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Any comments or queries?

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This is the liability decision following on from the 2013 decision of the Supreme Court which held that Essex County Council would be liable for any negligence found on behalf of the claimant's swimming teacher or lifeguard. more›

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The claimant's son was seriously injured in a bicycle accident, but died two years later for reasons unrelated. more›

Defending a claim for breach of Occupiers' duty – A bridge too far?

The interesting judgment given in the case of *Christopher Edwards v London Borough of Sutton* highlights several important considerations for defendant insurers when analysing claims brought under the Occupiers' Liability Act 1957.

Facts

The claimant fell from an ornamental bridge located within the grounds of Beddington Park of which the defendant was the occupier for the purposes of the Occupiers' Liability Act 1957. The claimant was 64 years old and suffered spinal injuries which left him wheelchair bound for the remainder of his life.

Witness evidence

It can often be the case that the only witness to a 'slip and trip' accident is the claimant himself. In this instance there happened to be two witnesses, the claimant and his wife.

The claimant and his wife both gave evidence that the claimant had been walking his bike over the ornamental bridge when he fell into the river below. The claimant stated that his bike had, for no known reason, pulled him to his left causing him to lose his balance and fall.

The claimant's version of events was challenged by the defendant based on the fact that all the contemporaneous documentation, including the recorded call to the ambulance service (as made by the defendant's gardener), the accident report, the ambulance records and A&E records, referred to the claimant riding his bike over the bridge.

The claimant stated that he could not recall what was said following the accident but that he would not have asserted that he had been riding his bike as this was not correct. The gardener admitted that he did not see the accident and the contemporaneous documents were all created based on hearsay.

The judge held that in the absence of any evidence to the contrary he had no reason not to believe the claimant and his wife, who he found had given their evidence honestly and consistently.

The claimant was therefore able to prove his version of events whilst in the witness box.

Based on the documentary evidence and given the high value of the claim, we can understand why the defendant chose to put the claimant to proof. However, taking a claim to trial is an expensive process and (particularly in low value claims) relying upon a defence based solely on the claimant not being able to prove his version of events, without any witness evidence to the contrary, can be a risky strategy.

Given the ever increasing number of fraudulent claims, defendants can be forgiven for sometimes being reluctant to believe a claimant when faced with evidence that raises doubts as to his or her veracity. However, it should be remembered that the majority of claimants are honest and that courts are reluctant to call a claimant dishonest without strong evidence to support such an assertion.

The Occupiers' Liability Act 1957

The defendant also argued that even if the claimant's version of events was correct, there had been no breach of duty under the Occupiers' Liability Act 1957. The bridge had been in use since Victorian times and there had been no other reported accidents. The bridge was in such a state so as to be considered safe. Safety railings were both unnecessary and inappropriate as the bridge was ornamental and railings would diminish the bridge's aesthetic value.

These are all points with which the Judge agreed. However, the defendant was still found primarily liable for the accident.

s2 of the Occupiers' Liability Act 1957 states: "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

The judge highlighted that the test was not whether the bridge was safe, but whether reasonable care was taken by the defendant to see that the claimant was reasonably safe for the purpose he was permitted to be on the premises.

The defendant had failed to carry out any risk assessment in terms of visitors using the bridge. The judge held that had the defendant done so the risk of somebody falling from the bridge would have been identified and since the installation of railings was not appropriate, other steps should have been taken to warn users to take particular care or to divert them to other available routes.

The judge held that a reasonable occupier could not on the one hand admit visitors to use the bridge, whilst on the other hand not do or contemplate anything for their safety. As such the claimant succeeded.

It is therefore important to remember that 'safe' premises and compliance with the Occupiers' Liability Act are two separate issues.

The judge did find the claimant to be guilty of contributory negligence which he assessed at 40%. This was on the basis that, absent any demonstrated reason for the claimant's loss of balance that did not involve any fault on his part, for example, fainting or dizziness, the danger of the bridge called for a degree of vigilance in crossing it that the claimant simply cannot have exhibited.

Discussion

It is easy to see why this decision might not sit easily with the defendant or their Insurers.

The judge found that the defendant had not been obliged to install railings, which would have been the only measure to have guaranteed that the accident was prevented.

