

Recent developments in EL/Breach of statutory duty

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Guildhall Chambers**

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Hadlow v Peterborough City Council [2011] EWCA Civ 1329

- Clare Lodge secure unit for young women.
- “challenging, unpredictable and some dangerous behavior”.
- C should have been accompanied in the class room and was not.
- Claimant (a teacher) goes to leave a room and trips over a chair.
- Her injury was not caused by the violence or the threat of violence of her “pupils”

Who wins?

- Claimant?
- Defendant?
 - There was no violence...
 - The chair was not itself dangerous...
 - Falling over a chair was not obviously linked to an attack...

The arguments - Defendant:

- The accident was not reasonably foreseeable.
- The cause of the accident was C's actions and there were a novus actus.
- The foreseeable risk was violence on behalf of the "pupils" but this did not happen.

Doughty v Turner Manufacturing [1964] 1 QB 518

- Lid drops into a cauldron of molten liquid and then explodes injuring C.
- Risk of injury by lid dropping known.
- Risk of injury of explosion following emersion reasonably not known.
- Since injury caused by “unknown” risk no liability.
- The two risks were “in quite a different category”.

The arguments - Claimant:

- The risk was one of violence.
- Injury caused in attempting to avert that same risk.
- *Hughes v Lord Advocate* [1963] AC 837
 - Lamp knocked into manhole by boy.
 - Lamp then explodes causing injury.
 - HL: The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way.

Robb v Salamis MMI Limited [2007] ICR

- The employer must anticipate that it may not be possible to predict the precise ways in which situations of risk may arise, especially where the risk is created by carelessness. The employer is liable even if he did not foresee the precise accident that happened... the fact that an accident was caused by a known source of danger but in a way that could not have been foreseen affords no defence.

Pill, Moore-Bick, Aikens LLJ:

“The risk of physical injury was foreseeable and, while it did not happen in the most likely way envisaged, it was sufficiently connected with a risk created by the appellants to render them liable.”

Distance between risk and injury:

What if:

- Employee A injured whilst rushing to accompany employee B...?
- Overworked employee A injures employee B as a result of falling asleep when driving home...?
- Is it correct to separate the risk from the direct cause?

Bristol Alliance v Williams [2011] EWHC 1657

- 12 December 2008 James Williams drives into House of Fraser building.
- ? Intentional act of attempted suicide.
- HoF's insurers pay out £200k and pursue JW & RTA insurers EUI.
- A battle between insurers.

RTA 1988 – a refresher:

s.145:

- what policies must cover – death & bodily injury damage to property arising out of use of a vehicle on a road...

s.148:

- the policy cannot restrict cover by reference to age, mental condition, etc.
- Sums paid out as a consequence recoverable from policyholder.

EUI's case:

- The accident was a deliberate act by JW.
- s. 5 of the policy:
 - We will not pay for ... any loss damage death or injury arising as a result of a 'road rage' incident or deliberate act caused by you ...
- The liability is not caught by s.151 RTA.

s.151 RTA

- (1) This section applies where, after a certificate of insurance ... has been delivered under section 147 of this Act to the person by whom a policy has been effected..., **a judgment to which this subsection applies is obtained.**
- (2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is **required to be covered by a policy of insurance under section 145** of this Act **and** either:
 - (a) **it is a liability covered by the terms of the policy...** to which the certificate relates, and the judgment is obtained against any person who is insured by the policy ...

The clever bit

- Ordinarily this point does not arise due to Art 75 of Articles of Association of MIB – these would require EUI to pay out under MIB agreement.

But

- 6.1(c)(ii) – MIB does not have to pay for unsatisfied judgments made pursuant to a right of subrogation...

But not clever enough...

HoF's arguments:

RTA s.145(3):

... the policy— (a) must insure such person, ... as may be specified in the policy in respect of **any** liability which may be incurred by him ... in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain.

And finally some Eurolaw...

- The RTA must be interpreted, so far as possible, to give effect to European Directives: *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 [1990] ECR I-4135.
- By reference to the Codified Motor Insurance Directive 2009/103/EC and Ruiz Bernaldez Case C129/94 [1996] ECR I-184 the RTA must cover all liabilities but an insurer could contract so as to be able recover its outlay from the insured in certain circumstances.
- The MIB agreement did not act to plug any deficiencies in the policy in order to render compliance with EU directives.

Held:

s.145 requires the victim of ANY liability arising out of use of a vehicle on a road to be compensated.

But could exclude it so that policyholder could not benefit himself from a deliberate act.

Yeah – but does it matter?

Get out clauses:

RTA s.151

- C knew/reason to believe.
- stolen / TWOC.

MIB 1999 – assignment/subrogation:

- C knew / ought to have known.
- **No insurance.**
- Stolen/TWOC.
- Course/furtherance of crime.
- Means of escape lawful apprehension.

When it might be important:

“exceptions” cases not caught by s.148 where indemnity refused and s.151 would not have bitten:

- Deliberate acts.
- Racing, rallies etc.
- Other use – hire etc.
- Car normally kept outside UK?
- Car imported from outside UK?

