



Bond Pearce

Insurance briefing - Casualty Risks

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Introduction

Welcome to our regular review of significant liability cases and other legal developments.

The Court of Appeal confirmed that the duty of care is not restricted to the classic employer/employee situation when it decided that the management of a nightclub owed a duty to protect their guests from the actions of other guests.

Recently the Court of Appeal has been looking at the thorny issue of when the social utility of sporting or leisure activities outweighs the risk involved, but arguably has increased the uncertainty in performing the balancing exercise between benefit and risk.

And in a case which brought welcome news for local authorities, the Court of Appeal made it clear that highway authorities are not required to keep the roads clear of any build up of material other than snow or ice.

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Duty of nightclub management to protect guests from the actions of a third party

Everett and another v Comojo (UK) Ltd [2011] EWCA Civ 13

The issue: Is there a duty of care on nightclub management to protect their guests from violence from other guests?

The facts: D owned a nightclub which was open to hotel residents, members and their guests. C were guests at the nightclub. One of the group they were with touched a waitress on the bottom. She did not complain, but another member, B, took offence on her behalf and told her those responsible would apologise. B's driver, who was clearly a bodybuilder, later joined B at the club. The waitress thought the driver looked 'scary' and was worried there might be a confrontation, so she went to speak to the bar manager. Whilst she was talking to him, the driver stabbed C, wounding both men severely. C sued D, arguing that D owed its guests a duty to take reasonable steps to protect them from dangers from third parties which were reasonably foreseeable. In particular C argued that the waitress should have spoken directly to a door supervisor rather than the manager.

The decision: The Court of Appeal applied the three stage test in *Caparo Industries plc v Dickman* (1990) and decided that:

- the relationship between club management and guest was of sufficient proximity to justify a duty of care
- it was foreseeable that there was a risk one guest might assault another
- and it was fair, just and reasonable to impose a duty provided the standard of care imposed was also fair, just and reasonable.

But in all the circumstances of this case, the waitress had not been in breach of duty. She had realised that there was a risk of confrontation, but had no reason to think the situation was urgent, as the bottom-touching incident had occurred several hours ago and B had no history of violence. She could not have been criticised if she had done nothing, so there were no grounds to criticise her for telling the manager and letting him decide what to do, rather than reporting the matter immediately to the door supervisor.

Comment: Lady Justice Smith found that there was a duty on nightclub management in respect of the actions of third parties, but stressed that

the standard of care imposed or scope of the duty must also be fair, just and reasonable. So the steps which the management must take to comply with their duty will depend on the type of establishment. In a dodgy club with a history of violence, liability might well attach if bouncers are not on hand to control the outbreak. If guests often try to bring in weapons, it might be necessary to search everyone on entry. But in a respectable members' only club where violence is virtually unheard of, the only duty on management may be to ensure that staff are trained to look out for any sign of trouble and alert security staff.

Social benefits of scouting activities do not always justify the risk

Scout Association v Barnes [2010] EWCA Civ 1476

The issue: Whether conduct by adult supervisors of children's games and sporting activities amounted to negligent conduct or the taking of an acceptable risk?

The facts: A boy scout was injured at a scout meeting whilst playing a game organised by the scout leader called "objects in the dark", which involved running into the middle of the room in the dark to pick up a block from the floor where there was one less block than there were players. At first instance the judge held that playing the game in the dark introduced an unacceptable level of risk. The Scout Association appealed on the basis that any risk should be balanced against the well-established principle that the social value of the activity had to be taken into account (*Tomlinson v Congleton BC* (2003) UKHL 47).

The decision: The appeal was dismissed. It could not be said that the boy would have suffered the same injuries if the game had not been played in the dark. Even when *Tomlinson* was applied it did not mean that every scouting activity was acceptable regardless of risk.

Comment: Following this case, whether or not the degree of risk in an activity is acceptable compared to its social value will be a question of fact, degree and judgment which must be decided on the individual circumstances of the case, not on a broadbrush approach. *Barnes* seems to indicate a shift in the judicial attitude towards recreational activities. It now appears that organisers will need to demonstrate not just that an activity was "fun", but that it had some educational or social value.

Employer's reliance on a contractor's risk assessment

Uren v (1) Corporate Leisure (UK) Ltd (2) Ministry of Defence [2011] EWCA Civ 66

The issue: Was an employer entitled to rely on a contractor's risk assessment?

