



# Personal Injury Review of 2008

*by Karamjit Singh*

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*In a year where stock markets have had a torrid time and where the property market is no longer the sure fire bet that it once was, Karamjit Singh, the newest member of the St. Ives PI Team, covers some of the most interesting cases that have taken place in the equally unpredictable world of PI law.*

## Accidents at work

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### **Smith v Northamptonshire County Council [2008] EWCA Civ 181**

The Council appealed to the CA on the definition of “work equipment” given by HHJ Metcalf in the hearing of this case. The Council’s appeal was successful and Smith’s claim was dismissed.

#### **The facts**

The Claimant was employed by the council as a carer/ driver by the Defendant. Her duties included collecting a Mrs Cotter from her home and taking her by minibus to a Day Centre. She had performed this task three times a week for eight years prior to the accident.

On the 1st December 2004, she was pushing Mrs Cotter down a wooden ramp which led from the living room of her home to the patio area outside. The ramp gave way as she stepped on the edge of the ramp causing her to fall and sustain injury.

The ramp had been installed by the NHS in the 1990s. The Judge at first instance said that “the Council was not liable to maintain it”. The ramp was made of wood and left. Exposure to the elements meant that the edge had become rotten. The Judge found that an inspection carried out by the Council, including the ‘wobble test’, was adequate and that the ramp was not in a state of disrepair such as to set alarm bells ringing of something being wrong.

### **The first instance decision**

During the trial, the case was put on the basis of a breach of the Provision and Use of Work Equipment Regulations 1998. HHJ Metcalf concluded that the 1998 Regulations applied in this case in that they imposed on an employer a strict liability in respect of “work equipment” and in particular as regards the maintenance of such equipment. The Judge found that the ramp was “work equipment” being “an appliance or piece of apparatus or possibly an installation” and that it was for “use at work”.

### **The appeal**

The Council appealed. It was contended on their behalf that if the ramp was not work equipment for use at work within regulation 5(1).

The Council argued, *inter alia*, that the implications for Councils and indeed charities who send employees to visit premises was argued to be great if the appeal was not successful. Employees of both were often asked to use items which, on the HHJ Metcalf’s definition, might be work equipment being used by them in the course of their employment and thus on the judge’s definition “at work”.

The Council argued that the wide construction being given by HHJ Metcalf to the regulation could mean that a courier driving his van to deliver a parcel the other side of a bridge which collapses could succeed against his employer on the basis that the bridge was an “installation” being used by the employee while at work.

The Court considered the degree of control that an employer had over the item in issue to assess whether it constituted work equipment.

Lord Justice Waller held that work equipment must in some way have been selected by the employer for use by the employee before it can constitute work equipment under the 1998 Regulations and strict liability imposed.

If the employer had allowed the use by an employee of his own equipment or if the employer had allowed the use of work equipment supplied by a third party, then that may well have constituted

control or selection by the employer for strict liability to be imposed. The test could be applied easily to “tools of the trade.”

Waller LJ removed any doubt about the use of the ramp as work equipment by considering the question of whether the ramp if placed by an employer for use in a factory would be an installation and thus work equipment. He said that the question identified a false starting point.

**“It may be because of where it is installed, because of who installed it and the reason for which it was installed that provide a clear answer in the case of a ramp in a factory. It does not follow that because a ramp would be “work equipment” if it was installed at a factory, it must be “work equipment” when it is a ramp installed in Mrs Cotter’s house and used for many purposes including being used by the Council when they collected her.”**

**“I also however accept that because the ramp could be work equipment, it is not impossible that it was work equipment in this instance and, what is more, work equipment used by the Claimant “at work” at least in the sense of in “the course of her employment”. Clearly, if the Council had placed a wooden ramp against the door step for the specific purpose of enabling the Claimant to wheel Mrs Cotter to the minibus, that ramp would be an “installation” for use at work and thus “work equipment” used at work by the Claimant.”**

In deciding if the regulation applied the Court found significant that:

1. the ramp was installed by others ;
2. it had a permanence ;
3. it was used most of its time by people other than the Council’s employees ;
4. the Council had no ability to “maintain” it ; and,
5. the ramp was part of Mrs Cotter’s premises.

### **Comment:**

From reading the judgment “tools of the trade” and other installations which are temporary in nature (for example, scaffolding on building sites) remain work equipment. Where, however, the item is a permanent structure and it is not obvious that the employer was in a position to control the item, then it is possible that it may not be work equipment.

### **Spencer-Franks below Spencer-Franks v Kellogg Brown and Root Ltd [2008] UKHL 46**

The Claimant appealed to the House of Lords dismissing his claim for damages arising out of an accident at work and the definition of “work equipment”. The Claimant’s appeal was successful.