Reynolds v Strutt & Parker [2011] EWHC 2263

The facts:

- 19 June 2008 – a Thursday.
- Strutt & Parker– “Staff event”, “Team building day”, Staff day out”.
- Normal work day – staff being paid.
- All employees (save skeleton office cover) attended.
- Vehicular treasure hunt followed by a bike race at Fowlmead.
- Staff pitted against each other via teams.
- C sustains head injury – no helmet worn.

Were the staff “at work” or “in the course of their employment”?

- *Lister v Helsey Hesley Hall Ltd* [2002] 1 AC 215
- *Ilkiw v Samuels* [1983] 1 WLR 991
 - Was the job on which he was engaged for his employer?
 - Answer the question as a jury would.
 - Can be it be fair and just to hold the employer vicariously liable?
- Not in the course of employment.
- Regulations [MHSWR, PPE] did not apply.

Was there any other duty owed by the employer to the employee?

Ministry of Defence v Radcliffe [2009] EWCA Civ 635

He was the officer in charge of them in Germany and, in the context of the swimming party, it was fair, just and reasonable to ascribe to him a duty to take reasonable care to guard his subordinates against the foreseeable risk of injury, if they jumped from the bridge into the lake. By his own presence there in the circumstances that pertained and by reason of his rank, he assumed responsibility to prevent them from taking undue risks of which he was or ought to have been aware.

Judge Oliver-Jones QC:

Although the event was not in the course of employment, one cannot, in my judgment, simply ignore the relationship of employer and employee... It is, in my judgment, from that relationship, as well as the relationship of organiser and attendee, that the duty of care arises.

Ok – but what duties were owed?

- (1) The duty on the Defendant in this case was to take such reasonable care as any reasonable employer would take (a) to ensure that employees were reasonably safe in engaging in the activities which the employer had arranged and (b) in the making and management of the arrangements that were being organised.

(2) The making of adequate and suitable risk assessments which, in my judgment...are the same as those owed under the [PPE, MHSWR] regulations ...

So...

- (1) Not “employed” at the time;
- (2) But duty to to take such care as any reasonable employer would...
- (3) And to carry risk assessments identical to those required under PPE, MHSWR.

The result?

- C was travelling at sufficiently low speed as to render the helmet effective (Dr Chinn of *Smith v Finch* [2009]EWHC 53 >12 mph makes no difference);
- C was an experienced rider.
- The crash had occurred as a result of C “cutting up” a competitor.
- 2/3 1/3 in D’s favour.

Ex turpi cases: *Delaney v Pickett & Tradewise* [2011] EWCA Civ 1532

- 25 November 2007 serious RTA.
- D1 loses control of a Mercedes 500SL and collides with people carrier.
- His passenger C seriously injured.
- Cannabis is found at the scene: a small packet in D1's sock, a very large packet up C's coat.
- C sues D1.

At first instance:

- The trial judge finds that Delaney had possession with intent to supply.
- ...and that the driving was part of the “supplying”
- and therefore the claim failed on ex turpi grounds.

On appeal (Ward LJ dissenting)

- The trial judge's finding of intent to supply could not be overruled.
- Were the insurers entitled to rely upon clause 6(1)(e)(iii) of the MIB rules "the vehicle was being used in the course or furtherance of a crime"?

- “crime” was not to be construed as “serious crime” hence, even if a minor crime was involved (subject to possible de minimis arguments) the exception applied. Use of the vehicle did not have to constitute an element of the offence.
- The Court rejected the submission that there must be proportionality between the crime and the injury.

Ex turpi cases: *Joyce v O'Brien & Tradex* [2012] EWHC 1324

- 21 April 09 Addiscombe Croydon C thrown from rear of a van.
- D1 pleaded guilty to dangerous driving.
- D2 defends C's claim on the basis of ex turpi.
- Judge finds that C and D1 were on joint enterprise theft of ladders and C was holding onto ladders in the course of their get away when he fell.

Legal aspects

Legal aspects:

- Thorough analysis of Ex Turpi caselaw including Delaney (above).
- There need be no proportionality between injury and crime.
- Claim dismissed.

So make the most of:

Passenger claims where joint enterprise and:

- Car speeding?!
- Car contains stolen goods?
- Presence of drugs?

Blair v Chief Constable of Sussex [2012] EWCA Civ 633

- 21 May 2009 a police officer wearing normal police boots.
- B had been undertaking an advanced motorcycle course.
- B was required to travel off-road on to green lanes and lost control of the motorcycle in a rut.
- The bike fell breaking C's ankle and tibia.

At first instance: (HHJ Barratt QC)

- Defective & Unsuitable bike PUWER 1998?
- Unsuitable boots PPE 1992?
- All claims dismissed after a 2 day trial.

The boots:

- The [normal] boots were suitable and appropriate in the circumstances.
- Motocross boots were appropriate for competitive riding at speed on extreme terrain and that normal mobility would be hindered by wearing boots of that kind.