The facts: C was a senior aircraftman in the RAF. He took part in a fun day on an RAF base. The first defendant (D1) was an events company which had supplied the equipment and personnel to supervise a series of games. C took part in a team event which involved retrieving objects from an inflatable pool filled with water to a depth of about 18 inches. C dived into the pool headfirst and broke his neck. D1 had not instructed participants not to go into the pool headfirst.

The trial judge found that the risk assessments were inadequate and the MOD could not delegate risk assessment to D1. However he went on to find that the game was reasonably safe even when participants entered the pool headfirst. The small risk of injury was outweighed by the social benefits of the game. Both parties appealed.

The decision: The judge's conclusions on the degree of risk were unsound, because he had not carried out sufficient analysis of the expert and eye witness evidence, so this issue was remitted for retrial.

The duty to undertake a risk assessment was non-delegable. But if an employer used a contractor for some activity and satisfied himself that the contractor had carried out a thorough risk assessment, that might lead to the conclusion that the risk assessment was suitable and sufficient even if it was not as detailed as would otherwise be required. That would be a question of fact in each case. In this case it was clear that D1 had not carried out a suitable or sufficient risk assessment so the MOD could not properly rely on it.

Comment: The point that is demonstrated by this case is that even though an employer's duty to carry out risk assessments is non-delegable, the employer may be entitled to rely on a contractor's risk assessment provided the employer has satisfied himself that the risk assessment is sufficient.

Although the Court of Appeal remitted for retrial the task of balancing the risk of injury against the social benefit of the game, Lady Justice Smith did express her personal view that she would not have assessed the social value of this game in quite such

glowing terms as did the judge. Admittedly this game did involve retrieving plastic fruit from a pool, but it can be taken as another indication that the organisers of leisure activities involving a risk of more than minor injury may struggle to persuade judges of the educational or social value of their games.

Duty to keep highway free from dirt and gravel?

Valentine v Transport for London and London Borough of Hounslow [2010] EWCA Civ 1358

The issue: Does section 41 Highways Act 1980 place a duty on highway authorities to keep the highway free from dirt and gravel?

Section 41: provides that highway authorities are under a duty to maintain highways which are maintainable at public expense. This is an absolute duty.

The facts: C's husband died when his motorbike skidded on grit on a sliver of tarmac at the edge of the highway. C's case against TfL was that s41 placed a burden on them to keep the highway free from any build up of dirt or gravel. Crucially, they did not argue that the grit was there because of any break-up of the fabric of the road. C also brought a claim against LBH which was the cleansing authority (with responsibility for keeping the road surface clean) for its failure to carry out the cleansing operation properly.

TfL's case was that s41 did not include a duty to keep the carriageway free from transient or surface debris. They relied on the House of Lords decision in *Goodes v East Sussex County Council* (the famous snow and ice case), in which Hughes LJ stated that s41 did not include a duty to remove material from the surface of the road, even if it created a danger.

The trial judge granted both defendants summary judgment. C appealed.

The decision: The Court of Appeal held that the build up of dirt or gravel on the road did not constitute a failure to maintain the fabric of the highway. Hughes LJ reminded the court that s41 gives rise to an absolute duty in public law, and as such, highway authorities would be in breach of their public duty if there was any build up of any substance on the surface of the highway. In this age of austerity, he thought that was a decision for

parliament, and not an area of law that should be developed by caselaw. This was what happened in the Goodes case, where the law was in fact changed to include a duty on highway authorities to clear snow and ice, but snow and ice only and not other materials.

So the claim against TfL was dismissed, but the claim against LBH was allowed to proceed, because C could advance a case that the manner in which the carriageway had been swept created a trap, in that there had been a positive negligent act which left the road in a more dangerous state than it would have been if they had done nothing.

Comment: This case makes it clear that highway authorities are not required to keep the roads clear of any build up of material other than snow or ice. However one of the critical points to note about this case is that the surface debris was not caused by a breakdown in the surface of the road. If the grit had come from potholes, the outcome would have been different.

Another point to note is that the case does not just apply to grit and debris – it would equally apply to water on the surface of the road. If that water is the result of poorly maintained drains, the highway authority would be liable. However the drains had been properly maintained, then there would be no breach of section 41.

This case is good news for local authorities. If it had succeeded, it would have had a huge impact on their budgets. Clearly that was not a step that the Court of Appeal were willing to take, leaving it up to parliament if they want to extend the current law.

If you would like further information please contact Nathan Peacey or Lea Brocklebank.



Nathan Peacey
Partner
T: 0845 415 6653
E: nathan.peacey@
bondpearce.com



Lea Brocklebank
Partner
T: 0845 415 88130
E: lea.brocklebank@
bondpearce.com

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