### **The facts**

The Claimant worked aboard an offshore oil rig. He was employed by the Defendant as a mechanical technician who supplied staff to the owners of the oil rig.

On 12 October 2003, the closer on the door of the central control room was not working properly. The Claimant was asked to inspect and repair it. One of the screws in a linkage arm came out and the arm struck the Claimant in the face. He lost four teeth which had to be replaced by implants.

The Claimant made a claim for damages claiming a breach of the Provision and Use of Work Equipment Regulations 1998 against his employers and the owners of the oil rig. The Claimant argued that the door closer was a piece of machinery or apparatus for use at work.

The Judge at first instance held that the closer was not “work equipment” and even if it was, the Claimant had not been using it within the meaning of the 1998 Regulations.

Lord Hoffman made clear that the Regulation did not distinguish between the fabric of the installation and its equipment [paragraph 13 of transcript].

His Lordship distinguished **Hammond v Commissioner of Police of the Metropolis**. In that case, the Claimant was a mechanic employed by the Commissioner of Police. He was working

on the wheel of a police dog van when the shearing of a wheel bolt caused him to suffer injury. The question was whether the van was "work equipment" within the meaning of the 1992 Regulations. Giving the leading judgment May LJ said that the van might well be work equipment of a policeman driving it, but not of the police mechanic repairing it.

Lord Hoffman disagreed. He could not accept that something can be work equipment in relation to one person but not to another. If the dog van was "machinery, appliance [or] apparatus" under the 1992 definition and "for use at work" under the 1998 definition, then in it was in his opinion work equipment.

In Lord Hoffman's view the correct approach should have been:

**“[22] If one were simply applying the Equipment Directive, the garage case posed by the Court of Appeal would cause no difficulty. Article 3.1 of Council Directive 89/655/EEC provides: [his Lordship quoted its terms set out supra and continued:]**

**[23] In the garage case, it seems to me that although the car brought in for repair may be work equipment, it has not been "made available to workers in the undertaking and/or establishment". The notion of "selection" of the work equipment by the employer does not apply to equipment which his customers bring to be repaired. It is therefore outside the scope of the duty created by the directive.”**

**[25] I therefore think that in the Hammond case, the question which should have been asked was not whether the van was work equipment (it clearly was) but whether Mr Hammond was a worker in the undertaking to which it had been supplied. I should have thought he was the policemen who drove the dog van and Mr Hammond were all employed (or deemed to be employed) by the commissioner in a single undertaking, the Metropolitan Police. The fact that the van belonged to a separate legal entity, the Metropolitan Police Authority, does not seem to me to be relevant. On the other hand, if a van used by the Royal Mail is taken for repair to an independent garage, the garage mechanic is not a worker in the undertaking, to whose workers the van has been supplied. That undertaking is the Royal Mail and not the garage.**

**[26] The equipment regulations should in my opinion be interpreted to accord with the principle stated in the directive. It should therefore have covered Mr Hammond repairing a defective police car but not a mechanic repairing a third party's car which had not been provided as equipment to the undertaking for which he worked. There is in my opinion no difficulty about construing the regulations to include Mr Hammond. But, if they are read literally, there may be a difficulty about excluding the worker repairing a third party's equipment....”**

**Comment:**

The decision in **Smith v Northamptonshire County Council** was not cited by their Lordships even though it was published 5 weeks before Spencer was heard.

## Occupiers Liability

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**Lough v Intruder Detections and Robert Fulton (third party) Court of Appeal 26 June 2008**

The Defendant, Intruder Detections, appealed against a decision refusing a claim for contribution against Mr Fulton, the respondent, alleging a breach of the common duty of care owed under the Occupiers' Liability Act 1957 following the Defendant's settlement of the Claimant's personal injury action. The Court of Appeal allowed the appeal.

**The facts**

The Claimant was employed as an apprentice by the Defendant company who designed and installed specialist security systems. The Defendant had contracted to install a security system at the respondent's home.

The respondent was conducting substantial renovation works to his home. Those works included the replacement of the staircase. A temporary safety bannister was erected by the staircase contractors. On 26 May 2003, the temporary barriers were removed to enable the contractors to carry out a fitting of the bannisters. The temporary barriers were not replaced on the instructions of the respondent.

The Claimant arrived later with another employee of the Defendant at the respondent's home to carry out works on the alarm system.

The respondent informed them that he had not expected them that day and that he did not wish for them to work as he did not want his family to be disturbed. Eventually, the respondent relented and allowed them to enter the property.