Reg 4(3) PPE 1992:

...personal protective equipment shall not be suitable unless:

(a) **it is appropriate for the risks involved**, the conditions at the place where exposure to the risk may occur, and the period for which it is worn;

....

(d) so far as is practicable, **it is effective to prevent or adequately control the risk** or risks involved without increasing overall risk;

Threlfall v Kingston-upon-Hull City Council [2010] EWCA Civ 1147:

- (1) was the equipment effective to prevent or adequately control the risk or risks involved without increasing overall risk?
- (2) If not is a practicability defence?

Here – boots were not “effective to prevent or adequately control” leg injury. D did not call evidence on practicability...

Other recent cases generally:

***Tafa v Matsim Properties Ltd* [2011] EWHC 1302**

- Director/occupier/controller or work liable for injury to employee of contractor.

***Saddler v Filipiak* [2011] EWCA Civ (10.10.11)**

- Analysis of GD assessment in multiple injury cases.

***BAI (Run Off) Ltd v Durham* [2012] UKSC 14**

- The final (?!) trigger litigation case.

***AB & Ors v MOD* [2012] UKSC 9**

- Limitation/date of knowledge exposure to nuclear tests.

***Fred Perry v Brands Plaza* [2012] EWCA 224**

- Hardening of CA approach to relief from sanction cases.

***Whiten v St Georges NHS Trust* [2011] EWHC 2066**

- Interesting impaired life/multipliers/FLE (child)/Care damages assessment case.

***Baker v Quantum clothing* [2011] UKSC 17**

- Knitting industry escape liability for NIHL.

***W v Veolia Environmental Services* [2011] EWHC 2020**

- £138k credit hire claim.

***Bodey v Hall* [2011] EWHC 2162**

- Animals Act (horses) – volenti succeeds.

***Dawkins v Carnival plc* [2011] EWCA Civ 1237**

- Interesting carriage by sea PI case.

***Williams v University of Birmingham* [2011] EWCA Civ 1242**

- Correct test to apply in asbestos breach of duty cases.

Weddall v Barchester / Wallbank v Wallbank



Weddall [2012] EWCA Civ 25

- Mr Weddall telephones a very drunk Mr Marsh at home.
- An angry Mr Marsh cycles to the care home where both work.
- Mr Marsh violently attacks Mr Weddall – 15 months imprisonment.

Wallbank [2012] EWCA Civ 25

- Mr Wallbank MD of Defendant Co.
- Mr W and Mr Brown on the factory floor. Mr W criticises Mr Brown and instructs him to “come on” (“Come on”? “COME ON”?).
- Mr B walks over to Mr W pushing him in the face sending Mr W onto a table 12’ away.

Weddall lost (Unanimous points decision)

- Marsh was at home - an independent venture separate and distinct from employment.
- Context is different from *Mattis*.
- *Far from “modest force by way of a spontaneous reaction to an instruction.”*

Wallbank won (TKO)

- Violence closely related in time and space – an instant yet irrational response.
- The risk of an *over-robust* reaction is a risk created by employment.
- It would be 'fair and just'.

What can we take from the case?

Must be 'closely connected' and 'reasonably incidental'

- On premises.
(but what about Mattis?)
- Not much force used – The David Hays principle.
(err...but what about Mattis?)
- Responding to instructions – Wallbank closely connected to the instructions in time, place and causation (Aikens LJ).
(um...again what about Mattis?)

What can we take.....cont.

Aikens LJ – It's a value judgment.

Vaickuviene v Sainsbury [2012] CSOH 69

Lady Clark:

“...there appears to be an acknowledgement in some of the case law that the principles which have been developed are **not entirely consistent**, that the cases are **very fact dependent**, and that **policy considerations** have been and remain a major influence”

Answer – Does it feel right?



See Also...

Section 40 Equality Act 2010

(Employers liable for third party harassment of employees).

Government Consultation (closes August).

<http://www.homeoffice.gov.uk/publications/about-us/consultations/third-party-harassment/>

Ali Ghaith v Indesit [2012] EWCA Civ 642

Manual Handling – stock take of items in the back of a van.

The task brought with it a risk of injury. No specific risk assessment.

Onus was on the Defendant to show all reasonably practicable steps taken to reduce the risk of injury – longer breaks an obvious precaution.

Ali Ghaith – A ‘strict’ decision?

Causation:

“If the employer does not [prove he took appropriate steps], he will usually be liable without more ado. It is possible that an employer could show that, even if he had taken all practicable steps to reduce the injury...the injury would still have occurred.....”

Ali Ghaith – Defence of Freak Accident

e.g. If the injury was caused by a *freak accident* or some such thing; but the onus of proving must be on the employer to show that was the case...”

NB – *Costa v Imperial* [2012] EWCA Civ 672

Ali Ghaith – Can we kiss and make up?



“...the Court has, since April of this year, decided that any claim for less than £100,000 will be the subject of compulsory mediation”