Guildhall Chambers Personal Injuries Team
Occupiers' / Public Liability Workshop Questions

Matthew Porter-Bryant & Abigail Stamp

Mr Robert Ust owns and operates an outdoor centre which offers a variety of exciting activities to the public.

Rob has just won a major contract with the Local Education Authority. They have a number of *"young persons who have or are likely to exhibit interesting behavioural patterns"* and feel that Rob's centre may be just the place to re-direct their undoubtedly high energy levels into more positive directions.

Unfortunately, following the first visit, a number of claims are made against Rob.

1. The Climber

One of the young persons was engaged in an activity known as "bouldering", which is low level simulated rock climbing without ropes. Rob had positioned shock absorbent matting, at least 12 inches thick, beneath.

The Claimant was not handed any written rules. He did not sign a disclaimer. He was not given any oral warnings or instructions.

There was a sign on the wall saying "*Climbing Wall Rules*", which included: "*Do not jump off the walls*."

The Claimant and his friend say they did not read these Rules. The Claimant's friend, who had done some climbing before, jumped from one wall to another wall and managed to catch hold of the handholds on it successfully. The Claimant attempted to copy this feat, but never reached the other wall, somersaulted in the air and fell head-first onto matting below. He was very seriously injured.

It transpires that the HSE produced a DVD for the climbing industry. One passage in this video advises that thick matting can increase the risk injury by providing climbers

with a false sense of security. Rob has never watched this DVD but concedes that it is possible that he has a copy buried in his office somewhere.

The Letter of Claim cites, among others: (a) the Occupiers' Liability Act 1957, Section 2; (b) negligent failure to supervise; (c) "negligently or in breach of contract failing to warn the Claimant that the thick safety matting did not make a climbing wall safe but, indeed, might induce or encourage an unfounded belief that it did."

The Claimant was aged 18 at the time of the accident.

Q1. What is your view of liability / contributory negligence?

Materials

The Occupiers' Liability Act 1957, Section 2

Answer:

Trustees of Portsmouth Youth Activities Committee v Poppleton (2009) EWCA Civ 646

The trial judge allowed the claim subject to 75% contributory negligence.

The Court of Appeal disagreed.

Lord Justice May cited Tomlinson v Congleton Borough Council [2004] 1 AC 46. The risk in the present case was inherent and obvious. The duty to protect against obvious risk or self-inflicted harm exists only in cases where there is no genuine or informed choice. It is obvious that no amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall.

The law did not require the Defendant to protect Mr Poppleton from undertaking the risk, nor to train him, nor to supervise him.

The advice in the HSE video did not dictate the result of the case. The balance between risk on one hand and individual autonomy on the other is not a matter of expert opinion. It is a judgment which the courts must make.

The "twist" in relation to the case study above about it being some kind of school or college visit could make things more difficult for Rob, but it is strongly arguable that any supervision duties lie on teachers etc., not a commercial venue.

2. The Footballer

Another lad, aged 16, was goal-keeping in a typical tubular portable goal frame which was 4 feet tall. As he went to retrieve the ball from the back of the net, he tripped over the netting and fell. The goal frame was unsecured. It toppled over and the cross-bar hit the Claimant in the face.

Rob says that he did use pegs to anchor the goal frame to the grass. However, there don't seem to have been any there at the time. They must have worked loose or been stolen or something.

Rob then goes quiet. Persistent correspondence from yourself fails to elicit any details about the system of installing and inspecting pegs.

Eventually Rob responds with: (a) a purchase receipt for some pegs from 3 years pre-accident; (b) a photograph which can be dated to 2 ½ years pre-accident which appears to show the pegs in place.

In response to your continuing questions, Rob emails to say: *"Look, even I know the burden of proof is on the Claimant. Those pegs might have been in place until the day before the accident, or even that morning. And that, so far as I am concerned, is the end of the matter."*

Materials

The Occupiers' Liability Act 1957, Section 2

Q2. Is it?

