

CLAIMS AND MORE CLAIMS: WHAT THE COURT BROUGHT US IN 2011

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7 September 2011

These notes are derived from a talk by Ed Stanely of Elborne Mitchell LLP, given at Lloyd's Old Library on Wednesday 7th September 2011.

Where specific reference is made to the law it is to English law as at 7 September 2011.

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Claims and more claims: What the Court brought us in 2011

Compensation culture is something that keeps on growing, as we are constantly reminded by our tabloid press.

Egged on by the fee hungry lawyers at Recoveries –R-Us LLP and assisted by the well-intentioned but naive Mr Justice Bonkers, those claimants keep on coming. It is of course symptomatic of a general collapse in the fabric of society along with its related cousins – Broken Britain, looting 12 year olds, ‘elf and safety gone mad, rap music, phone hacking and so on and so forth.

But is this borne out by recent Court decisions?

I am going to talk about 9 recent decisions; not all of them will make the textbooks but they are illustrative of some basic principles that might be forgotten and maybe put some perspective on where things are presently going.

I will start with three cases on Occupier’s Liability in the last 2 months that all involve the highly emotive issue of serious injury to young people - and which severely tested the desire of any Judge to right a wrong.

Occupiers Liability

Section 2 Occupiers’ Liability Act 1957

*“(1) An occupier of premises owes the same duty, the “common duty of care” to all his visitors ...
(2) the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there”*

There is no obligation to ensure the safety of visitors under the Act or under the general common law of tort. The issue is generally - has the Defendant exercised such care as was reasonable in the circumstances?

Where D is an institution, this often involves an inquiry into D’s risk assessment systems.

The real question is always “where do you draw the line to prevent a tragedy”

Bowen v The National Trust

A school party went on a nature trail in the Great Wood at Felbrigg Hall in Suffolk. It began to rain and the group sheltered under the canopy of a large beech tree (*fagus silvaticus*, probably 180 – 200 years old). Without any warning, a large branch of the tree weighing 2 tons fell, killing one child and severely injuring three others.

The NT employed one full time tree inspector and a volunteer, who were sent on training courses and given risk assessment guidelines prepared by the NT’s head of forestry.

C alleged:

(1) the fallen branch showed symptoms of Adaptive Growth (AG), a biomechanical response by a tree to load stress on a branch which exaggerates the growth process and makes it more prone to collapse, which NT's inspectors had negligently failed to spot. The standard of care in any professional context is – the standard of an ordinary skilled person professing to have the skill in question; *Bolam v Friern Hospital 1957* (hence, the *Bolam* test). D is not acting negligently if he acts in accordance with a practice regarded as proper by a reasonable body of opinion in a particular field.

(2) NT's risk assessment procedures were inadequate. NT's head of forestry issued a 4 page guide which came into some criticism from C's counsel. It set out three risk zones (high, medium and low risk) so as to concentrate resources on where there was most potential risk to people and property. The accident happened in a medium risk area i.e. "*footpaths bridleways etc in regular but not intensive public use, quieter areas of parks*".

The area itself had only been upgraded to "medium risk" following the collapse of a branch in high winds 2 years before and it was known that school groups occasionally used the path nearby. The evidence was that on average, 14 people per day would use the path.

The evidence was that the Inspector had inspected the tree twice in the last 3 years (there are 250,000 mature trees in the forest); he was aware that the tree had some defects but that lots of other beech trees had similar defects and never had collapsing branches; there was dispute over how bad the AG actually was; however, critically, had it been in a high risk zone "*close to main public areas, work yards, buildings, roads, car parks, major footpaths, picnic areas*", it would have been tagged and people guided round it.

C's case was that if a tree was perceived as dangerous, it should have been tagged irrespective of what risk zone it was in.

The Judge held the NT had reasonably balanced the risk and their tree inspectors had acted reasonably.

