

HIGHWAYS - LIABILITY FOR VERGE

Sarah Russell v West Sussex County Council - 2010 (CA)

The claimant was driving her car along a rural "A" road on a frosty morning when she lost control and collided with a tree, sustaining serious injuries. The road had a drop from the edge of the carriageway down onto the verge which at the point of the accident was about six inches. The sequence of events was that the claimant's car skidded on the frosty road so that the nearside wheels went off the road surface and onto the left hand verge. She turned the wheel violently to the right and succeeded in getting the nearside wheels back onto the road, but then had to turn the wheel hard to the left to regain her side of the road. Due to her speed this was a difficult manoeuvre and she overcompensated so that the car went off the road, across the verge on the left hand side and collided with the tree. The highway authority had resurfaced the road some two and a half years earlier and, at the same time, had raised the height of the verge with topsoil to the same level as the road but this had sunk due to vehicles driving over or parking on the verge. As well as a central white line the road also had white lines down each side of the road indicating that drivers should stay within those markings. At first instance the judge held that the verge was part of the highway and in the light of the experts' opinions that the drop-off was "a significant hazard" or a "potential hazard" the defendant was liable under Section 41 of the Highways Act 1980 and there was no Section 51 defence. Although the claimant had only been travelling at 45mph which was well within the 60mph speed limit, the court found that it was still too fast for the road conditions at the time and decided that she had negligently contributed to the accident to the extent of 50%.

In the Court of Appeal the Council argued that it was inevitable that the topsoil in verges would sink, that the drop-off was only a danger to those travelling too fast and that the section 41 duty should not be set so high that it required the verge to be maintained at a height which enabled a car to regain the road surface having dropped onto the verge. The appeal was dismissed on the basis that the road was in a dangerous state of disrepair due to the drop-off and the highways inspectors had failed to identify the hazard so a Section 58 defence was not available. The 50% contributory negligence finding was also upheld.

Comment

This decision may come as a surprise to many highway authorities and insurers who consider the duty to maintain to be restricted to the condition of the road surface and to repairing the structure of the highway if it is out of repair. The Court of Appeal did not accept the argument that the verge was only dangerous to a driver who had already lost control and, of course, there can be many other hazards beyond the boundary of a clearly designated highway.

PSYCHIATRIC INJURY - CAUSATION

Diana Smith v Youth Justice Board for England & Wales - 2010 (CA)

The claimant was a training assistant at an institution for children serving custodial sentences. She was one of three officers who had forcibly restrained a 15 year old boy using the seated double embrace (SDE) procedure following a disciplinary incident. Tragically the boy died as a result of inhaling vomit and suffocation during the procedure. The death had such an impact on the claimant that she was unable to continue her employment and she brought proceedings against her employer on the grounds that they had authorised the continued use of a dangerous system of restraint. The judge at first instance found that there had been a breach of duty in failing to keep the procedure under review but the claim failed on causation grounds as the judge considered it unlikely that the procedure would have been abandoned before the date of the incident.

The Court of Appeal accepted that the procedure should have been reviewed and withdrawn before the incident but dismissed the claim because the three officers, including the claimant, did not implement the procedure correctly. The boy was a small 15 year old and had shaken his fist at an adult male officer who was much larger than him. The use of the procedure by three officers was unnecessary and also excessive in that they continued to restrain the boy despite clear signs of distress which they either misread or ignored. This action constituted an assault on the boy in which the claimant had taken part. In those circumstances the test was whether the claimant's own actions in bringing about the harm for which she sought damages had displaced any prior fault on the part of the defendant. There were other perfectly safe ways of restraining the boy and the claimant's role in the incident was not a form of contributory negligence but an intervening cause

sufficient to break the chain of causation. Effectively, the Court of Appeal placed responsibility for the death on the claimant and her colleagues and, therefore, it would be unjust if she were able to recover damages for its effect on her.

