DEVELOPMENTS IN SUBSTANTIVE LAW AND CPR

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Graham v Commercial Bodyworks Limited [2015] EWCA Civ 47

Facts

The Claimant and his colleague (Mr. Wilkinson) worked in the Defendant's bodywork shop. Mr. Wilkinson sprayed the Claimant's overalls with an inflammable thinning agent and whilst standing nearby, lit a cigarette. Unfortunately, the Claimant's overalls caught fire and he suffered severe injuries as a result of Mr. Wilkinson's negligence. Mr. Wilkinson could not be located, but the Claimant sought to establish that the Defendant was vicariously liable for his acts.

Argument

The inquiry one must undertake is whether or not the conduct was:

"*so connected with acts which the defendants authorised that they may rightly be regarded as modes – though improper modes – of doing them*."[1]

The Claimant submitted that:

i. the Defendants had created (or materially enhanced) the risk of injury to their employees by requiring them to work with thinners, which were an inherently dangerous substance;

ii. they had vested a power or discretion in their employees as to how the thinner was to be used;

iii. they had recognised the danger by imposing contractual obligations to use thinners in a responsible manner;

iv. there was no suggestion of malice, and so the cases involving malice were distinguishable;

v. the risk of injury from the misuse of the thinner was inherent in the nature of the business;

[1] *Lister v Hesley Hall [2002] 1 A.C. at para 15 (per Lord Steyn).*

vi. in light of the above, the Claimant had satisfied the 'close connection' test.

Held

In order to make a finding of vicarious liability there must be a strong connection between the creation or enhancement of a risk and the wrong that accrues therefrom. In determining the sufficiency of connection the Court turned to the two Canadian authorities referred to in ***Lister***. In particular, the Court looked at McLachlin J's judgment in ***Bazley v Curry 174 DLR (4th) 45***. There are five factors that may be considered when asking whether there was a sufficiently close connection for a finding of vicarious liability. Those factors were:

a) the opportunity that the enterprise afforded the employee to abuse his or her power;

b) the extent to which the wrongful act may have furthered the employer's aims;

c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

d) the extent of power conferred on the employee in relation to the victim;

e) the vulnerability of potential victims to wrongful exercise of the employee's power.

The Defendant did create a risk by requiring employees to work with thinning agents. However, looking at the above factors, that risk was not sufficiently closely connected with Mr. Wilkinson's highly reckless act. Only factor (a) militated in favour of a finding of vicarious liability where as the other factors militated against such a finding.

Reaney v (1) University Hospital of North Staffordshire NHS Trust (2) Mid Staffordshire NHS Foundation Trust [2015] EWCA Civ 1119

Facts

In December 2008 the Claimant was diagnosed with transverse myelitis. She failed to recover, and became paralysed below the mid-thoracic level. Her condition was not caused by any negligence. The consequence was that she would need seven hours of care per week, which would then rise gradually to 35 hours per week after the age of 75.

However, during a period of extended hospitilisation she developed a number of deep pressure sores (grade 4) with consequent infection of the bone marrow, hip dislocation, contractures of the lower limbs and increased lower limb spasticity. As a result of the Defendant's negligence the reality was that the Claimant now needed care 24/7.

First Instance decision

Foskett J held that if a Defendant makes a Claimant's condition worse, then he must compensate him for the entirety of his worsened condition. He drew on the examples given in *Clerk and Lindsell on Torts (20th ed)*, where it was said that this would be the case where, for example, a Claimant with one eye was made totally blind by the Defendant's negligence, or a Claimant who was partially deaf was made entirely deaf. In this instance, the Defendant's negligence *had* made the condition materially and significantly worse and therefore the were liable to compensate for the entire care package.

Held

The conventional approach is that the Defendant is liable to compensate the Claimant only to the extent that the Claimant's needs have in fact been increased. That was the approach in *Steel v Joy [2004] EWCA Civ 576*. In that case D1's negligence accelerated the symptoms of spinal stenosis by 7 to 10 years. D2's negligence also would have accelerated the symptoms by 7 to 10 years, but caused a flare up for between 3 to 6 months as well. D2 was liable for the flare up only.

In short, if the Defendant has caused the Claimant to have 'more of the same' needs, then they were only liable to compensate for those *additional* needs. However, if the needs were now *qualitatively different* from the pre-existing needs then those should be compensated for in their entirety.