By macabre co-incidence, the very next day the Court of Appeal delivered another judgement on a falling tree case, *Micklewhite v Surrey County Council*; this concerned a claim against a local authority in the general tort of negligence (not Occupier's Liability Act). C's partner was killed by a falling oak tree branch whilst in a parking lot on a road leading to Windsor Park. The tree was possibly 300 years old and overhung the whole road. There was no evidence that it was vulnerable and the Council had responsibility for 3,600 miles of road and 2 million roadside trees. The claim failed, as it was unreasonable to expect the Council to vouchsafe the safety of every single tree by the side of its roads.

Hufton v Somerset County Council

This is another case that turned on whether a safety system was adequate.

Claimant was a 15 year old schoolgirl in playground. She ran into school assembly hall as it had started raining, and entered via fire doors where there was an insufficiently absorbent mat for pupils to wipe their feet on. A puddle formed on wooden floor which she slipped on and injured her knee. She happily made a full recovery.

The evidence was that pupils were not supposed to enter the assembly hall via those fire doors when it was raining for that very reason. In 2000, a member of staff had slipped in that very place. Following that, a risk assessment report identified a couple of control measures, the most important being;

“1, Restrict use of entry, i.e. no access during wet weather”.

Prefects would be deployed to stop pupils doing that. Wet weather signs would be put on the fire doors saying “do not enter” but obviously there would be a short delay. The pupils knew this. They had to enter via a different entrance.

However, on the day, everyone was caught out by a sudden unexpected downpour during the morning break and young Hufton did not want to get wet.

Criticism was laid against the school’s risk assessment and procedures. Claimant relied on Ward v Tesco 1976, in which a Mrs Ward skidded on some yogurt whilst shopping at Tesco’s. However, in that case, the evidence was that prior to the accident, there were on average 10 spillages every week!

This was a different situation; in Ward, there was obviously a frequent problem which was not properly addressed and whatever system Tesco operated, was plainly ineffective. The school had an effective and reasonable system, but in the particular exceptional circumstances, it didn’t work.

Grimes v Hawkins

This is regrettably another case about young people, pools and alcohol, a mixture that rarely goes well together.

The Defendant’s 18 year old daughter was left alone at the family home when her parents were away. The family home was large with a separate swimming pool housed in a separate building. She negotiated with her parents to allow 4 friends to stay overnight. What she actually did was go to the pub and about 20 of her friends/acquaintances came back with her in various states of intoxication, and they all made for the swimming pool.

The Claimant was tipsy but not drunk. She dived into the shallow end of the pool after swimming for 30 minutes and broke her neck.

D’s daughter alleged that she had not invited C back, or permitted her or anyone else to swim in the pool. That was in an effort to make out that: (a) C was not a “visitor” and: (b) even if she was, she was not permitted to use the pool; so use of the pool was not one of the purposes for which she was permitted to be there.

However, D's daughter had actually ferried people back from the pub to the house – and it appears she even provided C with a swimming costume.

So, C was plainly a visitor and permitted to be in the pool. D owed C a duty of care as a visitor whilst she was using the swimming pool.

However, had he “*taken such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe?*”. The pool was not unsafe for diving and its depth, dimensions and contours were reasonably clear. It would be unreasonable for D to put the pool out of bounds or put up signs preventing diving. There was no breach of duty.

So, are these three deserving causes that haven't benefitted from the compensation culture?

In *Hufton*, Jackson LJ said “*no judge likes to send away empty-handed a claimant who has suffered injury through no fault of her own. But so long as we have a fault-based system of compensation, rather than strict liability or universal compensation for accidents on the New Zealand model, that is what Judges must sometimes do.*”

This is the very Lord Jackson who is conducting the review of Civil Litigation costs.

So, for those difficult cases, the imaginative claimant has to look to see if there are any doctrines of strict liability that might help. “**Dangerous escape**” under the doctrine of *Rylands v Fletcher* is one – if, for instance, whilst paying with your chemistry set in the back garden you allow a dangerous escape of noxious gas that suffocates your neighbour, the law has long held that you are liable regardless of how careful you have been.

