CASE UPDATES

Recent Decisions: Liability and quantum

Gabriel Farmer, Guildhall Chambers

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Hide v Steeplechase Co (Cheltenham) Ltd [2013] EWCA Civ 545

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First piece of bad luck …

- Cheltenham Race Course
- 11 November 2006
- Claimant riding “Hatch a Plan”
- Falls at the first hurdle
- Horse falls to the right
- Claimant slides into a guard rail post
- £58k hip injury

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Second piece of bad luck…

- Trial before HHJ Charles Harris QC
- “Cheltenham Racecourse is widely regarded as the best steeplechase course in England”
- Rails, padding, posts, layby all in approved form (BHA)
- No complaints before or after
- What happened to C “unusual and unexpected”

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Did the relative disposition of the hurdle and railing rendered them “unsuitable”?

PUWE Regulations 1998:

Suitability of work equipment

4(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.

4(4)(a) “Suitable”…means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person; ...”

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Findings at first instance

- The concept of reasonable foreseeability, a classic common law phrase, is imported in regulation 4. This, in my judgment, enables the manager of a racecourse appropriately to consider not whether a layout is a conceivable or “foreseeable” cause of injury, but whether the injury is “reasonably foreseeable”, viz whether the injury is likely or unlikely in the circumstances.

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Findings at first instance

- “None [groundsmen, jockeys, organisers, staff] thought that an accident of this kind was at all likely, though of course it was possible, and in that sense foreseeable. None had any doubts about the suitability of the arrangements at the material time.”

- Claim dismissed: equipment was “suitable”

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CA (LLJLongmore, McFarlane, Davis)

- "reasonably foreseeable" to be construed so as to be consistent with the limited concept of foreseeability envisaged by the Directive.
- *Defendant* must prove accident due either

  (a) to unforeseeable occurrences beyond the defendant's control or

  (b) to exceptional events the consequences of which could not be avoided in spite of the exercise of all due care.

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A significant enlargement of Reg 4?

Once, therefore, the claimant shows that he has suffered injury as a result of contact with a piece of work equipment which is (or may be) unsuitable, it will be for the defendant to show that the accident was due to unforeseeable circumstances beyond his control or to exceptional events the consequences of which could not be avoided in spite of the exercise of all due care on his part. The fact that an injury occurs in an unexpected way will not excuse the defendant unless he can show further that the circumstances were “unforeseeable” or “exceptional” in the sense given to those words by the Directive.

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Willock & Ors v Corus UK [2013] EWCA Civ 519

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Willock & Ors v Corus UK [2013] EWCA Civ 519

- Crane drivers at Corus
- Had to look down and adopt awkward postures whilst in the cab
- Suffered… backache
- Corus had suggested joysticks
- Proposals rejected by the drivers…

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Allegations:

Boiled down to:

A failure to ensure that the controls of the cranes were not in a position which exposed the driver to a risk to his health or safety, in breach of regulation 17(2) of PUWE Regulations 1998

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First instance:

17(2) PUWE Regulations

"Except where necessary, the employer shall ensure that no control for work equipment is in a position where any person operating the control is exposed to a risk to his health and safety."

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Construction via Directive leads to…

Council directive 89/655/EEC. Paragraph 2.1 of the annex provided in part as follows:

"Except where necessary for certain control devices, control devices must be located outside danger zones and in such a way that their operation cannot cause additional hazard. They must not give rise to any hazard as a result of any unintentional operation."

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Brumder v Motornet & Aviva [2013] EWCA Civ 195

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Brumder v Motornet & Aviva [2013] EWCA Civ 195

- 8 November 2008
- Mr Brumder working on hydraulic ramp in a garage. Compressor fails. Uses ladder to climb down, slips, ring finger torn off
- Mr Brumder sues Motornet Limited, his employer
- The ramp/compressor was not “maintained in an efficient state, in efficient working order and in good repair” Reg 5 PUWE Regs 1998

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At first instance:

But judge finds:

- C was the sole director and shareholder of Motornet Limited
- Ramp had failed 2 years before
- Had a risk assessment been performed the accident would have been avoided
- C was “100% contributorily negligent” having not given any thought to H&S including the 1998 Regulations

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On appeal:

Agreed:

- If PL attaches 100% contributory negligence wrong in principle (Pitts v Hunt [1991] 1 QB 24, *Anderson v Newham CFE* [2002] EWCA Civ 505

But D contended

- Uphold decision based on *Ginty v Belmont Building Supplies* [1959] a ALL ER 414, Boyle v Kodak [1969] 1 WLR 661

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CA (LLJ Ward, Longmore, Beatson)

Boyle v Kodak defence:

- Applies where non-compliance with statutory duty was also a breach of the statutory duty by the employee himself
- The onus is on the employer to prove that he did all he could to ensure compliance with the duty. Only if the employer does, will he have a defence against the injured employee whose act or omission put the employer in breach of the Regulation

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Can *Boyle v Kodak* apply where employee not under a duty?