PREVENTION OF ACCESS TO ELECTRICITY SUBSTATION

Mann v Northern Electric Distribution Ltd - 2010 (CA)

The 15 year old claimant had climbed into an electricity substation where he had sustained a severe electric shock resulting in serious injuries. He claimed that the defendant was in breach of Section 20 of the Electricity Supply Regulations 1988 which required the substation to have a fence not less than 2.4 metres high to prevent, in so far as was reasonably practicable, danger or unauthorised access. The substation actually had a 4 metre high wall but at one point there was a brick buttress and next to it, at an angle of ninety degrees to the wall, some steel railings about two metres high topped with a cross-bar. The claimant had climbed on top of the cross-bar from where he had used a makeshift assembly of pieces of wood in order to reach the brick buttress. From there he had jumped over a rotating anti-climb device (RACD) on top of the wall and gained access to the inside of the substation via the control room roof.

The claimant argued that the defendant had not taken all reasonably practicable steps to prevent access to the substation. Additional RACDs could have been fitted to all sides of the buttress which would have prevented access and they had failed to remove pieces of wooden debris that could be used as a makeshift ladder. The defendant argued that the regulations did not require additional precautions to be taken to the erection of the wall or fence. The Court of Appeal agreed that the judge was right to enquire into the reasonably practicable steps that the claimant argued should have been taken to prevent access and also agreed that entry into the site by the means adopted by the claimant was unforeseeable so that the defendant was not in breach of the regulations. Both the claim and the Appeal were, therefore, dismissed. No amount of security measures would keep out a sufficiently determined trespasser and it was not reasonably practicable for the defendant to take further precautions to prevent entry even in the context of the surrounding features.

CONTRIBUTORY NEGLIGENCE - SEAT BELT

Stanton v Collinson - 2010 (CA)

The claimant was a front seat passenger in the deceased defendant's car and at the time of the accident the court found that there had been a female passenger sitting on his lap. The defence counsel had argued that the claimant had been sitting on the female's lap. The claimant had sustained a serious brain injury and had injured his right hand in the accident. Liability for the accident was not in dispute but it was argued on behalf of the defence that the court should depart from the rule in *Froom v Butcher* 1976 and discount the claimant's damages by up to 50% where the injuries would have been completely avoided by the wearing of a seat belt and by up to one third where those injuries would have been substantially reduced. Furthermore, the fact that the claimant had decided to share the front passenger seat and had encouraged the driver to travel at an excessive speed, were aggravating factors in this case that should increase the amount of contributory negligence from one third to 40%.

The judge found that *Froom v Butcher* was still good law, that the defence had failed to prove the alleged encouragement to drive at an excessive speed and had not adduced medical evidence to prove that there would have been a significantly different outcome had the claimant worn a seat belt. Bizarrely the judge also found that the claimant had not exercised a deliberate choice not to wear a seat belt but had gone along with the situation presented to him. Consequently he was entitled to full damages without any deduction.

The Court of Appeal upheld the judge's decision. She had heard all of the evidence and was in the best position to decide whether it had been proved that the wearing of a seat belt would have reduced the head injury "to a considerable extent". The judge had heard the evidence of the two engineering experts on the subject and that evidence was admissible. Indeed, the experts did have useful experience which enabled them to express an informed opinion but, in the absence of any medical evidence, she was unable to tell from that the extent to which the injuries would have been reduced. It followed that the requirement in *Froom v Butcher* that the injury had been reduced by a considerable extent had not been proved. The court also commented that there was a powerful public interest in avoiding enquiry into fine degrees of contributory negligence so that the vast majority of cases could be settled according to a well understood formula.

Comment

There have been a number of recent challenges by defendants to the discounts for contributory negligence that can be obtained where the claimant's injuries would have been completely avoided or considerably reduced by wearing a seat belt. The courts seem determined to maintain the rule in Froom v Butcher, even though that case was decided before the wearing of seat belts became compulsory, and all of these challenges have failed.