Qader and ors v Esure Services Ltd, HHJ Grant (Birmingham TCC) 15th October 2015

Facts

The Claimants were involved in a RTA on the 25th October 2013 (one being the driver and the other two being passengers). It was alleged that the Defendant driver was negligent in that she had driven into the back of their car. Conversely, the Defendant alleged that the Claimant driver braked deliberately, despite there being no traffic, and that al of the claims made were fraudulently. The Claimants expected to recover between £5,000 and £15,000 in total.

The case was allocated to the multi-track and listed for a CCMC. At the hearing it was held that CPR45.29A fixed costs applied (i.e. fixed costs to those matters that no longer continue under the RTA or EL/PL pre-action protocols).

The Claimant appealed on the basis that i) the Judge had failed to interpret CPR 45.29A in a 'purposive manner' and ii) that the Judge had failed to interpret it in light of the overriding objective.

Held:

The text of the rule is quite clear. It states that fixed costs will apply when a claim is started under the RTA protocol, but no longer continues under that protocol or the stage 3 procedure set out if Practice Direction 8B. Since the text as clear, there was no need or requirement to 'interpret' the rule.

That conclusion was strengthened by three further considerations:

a) the wording of the RTA protocol itself stated that it would apply where the small claims track would not be the normal track for the claim. It did *not* state that the protocol applies to claims proceeding on the fast track only.
b) CPR 3.12 (1) (c) expressly contemplates the existence of proceedings on the multi track *'where the proceedings are the subject of fixed costs.'*
c) The heading of table 6B within CPR 45 is *'fixed costs where a claim no longer continues under the RTA protocol.'* Again, there was no wording suggesting that they were exclusive to the fast track only.

As to the failure to interpret the rule in light of the overriding objective, as per above, the text is quite clear and therefore there was no need to interpret the rule. However, even were that not the case then there was nothing particular about a fraud RTA case that warranted it escaping from the fixed costs regime. Whilst the Claimants' probity would be explored and there would be consideration of *some* documents, the overall nature of the case could still be described as a low value personal injury claim arising out of a RTA.

DANIEL NEILL

***Flint v (1) Tittensor (2) MIB* [2015] EWHC 466 (QB)**

Facts

The Claimant suffered injuries after being thrown from the bonnet of the First Defendant's car. The Court found that following an altercation the Claimant had hit the bonnet of the First Defendant's car, causing a dent. The First Defendant had then driven at the Claimant, forcing him onto the bonnet of his car, before reversing and drove forwards again whilst shaking his wheel so as to throw the Claimant off. The Claimant sustained severe head injuries.

Argument

The First Defendant argued, inter alia, that:

vii. he had been acting in self-defence because he had had cause to believe that the Claimant possessed a knife; and

viii. the principle of *ex turpi causa non oritur actio* (illegality) applied because the Claimant had caused criminal damage to the car.

Held

In order to find that the First Defendant acted in self-defence the Court would have to find that:

i. he believed that it was necessary to defend himself to protect himself from injury;

ii. that belief was reasonably held; and

iii. his response was reasonable and proportionate in all the circumstances.

Here, the Court found all three limbs unproven. The Court rejected the First Defendant's evidence that he believed the Claimant to have a knife and held that the First Defendant could simply have driven away. Having found that the First Defendant was not in physical danger from the Claimant, it further held that it was not reasonable for him to believe that he needed to use force to defend himself. Finally, it held that by driving towards the Claimant the First Defendant escalated the conflict and acted neither reasonably nor proportionately.

On the question of *ex turpi causa*, the Court turned to the judgment of Lord Hoffmann in *Gray v Thames Trains Limited* [2009] 1 AC 1339. Lord Hoffmann framed the problem of the application of the principle in terms of causation, namely, in the distinction between (1) causing something and (2) providing the occasion for someone else to cause something; or, differently put, (1) although the damage would not have happened but for the tortious act of the defendant, it was caused by the criminal act of the claimant and (2) although the damage would not have happened but for the criminal act of the claimant, it was caused by the tortious act of the defendant. The Court first noted that the Claimant's criminal act provoked not just a tortious act but a criminal act by the First Defendant, mindful of the public policy implications of a general principle which denied claims where damage was caused by the criminal act of a defendant ('a contributor to anarchy'). It then observed that, having previously found that the First Defendant's response was neither reasonable nor proportionate and that it was different from what the Claimant might have foreseen, the First

Defendant's action broke the chain of causation necessary for the principle to apply. The First Defendant's tortious and criminal act was the cause of the damage.

