk assessment. The statutory duty was higher than that at common law and required D to have taken expert advice, where necessary as part of the risk assessment. In this case, that duty extended to getting the advice of an ergonomist. Had D done so, drivers would have been trained in how to hold the control so as to reduce the risk of

injury. Appeal allowed.

Spencer-Franks v Kellog, Brown & Root Ltd [2008] UKHL 46 – work equipment

Scottish case of a man injured by a door closer attached to a door on an oil rig. He was inspecting and repairing it when it struck him in the face. The issue was whether this was work equipment within PUWER 1998 and whether C was “using” it. Held: it was work equipment because it was a thing provided for use at work. Whether something was or was not work equipment did not depend on the manner in which it was being used – it was the nature of the thing itself which mattered (*Hammond v Commissioner of Police for the Metropolis* [2004] EWCA Civ 830 doubted). The fact that it was bolted down did not stop it being work equipment. Repairing it was using it for the purposes of the regulations. Liability established.

Smith v Northamptonshire CC [2008] EWCA Civ 181 – work equipment

C was a carer/driver collecting a person from her home. There was a sloping ramp outside the home. As C stood on it, the edge gave way and she fell and was injured. The Judge held it was work equipment under PUWER 1998 and there was strict liability under Reg 5(1). On appeal by D, held by CA: a strict liability duty to maintain would not normally apply to something on someone else’s property, to which there was limited access, and on which the employer had no clear right to carry out repairs. The mere fact that it was a moveable thing which D allowed C to use did not in itself make it work equipment. There may have been a common law duty of care to C as an employee, but that was not breached. Appeal allowed.

Jennings v Forestry Commission [2008] EWCA Civ 581 – work equipment - control

C had a service contract with D to build fences, often in remote places and on slopes. He used his own Landrover, which overturned on a slope, injuring him. C argued the factual relationship was of employer and employee and that D had such control over the Landrover as work equipment within Reg 3(1) of PUWER 1998 as to make it liable. Held on appeal: C was an independent contractor, not an employee – it was C who had control over his work. The existence of a duty under Reg 3 depended on factual control. That lay with C, so D had no duty under PUWER. There was no assumption of responsibility either.

Mason v Satelcom Ltd [2008] EWCA Civ 494 – work equipment

C fell off a ladder in the course of work for D at Pt20D’s premises. The ladder was too short to be used safely. D knew C would need a ladder but had not provided one. The ladder C used was found by him in the room in which he was to work. Pt20D had been aware that it was there but C had simply used it without asking. The trial Judge had held Pt20D liable for a 25% contribution to D, on the basis that it was a non-employer which controlled C’s work equipment so PUWER 1998 applied. On appeal, Pt20D argued that it had no control over the purpose for which C used the ladder, and that it was not foreseeable to it that C would use the ladder for an unsuitable purpose. Held that, as Pt20D did not own the ladder its control extended only to putting it elsewhere or putting a notice on it. It would be wrong to impose all the PUWER obligations on Pt20D merely because the ladder was on its premises and C’s use of it in the way he used it was not foreseeable. No breach of PUWER on Pt20D’s part. Further, Reg 13 of the 1992 Workplace Regs did not apply – the regulations should be construed not to overlap.

Duncan v Arcabuild Ltd [2008] LTL 1.9.08 (QBD) – control

C was an apprentice joiner sub-contracted with his brother to work for D. While engaged in “noggin-out” a room (fixing timber to roof rafters) he climbed up into the roofspace. When getting back down onto the working platform he bumped his head and fell from the platform, suffering a serious head injury. The trial Judge dismissed C’s claim, holding that there was no need for C to climb up and it was not foreseeable that he would, a safe system of work using the platform had been in place, the risks of what C did were obvious and no amount of training would have made them any more so. The place of work and means of access which it was foreseeable that C would use were safe for him. C’s act in entering the roofspace area was not a part of his work and his actions had been beyond D’s control. There were no breaches of the Construction (Health, Safety and Welfare) Regulations 1992 of the Work at Height Regulations 2005. Judgment for D.