The bridge had been in place for more than 100 years and was used by numerous visitors to the park without any problem. Indeed, use of the bridge itself was considered to be of low risk and the bridge was found to be in a 'safe' state.

Whilst a warning sign could have drawn attention to the risks involved in walking over the bridge, the claimant had stated in his evidence that he had been proceeding carefully in any event. The risk would have been apparent to the claimant in the absence of such a sign and it was accepted that the claimant had seen the bridge and the river running beneath it before deciding to cross. As such it appears that the lack of a sign was not causative of the accident.

However, by not undertaking any assessment of the risk, the judge found that the defendant had failed to take such care as in all the circumstances of the case was reasonable to see that the claimant was reasonably safe, thus breaching their duty under s2.

Some parallels can be drawn with the criminal case of *R. v Merlin Attractions Operations Ltd* in which the operators of Warwick Castle were fined £350,000 following the death of a visitor who had fallen from one of the castle's access bridges.

In that case the jury found that the bridge exposed visitors to a foreseeable risk of harm and that it had been reasonably practicable for the owners to have done more to reduce the exposure.

This all goes to show that no matter how long a risk might have existed or how many people might have successfully navigated such a risk in the past, the duty under s2 Occupiers' Liability Act is a positive duty and successfully defending a claim can be very difficult.

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Case law update

Dusek v Stormharbour Securities LLP

The claimant brought a fatal accidents claim against the defendant following a helicopter crash in the Andes Mountains. The claimant alleged that the defendant breached their duty as an employer to ensure the safety of the flight.

The defendant did not charter the flight. This was done by a Peruvian investment company with whom the defendant had been working. Quotes were obtained by the Peruvian company and one of the quotes received advised against crossing the Andes because of the remote and inhospitable terrain. However, the company went with an operator willing to fly the route it wanted. The defendant did not make any enquiries to satisfy themselves as to the safety of the trip.

The court found that the defendant owed the deceased a duty not to subject him to unnecessary risk and to take reasonable care to ensure that he was reasonably safe while travelling to and from work.

The court held that the defendant should have inquired of the Peruvian company as to details of the flight operator, the helicopter to be used, the flight route and how they satisfied themselves as to the safety of the flight route. If the defendant had made the safety enquiries required to make an appropriate risk assessment, it would have instructed its employee not to take the flight because of safety concerns, and he would have listened. The defendant's breach therefore caused their employee's death.

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Cassley v GMP Securities Europe LLP

Just two months after *Dusek*, the court gave judgment in this similar matter.

The claimant brought a claim against two defendants in this case, the deceased's employer and the flight charterer, following an aeroplane crash between Cameroon and the Republic of the Congo.

Like *Dusek* the claimant alleged that the employer breached their duty to ensure the safety of the deceased's flight and like *Dusek* the court found that the deceased's employer had breached their duty of care by failing to undertake sufficient enquiries into the safety of the flight.

However, in this case the claimant's claim failed on causation.

The carrier had been changed at the last minute and the employer had no way of knowing this. Had they made enquiries it would have been about the original carrier and these would have been satisfactory and would not have led them to preventing the claimant from boarding the flight.

In any event, enquiries about the actual carrier would have revealed that it had been recommended by other pilots, had the requisite documentation and insurance, and had successfully flown to that destination before. The flight was relatively low-risk (despite being on an EU "banned" list) and positive recommendations in audits would have been persuasive and the deceased would still have taken the flight.

The charterer was also found not to be liable. Whilst they assumed a duty to the deceased by organising the trip, this duty was to take reasonable steps to satisfy itself that the carrier was appropriate and the court found that sufficient steps had been taken.

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Mandy Wall (Personal Representative of the Estate of Stephen Wall Deceased) v British Canoe Union [2015]

The claimant brought a Fatal Accidents claim following a canoeing accident in which her husband was killed.

The claimant alleged that the defendant, the publisher of a canoeing guidebook, had been negligent for failing to give a warning about a weir that the book said could be safely negotiated.

The defendant successfully applied for the claimant's claim to be struck out.

The court held that there was no relationship of proximity between the deceased and the defendant. He had not engaged in an activity arranged by the defendant nor had he been under its control, supervision or instruction.