***Hicks v Young* [2015] EWHC 466 (QB)**

Facts

The Claimant and his girlfriend hired a taxi and asked to be driven home. The Claimant's girlfriend left the taxi and he stood up to follow. At that point, the taxi drove off, with the sliding door open, towards taxi rank. The Claimant jumped out of the taxi about ¾ of a mile from home while it was travelling at a speed of about 20mph. The Claimant suffered a severe brain injury and brought a claim in negligence and for false imprisonment against the Defendant.

Argument

The Defendant argued:

i. that he drove off as he did because he believed that the Claimant and his girlfriend were going to leave without paying. Hence he relied on the principle of *ex turpi causa*;

ii. that he couldn't have foreseen that the Claimant would jump out of the taxi whilst it was travelling at high speed and sustain catastrophic injuries as a result; and

iii. that the Claimant's action in jumping out of the taxi constituted a *novus actus interveniens* (i.e., it broke the chain of causation).

Held

The Court first had to deal with the issue of breach. It held that the action of driving off while the Claimant was standing up and the door was open constituted a breach by the Defendant because he was not driving with reasonable care. However, that breach didn't cause the Claimant's injury. (At that point, the Claimant sat down.) It further held, however, that the action of driving the taxi at all whilst the Claimant was detained in it and the Defendant knew that he wanted to get out constituted a breach by the Defendant. Furthermore, that breach did cause the Claimant's injury. (As a result, the Claimant jumped out.)

Regarding foreseeability, the Court held that it was foreseeable that the Claimant would try to leave the taxi whilst it was moving and sustain an injury as a result but it was less foreseeable that he would misjudge the risk and jump out whilst the taxi was moving at high speed and sustain catastrophic injuries as a result. The former was the test, the latter was irrelevant. What was required was foresight of the kind of damage that occurred (personal injury) not foresight of the mechanism by which the damage occurred.

Regarding causation, the Court held that the Claimant's action in jumping from the moving taxi was insufficiently unreasonable as to constitute a *novus actus interveniens* but sufficiently so as to warrant a finding of contributory negligence. If he had jumped from the moving taxi in order to avoid paying then that might constitute a *novus actus interveniens* (as per *Beaumont v Ferrer* [2014] EWHC 2398 (QB) (and, of course, give rise to the defence of *ex turpi causa*) because it would amount to criminal misconduct. In fact, the Claimant's conduct was merely careless. In assessing the amount of the reduction for contributory negligence, the Court held that the causative potency of the Claimant's action was considerable and reduced his damages (in negligence) by 50%.

SOPHIE HOLME

Sobolewska v Threlfall [2014] EWHC 4219 (QB)

Facts

It was a frosty, dark, February evening around 8pm. The Claimant's case was that she had sustained a left ankle injury and a severe head injury causing aphasia and other cognitive deficits when she was struck by the Defendant's vehicle in a car park just after it pulled off. It was accepted that the Defendant must therefore have been travelling extremely slowly at the time of the accident.

The brain injury the Claimant sustained meant that she had no recollection of what occurred and she gave no evidence at the hearing.

The Defendant was uncertain about what occurred, including whether his car struck the Claimant at all. The Defendant's vehicle displayed no evidence of any collision having occurred. The Defendant had raised the alarm at the time having spotted the Claimant lying on the ground, but did not know how she came to be there.

Argument

Pre-trial, the Defendant's case was that both the ankle and head injuries were probably caused at some point by an assault before the Claimant's arrival in the car park. This having been a possibility considered, but discounted, during the police investigation of events. This position had to be partially abandoned during the course of the trial as more marked scuffing on the Claimant's left shoe than her right was conceded to make it probable her left foot had

been run over. However, the Defendant continued to maintain that the head injury could not have resulted from this accident.

The Defendant supported the view that such a low velocity collision could not have caused as severe an injury with expert evidence from a Consultant Neurosurgeon, MacFarlane, who gave evidence that he could understand that sufficient energy would have been imparted if the car had been travelling at 20mph, but not for a vehicle that was "barely setting off", that the impact would have been higher had she fallen sideways as alleged and that a linear fracture would have been expected in that area of the head as it is relatively flat as opposed.

In relation to contributory negligence, the Defendant argued that the Claimant would have been able to see the vehicle's lights and should have taken steps to avoid such a slow moving vehicle.

Held

The court rejected as "highly improbable" any scenario in which the head injury was caused other than by a fall following collision with the Defendant's car.

