QBE European Operations

Technical claims brief

Monthly update | April 2014

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Contents

This month we focus on some interesting liability cases and examine the court's approach to the age-old question of whether one party owes a duty of care to another, and if one does, what does that duty involve. A duty of care can arise with the clear intention of the parties or be imposed more obliquely with the application of the well established body of case law and authorities.

We also look at the well-publicised case of a cyclist successfully pursuing the council because of a road defect, a bouncer being exonerated despite serious injury to the claimant and the most recent prosecution for corporate manslaughter.

Liability

The greater good outweighs the individual hardship... *Robinson v Chief Constable of West Yorkshire Police [2014]*

Mrs Robinson was an unfortunate bystander during the arrest of a drug dealer on a busy Huddersfield Street. During the arrest, the drug dealer resisted and the resulting tussle caused the three plain-clothes police officers, and the drug dealer, to knock Mrs Robinson to the ground, causing her injury. She sued the police on the basis that the arrest was carried out in a negligent manner and that the officers should have waited for back-up. Her claim was unsuccessful in the county court, so she appealed.

The Court of Appeal judgment sets out the factors to be considered in deciding whether a duty of care is established and whether the conduct amounted to negligence:

1. The starting point should always be whether it is fair, just and reasonable to impose a duty of care (*Caparo Industries Plc v Dickman* [1990]). In this case, and in deciding there was no duty on the police, it was of significant importance that the prime function of the officers was the preservation of the Queen's peace. Lady Justice Hallett considered 'the risk to passers-by... is trumped by the risk to society as a whole
2. Proximity. Mrs Robinson was not sufficiently proximate to the police officers in terms of her relationship with them – she was merely an unfortunate bystander and had no direct involvement in the arrest itself
3. Whilst the officer in charge was aware of the risk the drug dealer might try to flee, the decision to proceed, and not to wait for back up, was not necessarily negligent. The court would not second-guess an officer in the field who had to make a quick decision to apprehend a known criminal.

Whilst the decision does not establish new law, it affirms the position that ordinarily the police do not owe individual members of the public a common law duty of care whilst undertaking their operational duties. As such, they will be generally immune from actions for negligence in respect of their activities in the investigation, detection, suppression and prosecution of crime (*see Hill v Chief Constable of West Yorkshire* [1989] and *Desmond v Chief Constable of Nottinghamshire Police* [2011]).

> *It would be wrong to conclude that the police have blanket immunity – we have seen successful claims due to negligent police driving for example. This case does serve to remind us that the police are employed for our benefit – to fight crime and keep our communities safe – and so, it is not unreasonable that they are afforded protection from litigation such as this. Whilst one has some sympathy for the innocent Mrs Robinson, as Lady Justice Hallett put it, 'the interests of the public at large may outweigh the interests of the individual' or the greater good outweighs individual hardship.*

Tough break – *Yates v National Trust [2014]*

This tragic accident happened when Mr Yates fell some 50 feet from a tree he was working on, at a National Trust park (Morden Hall, Surrey). He was lucky to survive, but has been left a paraplegic. A Mr Jackman, who the National Trust had contracted to undertake tree felling, employed Mr Yates as a tree surgeon. As Mr Jackman did not have Employers' Liability insurance, Mr Yates was left to pursue the National Trust as occupier.

The court was required to revisit the questions of what common law duty of care is owed to visitors, what can be expected of a contractor, and where necessary, what defence the Occupiers' Liability Act 1957 provides the occupier. The leading case is *Bottomley v Todmorden Cricket Club* [2003], when the claimant was injured by an errant firework and it was decided that the occupier had failed to take reasonable care in its selection of a contractor. The court also applied the *Caparo* test and asked whether it would be fair, just and reasonable to impose a duty of care.

In distinguishing this case from *Bottomley*, the judge decided that the activity of tree felling was not extremely dangerous, in the same way the fireworks display was. It was also relevant that the National Trust had regularly engaged Mr Jackman since 2007, without incident. In considering all the evidence, the judge decided that the occupier did not owe a duty of care to the claimant in the choice of the contractor, but in any event, the selection of the contractor was reasonable. For those reasons, the claim was unsuccessful.