The court also found that there was no duty of care and it would not be fair, just or reasonable in the circumstances to find that such a duty of care could be imposed. If a duty of care were found to exist it would mean that every publisher of every guidebook in the world on whatever topic would assume an unlimited legal responsibility for the action and omissions of anyone who read their guidebook at any time after the publication.

Whilst the claim was subject to Qualified One Way Cost Shifting, CPR45.15 states that cost orders can be enforced where a claim is struck out because the claimant has disclosed no reasonable grounds for bringing the proceedings. The claimant was therefore ordered to pay the defendant's costs.

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Thomas Edward Bartlett v English Cricket Board Association of Cricket Officials [2015]

The claimant claimed damages for an injury suffered during a cricket match that he alleged should have been called off due to the pitch being unsafe following heavy rainfall.

Umpires inspected the pitch before the match and concluded that it was not dangerous or unreasonably safe for play to take place.

The claimant during the match carried out a 'sliding stop' and in doing so suffered a soft tissue injury to his knee, requiring him to be in braces for eight weeks.

The court found that the umpires did owe the players a duty of care to ensure that the inherent dangers of any injury were kept to a minimum. By carrying out a full inspection in accordance with the rules the umpires had reached an informed decision. The fact that the grass in a cricket ground was wet and slippery did not mean that the conditions were dangerous. The ground was not so wet or slippery as to deprive the fielders of the power to move freely around the pitch. The umpires had therefore not acted in breach of their duty.

The court also examined the manner in which the claimant had carried out the 'sliding stop' and found that this had been carried out incorrectly, in that the claimant had led with the wrong leg. The cause of the injury was therefore not the condition of the ground but the claimant's incorrect technique.

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Pollock v Cahill

The claimant, who was blind, fell from a bedroom window at the defendants' home leaving him paraplegic. He claimed that the defendants had breached their duty as the occupiers of the house.

The court found that on the balance of probabilities the claimant had fallen out of the window as he was trying to make his way to the bathroom.

The defendants argued that a fall through the window, while possible, had not been a real risk that would influence the mind of a reasonable man, and so they had taken such care as was reasonable in the circumstances to see that the claimant would be reasonably safe.

The duty of care under s2 Occupiers' Liability Act requires occupiers to have regard for any known vulnerability of the visitor. An open window created an obvious risk for a blind person, particularly when on the second story of the house.

The court held that the defendants were liable for the accident: the open window had been a real risk to the claimant; they created that risk; and they ought to have appreciated the risk and taken steps to prevent it by keeping the window closed or by warning the claimant about it with particular reference to the extent of the drop from the window.

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West Sussex CC v Fuller

The local authority appealed against a decision that it was liable for injuries suffered at work by the claimant when she tripped on a staircase whilst delivering post to different areas of the office.

At first instance the judge found that the claimant had not been carrying a large amount of post and that she had simply misjudged her footing on the staircase. However, he allowed the claimant's claim on the basis that a risk assessment had not been carried out in accordance with the Management of Health and Safety at Work Regulations 1999.

The Court of Appeal overturned the decision. Whilst the local authority had arguably been in breach of duty for failing to carry out a risk assessment, a causal link between this breach and the injury suffered had not been established.

The cause of the fall was that the claimant had misjudged her footing whilst climbing the stairs. The court found that this was unconnected with the circumstance that she had been delivering post and was not within the ambit of the risk the authority had arguably been required to assess. There was no obvious connection between the claimant delivering post and the injury suffered.

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Woodland v Maxwell

This is the liability decision following on from the 2013 decision of the Supreme Court which held that Essex County Council would be liable for any negligence found on behalf of the claimant's swimming teacher or lifeguard.

The claimant was injured whilst attending a school swimming lesson at the local authority's pool. The claimant's case was that her swimming teacher and/or the lifeguard had failed to exercise reasonable care in the performance of their duties on the day of the accident, in that each failed to keep pupils under observation when in the water and failed within a reasonable period of time to observe that the claimant was in difficulties, raise the alarm and effect a rescue.

On the evidence the claimant was in the water for at least 50 seconds and was in difficulty and taking in water for at least 30 seconds.