The court drew on the principles elucidated in *Drake v Harbour [2008] EWCA Civ 25* that:

"In the absence of any positive evidence of breach of duty, merely to show that a Claimant's loss was consistent with breach of duty by the Defendant would not prove breach of duty if it would also be consistent with a credible non-negligent explanation. But where a Claimant proves both that a Defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the Claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense. The court must also consider any alternative theories of causation advanced by the Defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the Defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence."

What common sense involves is a detailed examination of what evidence was available and the reasonable inferences that might be drawn from this. What made the Defendant's 'assault' theory highly improbable was:

- Claimant left work at 20:00 and it takes around 9 minutes to walk to the car park concerned and an ambulance was called at 20.11 evidence that following head injury C would not have been able to get to her feet immediately;

- D's evidence he noticed a shadow which appeared and disappeared to his left when pulling off;
- No witnesses to any assault; no associated theft as the Claimant's rucksack was still in her possession

The probable scenario was that all injuries had been caused as a result of the collision, the only alternative being highly improbable.

The court accepted the Claimant's expert orthopaedic and neurological evidence that the Claimant's foot was likely to have rotated to cause the type of ankle fractures she had and had become entrapped causing her body to rotate and spin onto her side forcefully with the type of injury sustained at the extreme end of a broad spectrum of injuries that could be caused from an stumble where an individual does not protect their fall.

Breach of duty by the Defendant was established on the basis that:

- Evidence to the police at the time suggested the Defendant had not looked left before moving off;
- The Defendant would have turned immediately left to the car park exit when moving off and therefore it was incumbent upon him to look in that direction.
- The Claimant would have been near the vehicle at the point it moved off and would have been there to be seen to his left had he looked carefully enough.

Again, a detailed piecing together of evidence, but one which demonstrates that a lack of definitive liability evidence need not be fatal to a claim.

Contributory negligence was not found based on a similar approach:

- no evidence of earphones, mobile phone or other distraction;
- The Claimant would not have been to the side of the vehicle, not in the direct line of view of the car's front or rear lights as it moved off.

Dunnage v (1) Randall; (2) UK Insurance Ltd [2015] EWCA Civ 673

Facts

The Claimant tried and failed to stop his paranoid schizophrenic uncle from self-immolating with petrol with the Claimant sustaining substantial burns to his face and body as a result of the incident in which the uncle sadly died.

Argument and First Instance Decision

The claim was brought against the estate of the uncle and the household insurer who provided cover for accidental bodily injury.

The Claimant's case was that the uncle despite incapacity owed him a duty of care and mental illness was no bar to recovery of damages; but as against the insurer that the harm was not intended and was a consequence of the uncle's unsound mind such that it constituted accidental bodily injury which the insurer was bound to indemnify.

The experts before the court at first instance agreed that the delusional state would have been so overwhelming as to render the uncle incapable of formulating any rational alternative action and that the Claimant had not been in control of his actions.

The judge at first instance held that no-one is subject to a duty of reasonable care in respect of acts he could not, or could not reasonably be expected to, control unless the situation involved prior actionable voluntary behaviour, for example decided to drive when aware of the risk presented by illness.

He therefore found no duty of care was owed as the uncle had not been acting voluntarily at the time of the incident.

However, he ruled in favour of the Claimant as against the insurer finding that the exclusion for liability arising from any wilful or malicious acts by you or your family could not apply since the acts were neither wilful nor malicious.

Held on Appeal

The objective standard of care of the reasonable person reflects the policy of the law. Where it cannot be established that responsibility is entirely eliminated – sleepwalking or heart attack at the wheel – any residual level of awareness required an individual to meet the objective standard of care.

As a matter of policy, everyone should owe the same duty of care for the protection of innocent victims.

It acknowledged that there will be difficult cases, such as this one where a person does not know what action to take to avoid injury to others. However, 'his liability is no doubt treated in law as the price for being able to move freely within society despite his schizophrenia'. Thus, duty and its breach were held established despite a lack of wilful control over his actions.

In this case, the Defendant's estate were in the fortunate position in that the insurer was also held liable to provide indemnity since the acts were neither 'wilful' or 'malicious' and therefore fell within the definition of 'accidental bodily injury' for which cover had been agreed.

MARTIN LANCHESTER

ABD v West Heath 2000 Ltd and William Whillock 2015 [EWHC] 2687 QB

Facts

The Claimant was a troubled child with difficult family history and significant neurological symptoms arising out of treatment for epilepsy. As a pupil aged 11-16 the Claimant formed a close attachment to the Mr Whillock, the Second Defendant, 39 years her senior who was Vice Principle at the First Defendant's school.