> *Mr Yates had no recollection of the events immediately prior to his fall and there were no witnesses. There was no definitive and agreed evidence, on the cause of the fall. It is clear from the court judgment that the judge was understandably sympathetic to Mr Yates' plight and the absence of a compensator. For occupiers, and their insurers, it was important that the court took the opportunity to confirm they will not ordinarily owe a duty of care to a contractor's employees, in the same way that an employer owes a duty to its own employees. There is much greater scope for an employee to be injured and an occupier should not have to take into account the same range of matters.*

In a jam! *Orzechowska v ABF Plc (trading as Speedibake)* [2014]

Ms Orzechowska (the claimant) worked in the defendant's bakery and tripped over a pipe that carried jam from a large tank into muffins. She had left her chair on the production line and tripped over the pipe which was 6 inches in diameter, one metre away from the chair and was plainly there to be seen. The claimant argued the pipe breached regulation 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992, as the defendant had failed to keep a traffic route free from obstructions that may cause a person to slip, trip or fall.

The judge in the county court was clearly unimpressed with the claim and sceptical about the accuracy of the claimant's account. On the pipe, he said 'you certainly cannot miss it' and on the location, the claimant 'collided with a very straightforward object that was right in front of her.' In dismissing the claim, he concluded that the pipe caused no danger and the only conclusion was that the claimant was the author of her own misfortune.

Surprisingly, the claimant appealed and the only question for the Court of Appeal was whether the judge was wrong as a matter of law to find that the pipe was not an obstruction. The claimant had to concede there was no previous legal authority in which a permanent piece of plant (such as the jam pipe) had been subject of a regulation 12(3) claim. Previous cases had been based on obstructions or substances which should not have been there, which led to the slip, trip or fall. In dismissing the claimant's appeal, the court gave two reasons:

1. The pipe was a sufficient distance from the chair, big and obvious, so that it did not present a real risk of tripping and was not an obstruction
2. Regulation 12(3) is designed to address objects or substances which should not otherwise be on a factory or workplace floor.

> *One has to wonder who decided to fund the appeal – a clear example of throwing good money, after bad. Any other decision from the Court of Appeal would likely have resulted in another round of costly litigation. To find an employer liable for an employee tripping over a pipe that she did not have to step over – would make a mockery of the purpose and effect of the Workplace Regulations. The result would have been no different under the Enterprise Act, but one would like to think the claim would not have been pursued following the initial denial.*

Leave it to the expert – *Cyril Biddick (deceased) v Mark Morcom*

The accident happened in Mr Biddick's private residence, after he asked Mr Morcom to fit some loft insulation. Mr Morcom was a multi-skilled tradesman and had undertaken some work for Mr Biddick previously – some paid, some unpaid. Mr Morcom was in the roof fixing insulation to the loft hatch and Mr Biddick had offered to hold the hatch in the locked position so it would not open during the job. Unfortunately, he left his station to answer the telephone and heard a loud crash when Mr Morcom fell through the loft hatch. Mr Morcom admitted he knew the hatch was not strong enough to take his full weight, but it appears he had overstretched and that caused him to fall through the hatch.

In deciding the claim in Mr Morcom's favour, the Court of Appeal's findings were:

1. The cause of the fall. Had the door been in the locked position it would have required a far greater force to open it from the loft. Mr Morcom denied applying such a force and thus, Mr Biddick's failure to keep the hatch locked was a cause of the accident
2. The existence of a duty of care. Mr Morcom admitted that he had appreciated the risk that the loft hatch would not take his weight and he had not relied upon Mr Biddick in respect of that risk. The key point was that Mr Biddick decided to involve himself in the task by offering to hold the hatch in the locked position and in doing so, assumed responsibility for that task. He put himself in a degree of proximity to the work being done by Mr Morcom and it was foreseeable that if he left the loft hatch, it might open and cause the fall
3. The level of contributory negligence. This was originally apportioned as one-third to Mr Biddick and two-thirds to Mr Morcom. This was upheld due to the significant elements of negligence on Mr Morcom's part, his experience and expertise, the unsafe work method adopted, the absence of any risk assessment and an element of excessive pressure applied.

> *The imposition of a common law duty of care on a householder is relatively uncommon. The distinguishing factor here was Mr Biddick's involvement in the work and offer to keep the door in the locked position. In doing so, he created a duty of care to Mr Morcom and neglected that duty when we went to answer the telephone. The moral of the story? If you are going to employ the services of a professional, save from the occasional cup of tea, it is probably best to leave them to it.*

You cannot take the benefit, without the burden – *Cox v Ministry of Justice* [2014]

Ms Cox, a prison catering manager, had been supervising six prisoners carrying out paid kitchen work in the prison. As they carried food from a delivery van to the first floor kitchen, a prisoner dropped a 25 kg bag of rice which burst, spilling its contents over the floor. Ms Cox ordered the prisoners to stop moving, before kneeling down to secure the bag and she was just about to straighten up when a bag of rice fell onto her upper back. This happened when one of the prisoners, Mr Inder, inadvertently hit his head on the wall, lost his balance and dropped two bags from his shoulder, one of which fell onto the catering manager's back.