He warned them that the staircase and landing were unguarded, but he did not prevent them from going upstairs. Whilst working at the property, the Claimant fell from the top of the stairs, a distance of approximately three metres, injuring himself.

The Judge at first instance dismissed the claim for contribution on the basis that the Claimant had been under the supervision of S and the Defendant at all times. As a result, there was no breach of duty by Mr Fulton. He also stated that even if there had been a breach, then he would have found the Defendant 100% liable.

The Court of Appeal allowed the appeal on the basis that the Judge at first instance had failed to properly focus on the Occupiers Liability Act 1957. Mr. Fulton had allowed the Claimant and S to enter the property knowing that it was not safe. His warning about the banister was not sufficient to make the Claimant safe. The Court of Appeal found Mr Fulton 25%.

The decision of the Court was not surprising given the ambit of section 2(4) of the Occupiers Liability Act 1957 which provides,

**“2(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)**

- (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe”**
- (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as**

**answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.”**

**Poppleton v Trustees for the Portsmouth Youth Activities Committee [2007] EWHC 1567 (QB) and [2008] EWCA Civ 646**

**The facts**

The Claimant a relatively inexperienced climber went to the Defendant’s climbing centre to practice “bouldering”, which is low level rock climbing without ropes. He had climbed on the bouldering wall only three to four times before the 12<sup>th</sup> February 2002. He was not given any sort of training or safety check before commencing bouldering.

The Claimant tried a manoeuvre another more experienced climber had completed. Unfortunately, he did not complete it and fell to the floor sustaining injury.

He claimed the Defendant had breached its duty under the Occupiers Liability Act 1957 and the Management of Health and Safety at Work Regulations 1999 [“MHSWR”] in failing to provide adequate training, monitoring and supervision of the activity.

The Judge at first instance found a breach of MHSWR but held the Claimant 75% negligent. The Defendant appealed successfully.

May LJ stated,

**“Adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so that they are injured.”**

The learned Judge went to say,

**“It is, therefore, in my view, necessary to consider whether the risk in the present case was inherent and obvious. The risk of falling from the wall was plainly obvious. The judge held in effect that the risk that the matting might not in every case protect a climber who fell from serious injury was not obvious. But I do not consider that this finding is sustainable, not least in the light of Mr Poppleton's own evidence. Evidence apart, it is to my mind quite obvious that no amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall and that the possibility of an awkward fall is an obvious and inherent risk of this kind of climbing. Mr Poppleton's evidence was that he did not think it was *that* risky, indicating that he knew that there was a risk.”**

**Comment:**

It is apparent from reading the decision in this case that where the Claimant engages in an activity that he knows is inherently risky voluntarily, the Defendant will not be required to prevent him from undertaking the risk, or to train or supervise him while he did so.

## Civil fraud

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**Oriakhel v D Vickers [2008] EWCA Civ748**

**The facts**

The case concerned a road traffic accident where at the end of proceedings the Judge found that it was fraudulent. A witness (K) in support of the accident was found to have been dishonest. The witness had not been joined earlier as a co-conspirator in the fraud. After the case had been dismissed the witness was joined as a party to enable a costs order to be made against him. However, the Judge refused to make the costs order. The appeal was brought by the insurance company against a refusal of the Judge at first instance to make a costs order against a dishonest witness.

The Court of Appeal dismissed the appeal.

Jacob LJ laid down a number of guiding principles that should be borne in mind when such matters are considered.

- 1) Although the insurance company had made clear in their Defence that K was alleged to be a conspirator he had not been joined as a party which prevented him from having a full opportunity to put any defence of his own.
- 2) It is still possible for an independent claim to be brought against K alleging his part in a dishonest conspiracy.
- 3) K was not given any notice of the claim against him or an opportunity to take legal advice and advance a defence.
- 4) Even though K was a witness, he was not sufficiently proximate to be classed a controller of the litigation. As a result, he could not be bound by the findings of fact.

Arden LJ added that the appeal should be dismissed following the principle of witness immunity. The ambit of the conspiracy involving K had yet to be pleaded and there was a lack of clarity on the precise conduct relied upon.

### **J Kirk v C Walton [2008] EWHC 1780 (QB)**

The case concerned an application by the Defendant, through his insurer, asking for permission to bring contempt proceedings against the Claimant for false statements made in documents verified by statements of truth and without an honest belief in their truth. Permission was granted.

#### **The facts**

The Claimant on the 10<sup>th</sup> August 2004 issued proceedings claiming damages arising from a road traffic accident on the 14<sup>th</sup> September 2001. Liability was not disputed.