Answer:

Hall v Holker Estate Co Ltd [2008] EWCA Civ 1422

Although the overall burden of proof is on the Claimant, to show that the system of inspections is inadequate, once the Claimant has established a prima facie case of lack of care by the Defendant, the Defendant has an evidential burden to call evidence to show that the accident would have occurred even if adequate care had been taken.

The Claimant does not have the impossible task of addressing how much time there was between the last inspection and the problem arising – the Defendant cannot simply say that "maybe the problem had only just arisen and so innumerable inspections would not have prevented it", and leave it to the Claimant to prove when the defect arose.

The Court of Appeal have thus extended the doctrine in Ward v Tesco Stores Ltd [1976] 1 All ER 219 (the supermarket customer slipping on yoghurt case – burden on D to call evidence of system) to all occupiers claims.

3. The Hiker

That evening, an unsuspecting member of the public was walking across a muddy track which runs across Rob's land. At around 9 pm, as she was returning to her hotel at dusk, she suffered a badly broken ankle when her foot went into a pothole in the middle of the path.

Rob has no system of maintenance in respect of the track whatever. He tells you that he has never sought to prevent anyone using it. The track is an attractive route from a popular nearby hikers' hotel to a relatively famous local waterfall. Indeed, being a helpful soul, two years ago he put up a 6 foot by 6 foot sign at the start of the path saying:

WATERFALL THIS WAY →

Rob tells you that the track is not, so far as he is aware, in any official sense a footpath, but he has been onsite for 25 years and "anyone and everyone has used it whenever they liked the whole time".

Pre-proceedings, the Claimant's solicitors produce signed statements from a local magistrate, a local police inspector and the local District Judge to say that the hole in question was a foot deep, a foot wide, and had been in a similar state, right in the middle of the path, but getting progressively worse, for at least 12 months before the accident. Indeed, the local District Judge had written two strongly worded letters to Rob complaining about the hole and demanding its repair. The magistrate and the police inspector came upon the scene of the accident, where they found the Claimant lying with her foot still in the hole.

Rob says he never charged anyone to use the path, he doesn't own the hotel or the waterfall, and if they chose to use it, it was their own look-out. He didn't make the hole; it must have come on its own over time. He ignored the letters.

Proceedings are issued citing the Occupiers' Liability Act 1957, Section 2 and the matter is defended, albeit in somewhat bland terms, with the Claimant being put to proof.

The Claimant's side issue an application for summary judgment under CPR 24, setting out all the above and concluding that *"The claim is so overwhelmingly likely to succeed that it would be contrary to the overriding objective to allow the Defendant to proceed to trial with this utterly fanciful Defence, which has no real prospect of success."*

You attend court for the summary judgment application and wait for your favourite counsel to arrive. The clerk brings you a message with 10 minutes to go, to say that your counsel was him/herself in an accident that morning and will not be coming. The clerk says that the Circuit Judge is not going to adjourn the hearing because *"we*

all know you're up a gum tree anyway, so it won't make any difference whether you have counsel or not, but I didn't tell you that – the judge will hear from you instead."

The clerk then hands you a faxed case report which your counsel managed to have sent to Court (heroically) before losing consciousness. It appears to be a case called *McGeown*. You read it with 5 minutes to go.

Q3. What are your submissions?

Materials

The Occupiers' Liability Act 1957, Section 2

McGeown v Northern Ireland Housing Executive (1994) 3 WLR 187

Answer:

Bearing in mind that it is for the Claimant to prove the facts, there might be an argument that summary judgment is inappropriate. However, under CPR 24 the Court can indeed consider the evidence on paper and decide whether either side has a "real" prospect at trial. Unlike the pre-CPR system, there is no right to a trial just because questions requiring oral evidence are in issue.

McGeown is, in short, the answer. Because the track in question has been used by the public, without them seeking permission, for more than 20 years it has become a public right of way by prescription. (The same law applies to private rights of way as well).

An occupier of land owes no maintenance duties to people crossing his land using a right of way. He may liable for mis-feasance (eg, if he digs a hole in the right of way) but he can never be liable for non-feasance (ie, just letting it deteriorate) no matter how dangerous it may become.