It was accepted that the accident was caused by the negligence of Mr Inder. The Court of Appeal decided the Ministry of Justice's (MoJ) relationship with Mr Inder was akin to that of employment and they were vicariously liable for Mr Inder's actions for the following reasons:

1. Control. The relationship between the MoJ and the prison kitchen staff was actually closer than that of the usual employee/employer relationship. Mr Inder was undoubtedly under the control of the MoJ at all times during his incarceration
2. Creation of Risk. The MoJ had assigned Mr Inder to the activity of kitchen work and in doing so, created the risk of the tort being committed
3. Employment Relationship. The kitchen work carried out by the prisoners was essential to the functioning of the prison and benefitted the MoJ. The kitchen provided all meals for the prisoners, who numbered about 400, which meant no outside caterers were needed. Mr Inder was paid £11.55 per week for the kitchen work, which would compare favourably to the market rates the MoJ would have to pay private outside caterers.

It should be added that the Court took the opportunity to confirm this judgment does not make the MoJ vicariously liable for all negligent acts committed by a prisoner. The Court did however acknowledge that the scope and application of vicarious liability is evolving and developing year-on-year and this looks likely to continue.

> *The Court's view was simple – why should the MoJ take the benefit of the prisoner's work, without the burden. The MoJ choose to put the prisoners to work as part of their rehabilitative process, as well as saving the expense of contractors or ordinary employees. We are talking about taxpayers' money and in a time of spending-cuts, most would agree that prisoners should be expected to work whilst serving their time. Any fears of opening the floodgates have been calmed by the Court of Appeal and one presumes incidents with the same, or similar, circumstances will be limited.*

To Risk Assess, or not to Risk Assess – *Johnson v Warburtons* [2014]

Mr Johnson (the claimant) was driving the defendant's (the well known bakery company) lorry, of the kind generally used for delivery to retailers. He had rarely driven this kind of lorry and during the journey he heard a noise in the back and realised that something in the load must have toppled over. He pulled over to check the problem.

Having stopped and got out of the cab, he went to enter the back of the lorry by a rear passenger side door. Having opened the door, he raised a flap which covered the top step of three and fixed it in its vertical position, before entering the lorry. The claimant exited the lorry coming down forwards, but his foot slipped off the second step. He was not holding on to the flap and he fell into a gulley and he then over a low barrier, before falling down another 15 feet through brambles. His ankle was broken, but he was able to climb up, close the door and drive back to his depot.

The claimant put his case two ways:

1. That the steps, without a purpose-built handrail, were unsuitable and posed an inherent risk of injury – they were not a safe system of work
2. If that were wrong, they were so unsafe that drivers should have been trained in their use, told that the flap could be used as handhold and that it should be used on entrance and exit.

In arriving at their decision, the Court of Appeal considered the real risk of injury arising from the use of the steps. Warburtons' regular delivery drivers use the side doors about 15 times a day. There are 760 such lorries in the fleet and they have been used for about 20 years. In all that time there had been no accidents by way of fall, trip or slip. Nor was there any evidence that any driver had ever expressed concern about the safety of these steps.

The claimant responded that the delivery drivers would be familiar with the steps and therefore the need to take particular care when coming down them. By contrast the claimant was a first time user of the steps and for him they were inherently dangerous. It was emphasised that there was no risk assessment prior to the accident and no training had been delivered on the use of the steps.

The Court accepted the defendant's position that no training was needed because the need to take care was obvious. It was largely a matter of common sense and a point made that it was unlikely that any company trains their employees to go up and down staircases. For those reasons the claim had to fail.

> *The claim was essentially based on common law negligence, namely breach of the employer's duty to take reasonable care for the safety of its employees, rather than breach of statutory duty. Given the recent introduction of the Enterprise Act – removing civil liability for breach of statutory duty – it is interesting to see how the Court approached this claim. Reference to common sense, and the obvious need for employees to take care, should be seen as positive reinforcement for the intended purpose of the Enterprise Act – reducing unnecessary health and safety red-tape and bureaucracy.*

"Great news for cyclists" says the solicitor acting for Alan Curtis – *Curtis v Hertfordshire Council* [2014]

Mr Curtis had been training for a charity ride when he lost control of his bicycle, crashed and suffered a brain injury and a broken arm. He had been riding with a friend and they were travelling at approximately 18–20 mph. Mr Curtis has no recollection of the accident, but after hearing all the evidence, the judge decided the bicycle wheel got caught in a linear pothole, or that the pothole forced him to swerve suddenly to avoid it.