Gravil v (1) Carroll (2) Redruth Rugby Football Club [2008] EWCA Civ 689 – vicarious liability – close connection test

C and D1 were semi-professional rugby players. D1 had a contract of employment with D2 which expressly stated that D1 should not physically assault an opponent and that D2 might be vicariously liable for his acts during his employment. After a whistle had been blown in a rugby match between D2 and another club for which C had been playing, D1 punched C. D1 was held liable for the assault and C awarded damages. The Court of Appeal held that D1’s wrongful act was so closely connected with his employment that it would be fair and just to hold D2 vicariously liable (applying *Lister v Hesley Hall Ltd* [2001] UKHL 22, *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887).

Lough v Intruder Detection and Surveillance Fire and Security Limited (Defendant) and Fulton (Third Party) [2008] CA – occupiers’ / employer’s liability

C was employed by D, a security installation company. The Third Party, F, had engaged D to provide a security system in his home which he was refurbishing. Three of D’s employees including a supervisor and C attended F’s home. F was not expecting them but reluctantly let them in. He warned them about a missing balustrade and banisters on the stairs. C subsequently fell from the landing to the hall floor below and sustained serious injuries. He issued proceedings against D, who settled the claim and then brought contribution proceedings against F. The judge found that F had no supervisory role and had not been in breach of his duty and even if he had been, D would still have been completely to blame for the accident. The Court of Appeal found that whilst the employer might be liable for injuries to a visitor under other statutory duties, the occupier could also be liable. No amount of supervision could have prevented the fall. Responsibility had to be apportioned between D and F. D should still take the bulk of the blame but F should bear 25% responsibility.

Industrial disease

Richardson v G F Russell [2008] EWHC 1708 (QB) – mesothelioma exposure

Deceased mesothelioma claim. The fact and level of exposure with D (small building company) were in issue given that the evidence was slim and there had been exposure elsewhere. Held, on the facts, the deceased’s discussions with his son after diagnosis were likely to have been honest and accurate – he knew he was dying but no litigation was in progress. More than minimal exposure for 12 years from 1975 with no attempt by D to eliminate exposure gave rise to liability.

Shortell v Bical Construction (16.5.08) Mackay J – asbestos exposure

On the evidence, the level of exposure of a former employee to asbestos was 99 fibre/ml-years, which had more than doubled his risk of developing lung cancer. However, the employee, who had died from lung cancer, had been 15 per cent contributorily negligent.

Highways

Cenet v Wirral MBC [2008] EWHC 1407 (QB) – pedestrian on carriageway

C tripped in the carriageway of a residential street. There were substantial credibility issues over C and her witnesses. The Judge dismissed those concerns and found the accident location to have been dangerous. Held on appeal: The Judge's assessment of witness credibility could stand, but (despite the accident occurring at a point often used for crossing the road) the Judge had applied too high a standard of maintenance. This was a carriageway, not a footway. In that context, the defect was not dangerous.

Harrison v Derby City Council [2008] EWCA Civ 583 – section 58 defence

C tripped and fell over a depression in a footway. There were cellars beneath the footway, with metal access covers. There was the risk of subsidence or drop where there were such cellars. D did not carry out any risk assessment of the chance of such movement, and inspected every six months. C contended inspections should have been more thorough and more frequent. Held on the facts that the rarity of cellar "collapse" and the modest nature of any defect so created would not have made a different inspection regime either reasonable or proportionate. The s.58 defence was established.

Animals

McKenny v Foster [2008] EWCA Civ 173 – Animals Act claim

A keeper of an animal was not strictly liable under the Animals Act 1971 s.2 for the damage done by the animal because, on the evidence, the animal's dangerous and causative behaviour, namely the exceptional and exaggerated agitation in the particular circumstances, could not properly be described as normal and was not known to the keeper.

Other

Corr v IBC Vehicles Ltd [2008] UKHL 13 – chain of causation

The deceased was injured at work, suffering head injuries and developing depression which worsened significantly over time. Almost six years after the initial injury he committed suicide. Held: D's duty covered both physical and psychological injury, so the suicide caused by depression fell within the scope of D's duty. Depression was a foreseeable consequence of the injury and C did not have to prove that suicide itself was foreseeable. The deceased's ability to make rational judgments was compromised by the depression and it was therefore not unfair to hold D responsible. The suicide did not break the chain of causation and the principles of *novus actus* or *volenti* did not apply. But the HL left open the possibility that a finding of contributory negligence could be made in other similar cases.