The court found that the teacher's failure to notice a pupil in difficulties in the water for more than 30 seconds fell below the standard of care reasonably to be expected of a teacher and that the lifeguard's failure to observe the claimant was a failure to perform her role to the reasonable standard to be expected; She was not paying sufficient attention to users in the water at the material time.

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Graham v Commercial Bodyworks Ltd

The claimant appealed against a decision that the defendant, his employer, was not vicariously liable for the actions of an employee who had sprayed his overalls with an inflammable substance and then used a cigarette lighter in his vicinity.

The claimant's co-worker was a long-standing friend and there was no intention to cause harm. The claimant described the incident as "horseplay".

The claimant alleged that the defendant had created the risk of injury to its employees by requiring them to work with an inherently dangerous substance, and that the risk of injury from misuse of that substance was inherent in the nature of the business. Therefore, the co-worker's conduct was so closely connected with what he was employed to do that the defendant should be held vicariously liable.

The claimant's appeal was dismissed.

The relevant test is whether the co-worker's conduct was "so connected" with acts which the defendant authorised that they might be regarded as modes (albeit improper modes) of doing them.

On the facts, although the defendant did create a risk by requiring its employees to work with thinning agents, it could not be said that the creation of the risk was so closely connected with the co-worker's reckless act of splashing the thinner onto the claimant's overalls and then using a cigarette lighter in his vicinity.

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Baxter v Barnes (t/a WE Barnes Tree Surgeons and/or Up and Out Platform Hire)

The claimant brought a claim for breach of contract and negligence having been injured when a platform he hired from the defendant toppled over.

The defendant delivered the platform and helped to set it up in the first position from which the claimant was going to use it. Together with the platform, the defendant supplied hard plastic plates, to support the feet of the outriggers of the platform.

After using the platform at the first position, the claimant's employees moved the platform to another position. Whilst the platform was in use, it overbalanced and toppled over. Subsequent investigations revealed that two outriggers had lifted up from the ground. The claimant submitted that the accident had been caused by defects in the platform and/or instructions which the defendant had given to him in relation to setting up the platform. The defendant asserted that the accident was solely due to errors by the claimant in setting up or operating the platform.

The court found that the platform was specifically designed for use on rough or soft terrain and on slopes and narrow or uneven surfaces, where it was liable to be subjected to lateral forces which could cause a foot, if unrestrained by its bearing plate, to move considerably. The platform should have been provided with bearing plates which were attached to the outrigger feet or so shaped or recessed that the feet were prevented from slipping off the plate.

Since they were not, the court held that the platform supplied by the defendant was not of a satisfactory quality for the purposes of the implied condition contained in the Supply of Goods and Services Act 1982.

Interestingly the judge stated that he was not satisfied on the evidence that the defendant had a separate liability to the claimant in negligence, or that the claimant was negligent in any way.

In the absence of any negligence of the defendant, no question of contributory negligence on behalf of the claimant could arise.

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Foulds v Devon CC

The claimant's son was seriously injured in a bicycle accident, but died two years later for reasons unrelated.

The accident occurred when the deceased lost control of his bike and crashed into metal railings which had been placed on top of a low retaining wall. The railings had broken upon impact and the deceased fell down a large drop behind the wall onto a road below.

The local authority had constructed the retaining wall and railings many years earlier. It had included the wall and railings in its highway inspection regime, carrying out repairs to a different section of the railings on one occasion. The claimant submitted that the local authority owed a common law duty of care to ensure that the railings were sufficiently strong to prevent a pedestrian or cyclist from falling over the retaining wall to the road below.

The local authority denied that it owed any duty, and maintained that the railings were adequate to prevent pedestrians from falling over the retaining wall, and were not intended to be a crash barrier.

The claimant's claim was dismissed. At common law a highway authority owed no duty to maintain the road or to make it safe. Where a highway authority positively acted and created a trap or a danger which would not otherwise have existed, it might be liable. However, the local authority's actions in erecting the fence did not create a trap or danger.

There was a difference in maintaining the railings so as to provide some safety to pedestrians and creating a crash barrier. The local authority was not under a duty to ensure that the railings were maintained so as to provide a structure of sufficient strength to withstand the force exerted in the circumstances of the deceased's accident.

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