This is because persons using the right of way are not his "visitors" within the terms of the Act, as found in McGeown.

The remaining, interesting, question, is whether it makes a difference if the occupier actually invites the person to use the track (in this instance, the sign is a borderline invitation).

Lord Brown-Wilkinson was concerned by this point, because he cited the example of visitors to a shopping centre eventually gaining a right of way over it, but the owners of the shopping centre, who invited them to come there, would then owe the customers no maintenance duties. He queried whether this would be right.

However, the other four law lords did not mention the point and in the lead judgment Lord Keith of Kinkel stated:

"The concept of a licensee or visitor involves that the person in question has at least the permission of the relevant occupier to be in a particular place. Once a public right of way has been established there is no question of permission being granted by the owner of the solum to those which choose to use it. They do so as of right and not by virtue of any licence or invitation … the question (is) whether a person using a right of way can in any circumstances be the visitor of the owner of the solum … I am of the opinion that this question must be answered in the negative"

Accordingly, it is vital, in any occupiers' liability tripper / slipper, to check whether the Defendant could argue that the Claimant was using a right of way at the time. Note that it would be for the Defendant to plead and prove the same.

Within the instant case study, the Claimant's application should probably be rejected, with the Defendant given leave to amend the Defence to plead McGeown within 7 days – and then the Defendant should pursue a summary judgment application against the Claimant!

4. The Stunt Biker

The following day Rob calls you to say that there has been a further incident which he needs your help with.

Attached to the outdoor centre is an old disused car park Rob purchased from the local authority. The car park used to be part of an industrial estate and so is mostly tarmacced. Rob intends to use the site for development at some point.

Fearful of travellers and fly-tippers accessing the land Rob decides to dig a ditch and construct a steep bund around the perimeter.

Within the local area live a number of children who enjoy off-road motorcycling. A large number of these children are able to access the car park and enjoy riding around particularly on the tarmacced area where the children are able to build up a great deal of speed. It is common for the children to drive up and over the bund and even jump from it to try and clear the ditch beyond. Rob is aware of this but decides to do nothing about it.

One particular lad who is aged 14 decides that he is going to jump the ditch. He accelerates along the tarmacced section toward the bund. However, he is not particularly skilled and on realising that he has misjudged his approach he pulls on his brakes hard but is unable to stop in time. He hits the bund and suffers significant injuries as a result.

The injured lad's parents contact solicitors who send Rob a letter of claim. It alleges that Rob has acted in breach of duties owed under the Occupiers' Liability Act 1957 and/or 1984. It also alleges that Rob has "caused or permitted to be on the land an allurement and a trap to children".

Children continue using the field and jumping from the bund. The injured lad's parents have, despite an extensive leaflet-drop, been unable to identify anyone else who has suffered a similar injury.

Q4. What is your view on liability?

Materials – OLA 1957 and 1984

Answer:

The problem is based on the case of David Adam Lewis v National Assembly of Wales, Cardiff County Court, 2008

HHJ Hickinbottom dismissed the claim.

The question of whether the Claimant is a trespasser or visitor is not an easy issue to decide. On balance the Claimant had Rob's implied permission by way of toleration to use the land. The OLA 1957, therefore, probably applies.

The real issue is whether there was a risk of injury by reason of "a danger due to the state of the premises". This "threshold test" had to be met regardless of whether the claim is brought under the 1957 or 1984 Act.

The danger arising from an activity must be teased out and separated from a 'danger due to the state of the premises'. In this case the danger is obvious and clear – riding a bike at a bank and trying to jump from it could result in injury. In the Lewis case HHJ Hickinbottom cited the case of Donoghue v Folkstone Porperties Ltd [2003] EWCA Civ 231 (diver dived into harbour from slipway) and applied the principle that where a feature of the land is not inherently dangerous but tempts a person to indulge in an activity which carries a risk of injury the person carrying out the activity cannot ascribe any injury suffered to the 'state of the premises' unless caused by an 'unusual or latent feature of the landscape'.