Gray v Thames Trains [2008] EWCA Civ 713 – causation - illegality

C had been involved in the Ladbroke Grove train crash, as a result of which he suffered severe PTSD and personality change. He subsequently killed a man and pleaded guilty to manslaughter on the grounds of diminished responsibility. He claimed loss of earnings from the date of the accident into the future, including his time in prison. D disputed losses after the date of the manslaughter. The trial Judge accepted D's arguments. On appeal to the CA, held: where the cause of action itself did not arise out of an illegal act, the principle of *ex turpi causa* required the Court to consider whether the loss claimed was inextricably linked with C's illegal act and here, C's claim was simply that he had suffered a loss of earnings because of D's tort. The evidential burden of showing that the manslaughter broke the chain of causation lay on D and, if it did not, then public policy did not prohibit recovery.

Ide v ATB Sales Ltd [2008] EWCA Civ 424 – approach to causation

C's case was that the handlebars of a mountain bike suddenly broke, causing him to fall and suffer a serious head injury. D's case was that they may have broken without fault on its part as a result of C falling. C had no recollection of the accident itself. The Judge preferred C's expert evidence and found for C. D appealed, arguing that the Judge had decided which was the least improbable cause and then simply found it to have been the cause, and that was an impermissible approach to causation. CA dismissed the appeal: although explanations were uncommon, neither was improbable and it the Judge had in fact approached the case by eliminating all the suggested causes but on (i.e. the one advanced by C) and then asked himself whether on balance of probabilities that was the cause. This was a permissible approach to causation.

Monk v P C Harrington Ltd [2008] EWHC 1879 (QB) – nervous shock

Psychiatric harm to "rescuer". C was foreman of construction works at Wembley. A platform fell onto two colleagues, one of whom died and the other was seriously injured. C arrived at the scene and comforted the injured man. Held: C's help was not trivial, and he could rightly be categorised as a rescuer, but there was no reasonable basis for him to have believed that he endangered himself by doing so. If he believed so, his belief was unreasonable. Therefore he was not a primary victim. Similarly, any belief C held that he was in part responsible for the accident was without reasonable basis, therefore it was not foreseeable that he would have suffered the injury he did as a result of it occurring and he was not a primary victim for that reason either. Claim dismissed.

X and Y v Hounslow LBC [2008] EWHC 1168 (QB) – LA - duty of care

Local authority held liable for failing to transfer a vulnerable couple to alternative accommodation, with the reasonably foreseeable result that they were attacked by local youths. Relationship was sufficiently proximate to justify a duty of care.

PROCEDURE

Part 6 – Service of documents

Note that a completely new and revised Part 6 (and amendments to part 7) came into effect from 1.10.08.

Part 36

Carver v BAA [2008] EWCA Civ 412, [2008] 3 All ER 911, [2008] PIQR P15

At the conclusion of a quantum-only trial, C was awarded damages which exceeded D's Part 26 offer (made a year earlier) by a very small sum indeed. Costs had escalated in the case and C had never put forward a realistic proposal to settle. The Judge considered that C had not gained a judgment "more advantageous" (in the words of the new Part 36) than D's offer. C appealed and the CA upheld the Judge. CA held that a simple financial comparison of offer and judgment was no longer the test; the modern approach to litigation required parties to engage sensibly in discussions towards compromise and settlement; the irrecoverable costs of the extra year would have substantially exceeded the additional sum of damages gained. The outcome could not have been described as more advantageous than having accepted the offer a year earlier. Factors in considering whether a judgment was more advantageous than an offer included things as diverse as time, financial cost and emotional cost.

Amendment

Evans v Cig Mon Cymru Ltd [2008] EWCA Civ 290

C had made allegations of bullying at work. Separately he injured his hand. The bullying claim was not followed through. The Particulars of Claim identified the injury claim but the Claim Form erroneously referred to "loss and damage arising out of abuse at work". Claim Form and Particulars of Claim were served after the limitation period expired. D pointed out the inconsistency in its defence and applied to strike out. DJ and Judge held they would not allow any amendment. CA considered that justice required the totality of the documents to be looked at, held that it was clear what C's case was, and held that allowing an amendment to the Claim Form was not substituting a new claim but was merely clarifying an internal inconsistency. Note the comments of Laws LJ about preferring substance over form.