The local authority had inspected the road six months previously, and accepted that had they seen the pothole, it would have been recorded as a category one defect and repaired within seven days. It also admitted that due to the offside location of the pothole, and linear defect, it would have been less obvious to a drive-by inspection and may have been missed. The inspector's failure to identify the defect amounted to breach of duty – it should have been seen and it should have been repaired. The statutory defence under section 58 of the Highways Act 1980 was not made out.

The claimant recovered nearly £70,000 in damages, and credited his cycle helmet for saving his life. His damages were not reduced for contributory negligence and whilst the council has expressed disappointment at the judgment, it remains to be seen whether they decide to appeal.

> *There is no obvious reason to suggest this is "great news for cyclists" or that the case will "open the floodgates" – another quote from Mr Curtis' solicitor. The law in highway claims is well established, but the deteriorating state of the roads is likely to lead to more accidents. Local authority budgets are under pressure and ongoing cuts will continue to put a strain on highway inspections and repairs. However, that will be no defence for a council against claims of this type. Mr Curtis rightly points out that his injuries could have been far more severe, so perhaps the "great news for cyclists" is that cycle helmets can, and do, save lives.*

Bouncer-Law – *Stathers v Mitchell & Butler Plc* [2014]

Neal Stathers arrived at a nightclub in Plymouth on the night of 4 September 2009, having been drinking for the previous 10 hours. Not unsurprisingly, subsequent events were disputed, but what was clear is that Mr Stathers suffered serious injuries to the left side of his face, including fractures,and required hospital treatment.

He pursued a claim for damages against the club's owners, Mitchells and Butler Plc, alleging that the doorman, David Parker, had overreacted and caused the injuries. Mr Stathers argued that he had been lifted by the neck and had blacked-out before he hit the ground. The use of such a hold was 'obviously dangerous' and breached the doorman's training.

Mr Parker denied this allegation. He maintained that, in restraining Mr Stathers, he acted with the genuine belief that his colleague was under the threat of violence from Mr Stathers. The hold he used was entirely appropriate and specifically designed to ensure the recipient could not use his arms offensively.

At the High Court, the judge rejected the claim and accepted Mr Parker's account of events, which was consistent with the CCTV footage. The judge said he was confident that Mr Stathers was drunk and had brandished a bottle at Mr Parker's colleague. He was satisfied that the force Mr Parker used to restrain and remove Mr Stathers from the club was reasonable in all the circumstances.

> *These types of claims can be very difficult to defend. Club bouncers are routinely faced with drunk, aggressive and violent customers. They are trained to deal with difficult situations and have to make split-second decisions with regard to the safety of the club's customers, their colleagues and themselves. This claim highlights the dangerous nature of the job, but with the correct application of their training and the use of reasonable force, a full defence can be successfully advanced, even when the customer is left with significant injury.*

Sixth conviction under Corporate Manslaughter Legislation

Mobile Sweepers (Reading) Ltd have been found guilty of corporate manslaughter following the death of a worker in March 2012.

Malcolm Hinton died when he was crushed by a road sweeper whilst carrying out repairs to the machine. The 56-year-old had received no training in mechanics and had inadvertently cut through a hydraulic hose, which caused the road sweeper to fall on him. The police and HSE carried out a joint investigation following the incident and this highlighted extensive failings on the part of the company.

The company director, Mervyn Owens, admitted failing to discharge duties under the Health and Safety at Work Act 1974. He was fined £183,000, and the company was fined £8,000 and ordered to pay £4,000 costs. He has to make payment within 12 months, failing which a three-year custodial sentence will be imposed.

Mr Owens has also been disqualified from being a company director for five years. This followed evidence that he had started an almost identical company when the original company ceased trading on the day of the accident. A publicity order was also imposed on the company and notices worded by the judge are to be placed in various local newspapers. The judge further commented that, had the company been a larger corporation, the fine imposed would have been closer to £1 million.

> *Fortunately, HSE statistics show that work-related fatalities are on the decline. While we all hope that this trend continues and avoidable accidents of this nature become a thing of the past, this is probably unrealistic in the short-medium term. Unfortunately this means we can expect the frequency and number of corporate manslaughter prosecutions to increase for the timebeing. It remains to be seen whether more successful prosecutions will act as a deterrent for company directors who currently 'turn a blind eye' to health and safety obligations.*

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