Beatson LJ:

- Analysis of Pearson J's judgment in Boyle
  - Cannot derive benefit form you own wrong
  - Contributory negligence at common law complete defence
  - Circuitry of action if employer sues employee in contract
- Director would need to be in breach of duty to the company – need not be the same duty
- C in breach of s.174(2)(a) Companies Act 2006 to exercise reasonable care, skill and diligence as a director

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Outcome

So:

- C in breach of duty to the Motornet limited for failing to pay any attention to H&S
- C cannot derive any advantage from this breach
- Boyle v Kodac defence applies

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But remember:

If: (In sole director situation)

- Other employees have responsibility for H&S
- C has done something to comply with H&S legislation such that s.174(2)(a) not breached
- D fails to prove it has done all it could reasonably be expected to do

… the defence will fail

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Joyce v O'Brien & Tradex [2013] EWCA Civ 546

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Joyce v O'Brien & Tradex [2013] EWCA Civ 546

- 21 April 09 Addiscombe Croydon
- Theft of ladders - C thrown from rear of a van and badly injured
- D1 pleaded guilty to dangerous driving
- D2 defends C's claim on the basis of ex turpi

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Joyce v O'Brien & Tradex [2013] EWCA Civ 546

At first instance: [2012] EWHC 132

- 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: Claim dismissed.

- There need be no proportionality between injury and crime.

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Joyce v O'Brien & Tradex [2013] EWCA Civ 546

On appeal:

- Review of authorities
- Application of *Grey v Thames Trains* [2009] UKHL 33 and *Delaney v Pickett* [2011] EWCA Civ 1532
- Test: (causation) was the injury caused by (as opposed to being incidental to) the illegal act? If not the maxim does not apply.
- Applies to single act or joint enterprise

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Joyce v O'Brien & Tradex [2013] EWCA Civ 546

Where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise

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Joyce v O'Brien & Tradex [2013] EWCA Civ 546

However, (reversing Joyce at first instance)

- As doctrine is one of public policy it should be flexible in its operation – hence it will not apply to:
- Minor road traffic offences
- "relatively trivial offences"

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Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

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Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

- 27 February 08 Cindy Taylor hurts head and foot in minor accident at work
- 19 March 08 she suffers a DVT, collapses and dies
- DVT and death caused by accident
- Daughter Crystal Taylor witnesses death and suffers PTSD
- A “nervous shock” secondary victim case

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Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

The 7 “control mechanisms”

1. Injury reasonably foreseeable
2. Close relative / close emotional relationship
3. Suffered recognised psychiatric injury
4. The injury was caused by D’s act/omission
5. The injury was caused by “shock”
6. Present at scene or immediate aftermath
7. Must have perceived with her own senses

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Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

Question: did C satisfy no. 4?

Was she either present at the scene of the accident which caused the death or involved in its immediate aftermath (both physical and temporal proximity being required)?

- Helpful analysis of authority
- Many “borderline” cases cited

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Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

Taylor v Somerset HA

- Failure to diagnose heart disease – months later fatal heart attack – wife attends hospital – told of death 20 mins later – CA No “event”

North Glamorgan NHS trust v Walters

- Clin neg causes son to suffer seizure and die 36 hrs later – parents present – CA allowed claim as “one long drawn out experience”

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Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

Galli-Atkinson v Seghal

- Fatac 7.05 pm – parents attend mortuary at 9.15pm – CA: allowed claim

W v Essex County Council

- Foster parents learn that fostered child abused their own children four weeks earlier – CA did not strike out

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Held:

“Proximity” required. This means both:

(a) Legal proximity "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question” and

(a) Physical proximity in time and space to an event

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Held:

There was one “event” (the accident) with two “consequences” (the original minor injuries and the subsequent death).

C would qualify had she witnessed the accident but as she did not her claim failed.