Texts and photographs were later discovered on the Claimant's phone that showed the Second Defendant had been actively encouraging the Claimant to send indecent images of herself to him. Subsequently he pleaded guilty to four counts of possessing indecent images.

The Claimant was fond of the Second Defendant, and initially did not support any action against him. However she suffered an extreme reaction to the discovery of the texts and pictures which lead to her suffering an anxiety disorder and commenced a claim against the First and Second Defendant's alleging physical sexual assaults including rape.

The Second Defendant denied all misconduct save for the possession of texts and photographs and denied any sexual interest in the Claimant.

Held

That the extent of the sexual abuse included physical abuse of the Claimant but not rape and that the Second Defendant groomed the Claimant such that she was prepared to take indecent images of herself to send to him. The Claimant's injury was caused by the discovery of the texts and images rather than the taking of the images themselves.

The Judge, although finding physical abuse took place, was also of the opinion that even if the Defendant had not physically touched the Claimant he would have still be liable under the principle in *Wilkinson v Downton*[2] as refined in the recent Supreme Court case of *Rhodes v OPO [2015]*[3] for the tort of intentional infliction of harm.

In terms of conduct, the Defendant acted unjustifiably by emotionally manipulating the Claimant to send him images of herself. Importantly the court found that the mental element was satisfied as the Second Defendant must have intended to cause the Claimant harm and distress as the consequences of his actions. This was on the basis that it was so obvious that

[2] [1897] EWHC 1 (QB)
[3] *UKSC 32*

she would be harmed by his conduct that his actions could not realistically be said to be unintended. The court found that an illicit relationship with such a vulnerable girl by man in authority 39 years her senior could only have been intended to cause her harm. The consequence of the Second Defendant's actions was the psychiatric injury to the Claimant.

This is the first case relating to grooming and images where the court has been prepared to look at the tortious harm caused by non - physical sexual abuse which causes psychiatric injury.

Neumann v Camel (2015) QBD Jay J 29/10/15

Facts

The Claimant was injured in a road traffic accident caused by the Defendant's admitted negligence. The Claimant sought at a Case Management Hearing to rely upon expert evidence on accommodation (an architect) in support of her claim for the costs of moving to a single storey house which would allow wheelchair access. However the Claimant's medical records showed that she had applied to move to a ground floor flat previously because of her pre-existing medical condition. The Master refused the Claimant's application as he could not see any real likelihood of accommodation needs arising as a result of the accident.

The Appeal

The Defendant argued that the case management decisions should only be overturned if plainly wrong and that the decision was well within his discretion.

Held

Jay J allowed the appeal as the Claimant's case was complex and had unusual features such that it was impossible to reach conclusions about medical evidence which had not yet been tested. The court could only reach preliminary views and impressions and the Claimant's case depended on the court's assessment of the credibility and reliability of her evidence which had not been tested. The Master was wrong to apply a sort of CPR pt 24 summary judgment test. There might be circumstances under Part 35 that expert evidence was not required because a claim had no prospect of success but they were rare. In this case the court could not conclude on the evidence that the accommodation claim had no real prospect of success and it was not so weak that the claimant should be closed out of a court on that issue at an interlocutory stage. Only on rare occasion could such a debarring exercise be appropriately applied.

Mark Davies v ASDA Stores Ltd (2015) unreported

Facts

The claim arose out of a standard portal RTA. Liability was in dispute and the Defendant repeatedly failed to comply with requests for pre-action disclosure. The Claimant made an application for pre-action disclosure without an oral hearing seeking the costs for making the application which were calculated on the standard basis. The Defendant sought an oral hearing where it unsuccessfully argued that applications for pre-action disclosure were 'interim applications' and fell within the fixed costs provisions of CPR 45.29H which limited the costs to £125. Leave to appeal was granted.

Argument

The Claimant argued that the 'interim applications' are not defined within the rules, other 'interim remedies' such as freezing orders could not have been intended to be included in the fixed cost provisions and such limited costs offered no deterrent to Defendants and could not have been anticipated to apply to this type of application.

Held

On appeal HHJ Denyer QC at Bristol overturned the previous decision. He accepted that the terms of Part 45 were intended to restrict costs in cases that fell outside the portal and that the interpretation of the words were clear. The costs of the application were limited to £250.

The Judge indicated his own view that the case raised an important point of principle but in the event the Claimant did not seek to appeal