

General Liability Update

May 2010

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Case notes

Two cases which consider the issue of 'risk' involved in taking part in activities and the reluctance of the court to find in the claimant's favour:

Uren v (1) Corporate Leisure (UK) Limited (2) Ministry of Defence (3) David Lionel Pratt & Ors (Syndicate 2525) [2010] EWHC 46 (QB)

The claimant sought damages for serious personal injuries which occurred in an "It's a Knockout" style fun day organised by his employer (the Ministry of Defence). [More...](#)

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The claimant suffered serious injuries whilst she was on holiday in Austria. Having completed a toboggan run she remounted her toboggan and it subsequently careered into frozen straw bales..

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Any comments or queries?

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To disclose or not to disclose?

When faced with an HSE prosecution a defendant will often also face a civil action brought by an injured person. Disclosure issues can then arise as to whether material arising out of criminal proceedings can be disclosed in a civil action. Very careful consideration is required to decide what can and cannot be inspected by another party. Getting this wrong risks contempt proceedings.

The general rule is that material obtained in criminal proceedings should not be disclosed in a civil action until the former has been concluded. This is to ensure that the criminal trial process and any continuing enquiries by the prosecution are not prejudiced. In *Conway v Rimmer* (1968) Lord Reid commented that: *“it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.”*

The Law

Under section 17 Criminal Procedure and Investigations Act 1996, a defendant who has received prosecution material may only use it:

- (a) In connection with the case in which it was disclosed, including an appeal;
- (b) To the extent to which it was displayed or communicated publicly at a hearing in public (therefore once material is used in open court in a criminal trial it will normally lose its confidentiality); or
- (c) With the court's permission.

The consequences for a defendant falling foul of section 17 are serious. He could be held in contempt of court under section 18 (1), either of the court's own initiative or upon application by the prosecutor or the person affected by the disclosure. In the context of a summary trial, the contempt will be dealt with by the Magistrates Court, who could impose a custodial sentence not exceeding six months and/or a fine not exceeding £5k. In the context of a trial by indictment, the contempt will be dealt with in the Crown Court where the maximum custodial sentence is two years and/or a fine not exceeding £5k.

Therefore to disclose material not already displayed or communicated publicly, without fear of being in contempt of court, the defendant must apply for permission to disclose the material under section 22.7 of the Criminal Procedure Rules.

Under section 17 (5) an application *“may be made and dealt with at any time, and in particular after the accused has been acquitted or convicted or the prosecutor has decided not to proceed with the case concerned.”* This suggests that an application can be considered even during the criminal process but the words *“in particular after...”* imply that an application will only be dealt with during the criminal process under exceptional circumstances. Lord Reid's above comments tend to support this interpretation. The application must be served on the court and the prosecutor. It must specify what the defendant wishes to disclose together with full reasoning. The court's decision may be reached with or without a hearing. The prosecutor must have had at least 28 days in which to make representations.



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Where a defendant has obtained material himself in relation to the criminal proceedings, what should he do when faced with a disclosure request in the civil action?

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Under CPR 31.6 a party must disclose the existence of all documents relevant to the issues in dispute and which either adversely affect his case or which affect or support another party's case. However, certain documents are protected from inspection by legal professional privilege, which is divided in two parts:

(a) Advice Privilege

- (i) Communications between a solicitor and client; and
- (ii) Made for the sole or dominant purpose of giving or receiving legal advice.

(b) Litigation Privilege

- (i) Communications between solicitor and third party (eg an expert) or client and third party or within the client; and
- (ii) The litigation is reasonably contemplated or pending when the material was created; and
- (iii) The sole or dominant purpose of the communication is to obtain evidence or legal advice for the litigation.

Potential Issues

Quite often expert evidence might be obtained by a defendant in the criminal proceedings. If it is not relied on, but was obtained when litigation was anticipated and for the dominant purpose of obtaining evidence for the litigation, then it does not have to be disclosed. Again the issue comes down to whether the material enters the public domain. If it is made public, then privilege cannot be claimed (*Oxford Gene Technology Ltd v Affymetrix Inc (No 2)* [2000]).

Another common scenario is where a defendant carries out an internal investigation following an accident. In *West London Pipeline and Storage Limited and Ors v Total UK Limited and Ors* [2008], it was held that material obtained for an internal investigation was privileged. The dominant purpose of the investigation was in contemplation of either criminal or civil proceedings. If, however, the dominant purpose of the material had been to ascertain breaches in health and safety and to prevent similar accidents occurring in future, then it would not have attracted privilege, eg an accident report, as held in *Waugh v British Railways Board* [1979].

As a general rule, once material is privileged it retains this status unless and until it is waived. Defendants should be aware that they could waive privilege by discussing material either orally or in writing. Once privilege is waived it is lost forever and cannot later be claimed for the same document. However, it was held in *British Coal Corporation v Dennis Rye (No 2)* [1988] that disclosure of material in criminal proceedings did not give rise to waiver in subsequent civil proceedings.

When considering disclosure, a defendant should be wary of providing material which could incriminate him or his spouse, or which is privileged on the grounds of public policy, or which contains statutory secrecy, an agreement not to disclose or where inspection would be disproportionate.

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Conclusion

A defendant must disclose the existence of any material in a civil action that he obtained via disclosure in criminal proceedings but should only allow inspection of it if it was displayed or communicated publicly at a hearing or he has the court's permission to use it. As for material obtained himself, a defendant should consider the dominant purpose of obtaining such material. If it was obtained in contemplation of proceedings and has not entered the public domain then it will be privileged. Providing a defendant adheres to these rules he should have nothing to fear if a party in a civil action makes an application under CPR 31.19 (5) compelling him to allow inspection of a document.

Case notes

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Uren v (1) Corporate Leisure (UK) Limited (2) Ministry of Defence (3) David Lionel Pratt & Ors (Syndicate 2525)

[2010] EWHC 46 (QB)

The claimant sought damages for serious personal injuries which occurred in an "It's a Knockout" style fun day organised by his employer (the Ministry of Defence). The claimant dived into a shallow inflatable pool which resulted in him breaking his neck and fracturing his spine. He was rendered tetraplegic.

Although Risk Assessments prepared by the MoD were 'fatally flawed' in relation to one of the games being conducted, the risk of serious injury posed by the pool was very small. In these circumstances the defendant had taken reasonable measures to ensure that the game was safe.

The court was of the view that enjoyable competitive activities are an important and beneficial part of many lives. This was especially true in the present case given that the activities involved fit service personnel. Such activities are almost never risk free. This means that a balance has to be struck between the level of the risk involved and the benefits the activity confers on the participants and thereby on society generally.

As a result the defendant was not liable to the claimant for his injuries.

Susan Parker v TUI UK Limited **[2009] EWCA Civ 1261**

The claimant suffered serious injuries whilst she was on holiday in Austria. Having completed a toboggan run she remounted her toboggan and it subsequently careered into frozen straw bales.

The participants of this activity had been briefed prior to the toboggan run and had been told that on completing their run

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they should get off their toboggan and walk down to the toboggan shed. They were told not to remount the toboggan.

At first instance the claimant's claim failed on the basis that she had failed to adhere to the safety briefing given by the tour representatives.

The claimant appealed. The Court of Appeal found that, on the facts, the defendant had discharged their duty of care owed to the claimant. Whilst a specific Risk Assessment had not been prepared for the end of the run it was impossible to think that, if there had been, any conclusion drawn would have been different to what in fact occurred (ie, participants to be warned not to remount their toboggan). Other preventative measures were not feasible.

In these circumstances the claimant's Appeal was dismissed.

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