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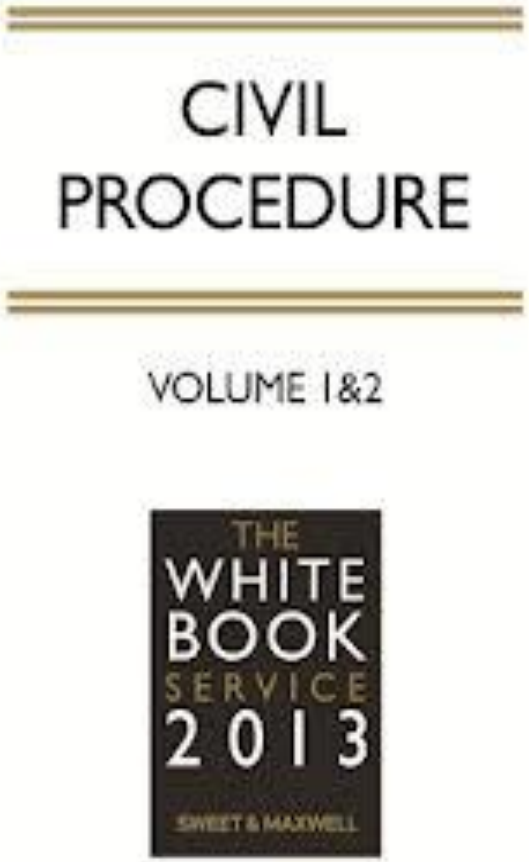
Wilson v MOD [23.04.13 CC Winchester]



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Wilson v MOD [23.04.13 CC Winchester]

- Asbestos (pleural thickening) claim by wife of MOD boiler maker
- Exposure via washing husband's clothes
- Liability admitted
- 04.02.11 C makes P36 quantum offer
- 17.02.11 D rejects offer
- D alleges claim Limitation Act statute barred
- 20.04.12 Limitation trial – C wins

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Wilson v MOD [23.04.13 CC Winchester]

- Case listed for assessment of damages on 06.11.12
- On 01.11.12 MOD purport to accept C's P36 offer
- C countered that offer could not be accepted without the Court's permission:
- 36.9(3) The court's permission is required to accept a P36 offer where:

  ... (c) the trial has started

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Wilson v MOD [23.04.13 CC Winchester]

HHJ Iain Hughes QC:

- "The trial has started" means the trial of any part (if severed as a preliminary issue) of the action
- Excludes applications for summary judgment or relief from sanctions
- Includes limitation issues, liability only trials
- Thereafter permission required for a P36 offer to be accepted

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And in other news:

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And in other news:

Chief Constable of Hampshire v Taylor

[2013] EWCA Civ 496

- Police pay £100k+ in costs defending a small cut to WPC's thumb
- claim over a failure to provide "thick gloves"
- Deconstruction of a cannabis factory
- PPE requirement triggered by a risk that was above de minimis level

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And in other news:

Jeffrey Jones v SoS for Energy and Another [2013] EWHC 1023

- Hugh James recover 4% interest on novel disbursement funding credit arrangement
- Phurnacite Workers Group Litigation
- Disbursements > £787k…

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And in other news:

Venulum Property Investments Ltd v Space Architecture Ltd [2013] EWHC 1242 (TCC)

- First reported post-Jackson relief from sanctions CPR 3.9 case
- Case struck out but deservedly so
- Much hype about this case but not of real significance?

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And in other news:

George Collins v SoS for business and Another [2013] EWHC 1117

- C found to have constructive knowledge (Adams v Bracknell [2004] UKHL 29)
- s.33 Limitation Act 1980 application to extend time
- Refused – one of reasons for refusing was disproportion between costs and damages

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And in other news:

Devon CC v TR [2013] EWCA Civ 418

- Car hits pothole and crashes - s.41 Highways Act 1980 claim - Inspection interval = 6 monthly
- Judge find D liable because Code of practice suggested inspection at monthly interval
- On appeal – Code of practice not binding – HA's can make their own judgments – C 50% contributorily negligent

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And in other news:

Williams v Williams [2013] EWCA Civ 455

- Mother places child in ill-fitting child seat contrary to manufacturer's warning – child injured in RTA – other driver to blame but contribution sought from mother
- First instance: 25% contribution based on Froom v Butcher [1976] QB 286
- On appeal: appeal dismissed

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And in other news:

Tagani v Cornwall CC and others [2013] All ER (D) 182 (Apr)

- Drunken woman falls off raised pathway in the dark
- First instance: D liable in Occupier's liability for failing to errect a barrier
- Appeal allowed: Judge failed to take into account s.2(3) the degree of care expected of an ordinary visitor

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And in other news:

Henry v News Group [2013] EWCA Civ 19

- First CA cost budgeting decision
- Despite the hype to the contrary C permitted to amend her cost budget

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And in other news:

Paramasivan v Wicks [2013] EWCA 262

- Child (13) runs out in front of car travelling at 25 at impact
- Judge finds driver should have seen group of boys and slowed to 15 mph
- CA: 15mph a counsel of perfection – danger of hindsight : Ahanonu v SE London and Kent Bus Co Ltd [2008] EWCA Civ 274
- If causation established then C 75% to blame

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