In this case there was nothing inherently dangerous about the land. There was no physical defect. There was no hidden danger. The area was no more hazardous than any other off road topography and required the same level of skill and experience to consider. The danger arose not from a danger due to the state of the premises but due to the activity of off road motorcycling.

Generally the question of whether a danger is attributable to the state of the premises does not turn upon the age of the particular visitor or the attraction or otherwise of the premises. The question is whether it is a 'danger' not whether children are attracted to it. (Although, if the premises were a danger the fact that the premises were also an allurement may go to the extent of the duty owed and the steps reasonably expected of the occupier.) While it is theoretically possible that premises not dangerous from the point of view of an adult can be dangerous to a child (see Tomlinson v Congleton [2003] UKHL where Lord Hoffman and the example given of a toddler and a derelict house) it is rare that the age of the person will make a difference to the threshold test.

Even if the threshold test were met the consideration would still have to be given to whether anything could or should have been done about it. The matter would involve some consideration of the purpose of the bund and ditch, the cost of removal and / or other steps that would need to be taken to prevent persons accessing the field. Do not forget also that there may still be an argument that there is some social value to the activities particularly if the field has been used extensively and without incident. Moreover many courts would be sympathetic to a submission that one should not be too paternalistic – the accident occurred as a result of a misjudged manoeuvre the lad thought he could complete, not necessarily a breach of duty on the part of Rob. It is unlikely to make a difference on these facts whether this is a '57 or '84 Act claim.

<u>What if, in fact, the accident had occurred as a result of the bund collapsing under the rider and that Rob knew of the danger but chose to do nothing about it?</u>

There is then a good argument that the bund does amount to a trap /hidden danger. It follows that a court is more likely to find that Rob ought to have prevented access to the bund or, at the very least, warned against the danger (query whether warnings alone would have been sufficient when he knew the majority of users to be children).

The Bouncy Castle

Finally, Rob informs you of one last claim which has been made against him.

Rob hired a bouncy castle and inflatable bungee run for his daughter's tenth birthday party and arranged for this to be set up in the one of the fields adjacent to his activity centre. Most of the guests were 10 or 11 years old. Also invited was a large 15 year old boy nicknamed "gentle giant" who is the son of one of Rob's neighbours.

At the start of the party the children were split into two groups. One group were to play on the bouncy castle and the other on the bungee run. Rob was supervising both activities. During the course of the day one of the children needed help to be strapped into the bungee run. Rob turned his back on the bouncy castle and went over to assist. As soon as Rob's turned his back one of the smaller children did a somersault on the bouncy castle. The large 15 year old boy then undertook a somersault. Unfortunately he started his somersault before the other child had got up from the floor. The larger child landed on the smaller child who as a result sustained serious injuries.

The claimant alleges that:

(i) there should have been continuous supervision on the bouncy castle,
(ii) the children should have been expressly forbidden from somersaulting
(iii) the larger 15 year old should not have been allowed on the bouncy castle at the same time as the other smaller children

What is your view on liability?

Answer:

Perry v Harris [2008] EWCA Civ 907

The Trial Judge found in favour of the Claimant. The Court of Appeal disagreed.

To a large extent the case turned on the first impressions of the Court of Appeal.

The duty of care owed was that which a reasonable parent would provide for their own children. It was not foreseeable that the children on the bouncy castle would be exposed to an unreasonable risk of injury if the adult's attention was diverted to another child requiring assistance. In the absence of an express recommendation a reasonable adult should have been in the vicinity of the bouncy castle to intervene if those playing on it became boisterous. There was no duty to continually supervise so that the children's behaviour never became boisterous.

Even if there had been continuous supervision it was doubtful whether allowing the children to somersault one at a time would have been negligent and was doubtful whether it would have been possible to react in time to prevent one child somersaulting whilst the other was on the floor. Whilst the risk of injury was enhanced if the colliding child was bigger than the injured child this did not automatically mean that there was an obligation to prevent children of different sizes using the bouncy castle together.

The accident was a tragic and freak accident which occurred without fault.