PART 36 OFFERS

Pankhurst v White and Motor Insurers' Bureau - 2010 (EWHC)

The claimant suffered catastrophic injuries in a road traffic accident with an uninsured driver and claimed compensation against the MIB. In 2006, before the liability trial, the claimant made a Part 36 offer of £3.4 million which was rejected. The claimant succeeded at the liability trial and just before the quantum trial in 2008 the MIB made a Part 36 offer of £6.8 million which was rejected by the claimant. The claimant was awarded £6.1 million and it was agreed that the MIB was entitled to its costs from the date its offer expired. The claimant argued that he was entitled to enhanced interest on his damages and indemnity costs between the date his offer was rejected and date of the MIB's offer. During that period the Part 36 rule had changed and the offer was no longer available for acceptance. However, the court had to give some credit for the fact that the claimant's offer had been made but had been rejected by the defendant, and for the fact that the defendant could have made a Part 36 offer of its own after the liability trial. In the circumstances, and taking account of the new Part 36 rules, the court awarded the claimant enhanced interest on his past losses at a rate of 10% (from 6%) and on general damages of 4% (from 2%). He was also awarded his costs for the period between the two offers on an indemnity basis but without any enhanced interest.

Part 36.9 now covers this situation and states 1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror. 2) Subject to rule 36.9(3), a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree.

Comment

This rule means that Part 36 offers must be kept under constant review and should be withdrawn if the circumstances of the case improve so that the offeror no longer wants the offer to be accepted. Obviously this should be done before the other party accepts the offer!

COSTS ASSESSMENT

O'Beirne v Hudson - 2010 (CA)

The claimant issued proceedings claiming more than £1000 in respect of general damages. Prior to allocation settlement was agreed at £400 for general damages plus car hire at £719.06. The settlement was recorded in a Consent Order which provided for the defendant to pay the claimant's reasonable costs on the standard basis, subject to detailed assessment if not agreed. The judge reversed the costs judge's decision that costs could not be assessed on the basis of a fixed costs regime and the claimant appealed, arguing that the wording of the Order clearly contemplated payment of the lawyer's reasonable costs and that must have precluded their assessment on a Small Claims track fixed costs basis. The Court of Appeal agreed that the costs would be assessed on the standard basis and not as fixed costs but in assessing the costs that had been reasonably incurred it was relevant for the costs judge to take into account whether it was reasonable for the paying party to pay more than they would have done had the case been allocated to the small claims track.

ASBESTOS - PLEURAL PLAQUES

Government Statement

The Government has made a statement that it will not legislate to overturn the House of Lords' decision in *Johnston v NEI International Combustion Ltd 2007* which ruled that symptomless pleural plaques were not a physical injury that was actionable, even when accompanied by anxiety and the risk of future serious disease. Neither will it set up an open-ended compensation scheme but it will pay £5000 from Government funds to all those claimants who had brought a claim for pleural plaques by the date of the House of Lords' judgement in October 2007. A working group will be established to look into ways of speeding up compensation in cases of mesothelioma and other serious asbestos related disease claims. The Government will also consider changing the law to make the amount of damages payable after death equal to those payable whilst the claimant is still alive and also to make the limitation period for bringing a claim start from the date the claimant first knows he has mesothelioma rather than from the date he first knew he had been exposed to asbestos.

The Government intends to set up an Employers' Liability Tracing Office to manage an electronic database of EL policies which will be populated with existing tracing data but also, from an unspecified date, with all new and renewed EL policy information. It also intends to set up an Employers' Liability Insurance Bureau which will be a fund of last resort for claimants who are unable to trace their former employers' insurance company. A DWP consultation has been set up to discuss how this would work, how it would be funded and the types of claims that should be included amongst other issues.

List of abbreviations used:

CA	Court of Appeal
CC	County Court
Ch D	Chancery Division of the High Court
ECJ	European Court of Justice
HL	House of Lords
MOJ	Ministry of Justice
QBD	Queen's Bench Division of the High Court
SC	Supreme Court
SCCO	Supreme Court Costs Office
TCC	Technology and Construction Court

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