Disclosure/ medical records

OCS Group v Wells [2008] EWHC 919 (QB)

A claim for a workplace injury was intimated and primary liability admitted at an early stage. Prior to issue of proceedings, D sought pre-action disclosure of C's expert medical evidence and her medical records. The County Court Judge's decision that her report was privileged was not appealed. His decision that C need not disclose her records was. On appeal, the High Court Judge held that there was jurisdiction to order such pre-action disclosure of medical records; they could be said to be relevant even before the issue of proceedings (once a claim for injury had been intimated); but that it was not necessary or desirable within the meaning of CPR31.16(3)(d) to order disclosure (given the interests of privacy and confidentiality) and that even if it were to be ordered, they should be seen only by medical experts and not by D's solicitors or insurers.

Limitation

A v Hoare [2008] UKHL 6

HL departing from *Stubbings v Webb* and holding that intentional sexual assaults fell within s.11 of the Limitation Act and s.33 could therefore apply in appropriate cases. Clarifying the objective approach to s.14.

Field v British Coal [2008] EWCA Civ 912

Applying *A v Hoare* in a deafness claim. C, having identified that his hearing was slightly reduced and having had an examination, was simply told that his hearing was down a bit and that he remained fit for work. He believed that it was due to wax and infection. Held that unless C was aware that he had a hearing problem which was unexplained, it would not be right to fix him with constructive knowledge of what he would have discovered only by seeking further expert advice. In other words, at the relevant time C was not aware he had suffered an injury and a reasonable man in his shoes would not have sought further advice. The later date of knowledge (at which C developed tinnitus and his wife started telling him the TV was too loud) was within three years of the date of issue. Claim therefore not time-barred.

Albonetti v Wirral MBC [2008] EWCA Civ 783

Appeal delayed pending the outcome of *A v Hoare*. The test of whether a claimant knew he had been injured was now an objective one. For a case of alleged sexual abuse in a children's home it was held that C must have known at the time not only that he had suffered a wrong but that he had suffered a significant injury. Time therefore ran from the date of C's majority and the claim was time-barred.

Costs

A v Chief Constable of South Yorkshire [2008] EWHC 1658 (QB)

C claimed against D that he developed psychiatric injury (schizophrenia) from the wrongful actions of Police officers. C issued proceedings in London, initially using local (Sheffield) solicitors. Proceedings transferred to Sheffield. C changed to London solicitors with experience of suing the Police. Claim settled. C's costs were limited to those of local Sheffield solicitors. Held: Right to do so. This could properly be characterised as a personal injury claim. Solicitors of experience could be found and could use Counsel. The London rates were substantially higher and a reasonable litigant would not have chosen to incur them.

Kilby v Gawith [2008] EWCA Civ 812 – CFAs

D admitted liability for an RTA. C had entered into a CFA with her solicitors. Quantum was agreed and D had agreed to pay costs but disputed that 12.5% success fee fixed by CPR 45.11(2). The Court of Appeal held that it was not discretionary. If the draftsman had meant it to be so, he would not have fettered that discretion by specifying the amount. The purpose of the rules was to provide a fixed level of remuneration.

Motor Insurers' Bureau

Byrne v MIB [2008] EWCA Civ 574

Frankovich damages were awarded against the Secretary of State arising from the 1972 Untraced Drivers Agreement which provided that any claim had to be made within three years of an accident. A child aged 3 was injured. His parents claimed on his behalf five years later when he was 8. MIB rejected it. C turned 16 and made a claim in his own name. MIB rejected that too. The Judge held (upheld by CA) that the 1972 agreement should be construed as no less generous in respect of limitation than personal injuries claims in the courts and that this was a sufficiently clear breach of obligations under EC law to give rise to liability for damages.

Contribution/ indemnity

BRB (Residuary) Ltd v Connex [2008] EWHC 1172

Where a residuary body, under the misapprehension that it was liable, had paid damages to the estate of a railway worker who had died as a result of exposure to asbestos, it was entitled under the Civil Liability (Contribution) Act 1978 to recover those damages from the company that was in fact liable.

Greene Wood & McLean v Templeton Insurance Ltd [2008] EWHC 1593

A claim under the Civil Liability (Contribution) Act 1978 was "in respect of" a contract within CPR r.6.20(5), notwithstanding that the claimant was not party to the contract in question and that the claim was not brought under that contract.