The Defendant obtained surveillance evidence which they relied upon showing the Claimant's statements regarding her injuries were untrue.

The learned Judge approached the question of whether to grant permission on the following basis,

**“I approach the present case, therefore, on the basis that the discretion to grant permission should be exercised with great caution; that there must be a strong prima facie case shown against the Claimant, but that I should be careful not to stray at this stage into the merits of the case; that I should consider whether the public interest requires the committal proceedings to be brought; and that such proceedings must be proportionate and in accordance with the overriding objective.”**

**“I agree with Mr Featherby QC, for the Defendant, that the mere fact that the action was settled, on the terms agreed between these parties, does not extinguish any contempt. If it were otherwise litigants would have to keep open the substantive litigation, thereby occupying court time and resources, and incur further costs of both preparatory work and of trial, which would be wholly disproportionate and, as it seems to me, contrary to the interests of justice.”**

**Comment:**

This case sends out a clear warning to those contemplating a fraudulent claim that the Courts take a dim view of such matters. It is apparent from reading the judgment that despite there being allegations of delay in bringing the contempt proceedings and a failure of the insurers to disclose all material relied upon in a timely manner the Court did all that it could to allow the case to proceed to trial.

## Costs – Part 36 Offers

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**Carver v BAA Plc [2008] EWCA Civ 412**

The Claimant appealed against the decision of the Judge at first instance in ordering the Claimant to pay the Defendant’s costs after the last date on which a Part 36 offer could be accepted even though the Claimant had beaten the Defendant’s offer.

## **The facts**

The Claimant was an air hostess flying in and out of Gatwick Airport. On the 31<sup>st</sup> March 2003, she sustained injury in a lift when due to a mechanical defect it fell 2 feet below floor level. She fell heavily sustaining injury.

Before the issue of the claim, the Defendant conceded liability on the 24<sup>th</sup> July 2003. On the 17<sup>th</sup> November 2003, BAA made a Part 36 offer in the sum of £3,486 plus £520 representing the amount of an interim payment which had already been paid. The Defendant judging the total value of the claim as being £4,006.

The offer was rejected and the claim issued on the basis of it being worth more than £5,000 but less than £15,000.

At trial the Claimant obtained judgment and obtained damages that beat the Defendant's offer by £51.

At first instance, HHJ Knight QC stated,

**“..On no view does it seem to me can it be said that for an excess of a few pounds within a margin of £50-£87 odd could it be said that the monetary judgment obtained today is more advantageous than the position in June of last year. I say that, of course, without making any judgment upon the responsibility for the change in approach by the Claimant upon receiving different advice.”**

On appeal, Ward LJ stated,

**“The primary question for us is whether the change in the language of Part 36 results in a change of approach. Under the old rule the Claimant would have recovered her costs(subject to any derogation from the rule that costs follow the event under CPR 44). All one can glean from the change is that the purpose of the amendment was to replace the old system of payment in with offers to settle and to apply the same costs consequences irrespective of whether the offer was for the**

payment of a sum of money in a money claim or an offer of terms and conditions on which to settle non-money claims. The previous practice for the latter – the “more advantageous” approach – became the uniform approach for both. For money claims as well as for non-money claims the same questions arise under CPR 14(1) namely, under (a) whether the judgment is “more advantageous” than the offer and under (b) whether the judgment is “at least as advantageous” as the offer.

It is quite clear that in non-money claims where there is no yardstick of pounds and pence by which to make the comparison, all the circumstances of the case have to be taken into account. Why, therefore, should the rule be different where a money claim is involved? Mr Coughlan proffers a compelling answer, namely that a pure monetary comparison produces clarity and avoids placing value upon subjective elements such as the stress and anxiety involved in protracted, risky litigation. I see the force of that argument. In this case, as in so many, the amount of the costs exceeds the amount in dispute by a significant margin and any rule which reduces the scope of argument over costs is a salutary one.

Nonetheless, the Court must give effect to the new rule and if that has introduced a change in practice, so be it. Are the concepts of bettering a Part 36 payment and obtaining a judgment more advantageous than the Part 36 offer synonymous? Posed in that way, perhaps they are. But in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, “more advantageous” is, as Rix L.J. observed in the course of argument, “an open-textured” phrase. It permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.”

**Comment:**

The Court of Appeal approved the decision of the trial Judge. The consequences of this decision are that Claimant’s will need to think very carefully about Part 36 offers to settle. In the words

of Ward LJ “**No reasonable litigant would have embarked upon this campaign for a gain of £51.**”

The open-textured approach that Courts may now take means that the certainty of Part 36 has been undermined.