Animals are another fruitful area.

The *Animals Act 1971* provides the core legislative framework. It stipulates that strict liability is imposed upon the owner or keeper where “*any damage is caused by an animal that belongs to a dangerous species*”, see section 2(1); it is plainly a matter of public policy that, no matter how much care you take, you should be liable for any harm done by your pet crocodile.

However, what of more domesticated species?

Section 2(2) provides that; “*where damage is caused by an animal that does not belong to a dangerous species, a keeper of the animal is liable for the damages If*

(a) the damage is of a kind which the animal unless restrained was likely to cause or which if caused by the animal was likely to be severe: and

(b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not ordinarily found in animals of the same species or are not normally so found except at particular times and in particular circumstances: and

(c) those characteristics were known to that keeper....”

Prior to the Dangerous Dogs Act 1991, most of the cases involved dogs.

And appropriately so, as the legislation is a dog's breakfast; as confirmed by Lord Denning in 1977 who commented "*this section is cumbrously worded and will give rise to several difficulties*". Indeed.

Section 2(2)(a) and (b) provide for two sets of alternative limbs;

A Claimant must show;

- Damages are of a kind the animal was likely to cause: or, if caused by him, were likely to be severe;
- Dangerous and causative behaviour was due to a characteristic that was abnormal to the animal in question: or normal of the species in certain circumstances.

Which takes us to the humble pony and trap - and to the minefield that is the law of liability by animals.

Bodey v Hall concerned a Mrs Bodey who was travelling as a groom on a pony and trap driven by Mrs Hall on a country lane. Mrs Bodey was an experienced horsewoman; a field officer for the Veteran Horse Society: and at the time, taking an HND in Equine studies with a view towards becoming a teacher. She had chosen riding on a pony and trap as an option on her HND course. She had ridden with Mrs Hall about 7 times before on her pony and trap.

The pony, Pepper, bolted for no apparent reason and tipped both Claimant and Defendant out of the back of the trap.

Mrs Bodey conceded that Mrs Hall had not been negligent. However, was she strictly liable under the s 2(2) Animals Act?

There is significant authority on damage caused by bolting horses - the most authoritative being the House of Lords decision in *Mirhavedy v Henley (2003)*. 3 horses owned and kept in a field by a Dr and Mrs Henley became terrified, escaped from their field and ran down the A380 between Exeter and Torquay until one of them collided with a somewhat surprised Mr Mirhavedy as he drove home from his work as a night-shift hospital nurse.

The HOL accepted that all the requirements of section 2(2) were satisfied insofar as bolting horses were concerned. It is a characteristic of horses that they can bolt at particular times and circumstances – and that the damages they cause can be severe. The Henleys were strictly liable to Mr Mirhavedy. They thought that was unfair because they had done everything possible to keep the field secure.

Compare and contrast however with *McKenny v Foster (2008)*, which concerned an escaping cow. Said cow had managed to climb over a 6 bar gate and tiptoe over a 12 foot cattle grid and run amok on a road before killing the Claimant. The behaviour was caused by the cow's distress at its separation from its recently weaned calf. The phenomenon of a cow suffering distress for that reason is normal to the species; but a reaction on the scale that happened was definitely not normal, so the farmer escaped strict liability.

On the subject of cows, apparently one of the largest types of claim arises from attacks on rambblers. You may recall the erstwhile home secretary David Blunkett being rolled on by a cow in 2009 and having his rib broken.

Anyway, *Mirhavedy* led to concern in equestrian circles. Taken at face value, anyone owing a horse could face strictly liability for the consequences of normal equine behaviour: and that liability can stretch to people riding their horse. It is a characteristic of horses that they can bolt or throw their riders in certain circumstances – and that the damage suffered thereby can be severe.

And the Judge in *Bodey v Hall* applied the same logic. Horses bolt and so do ponies.

However, there is thankfully a get-out. Section 5 of the Animals Act provides a defence if;

5(1) the damage is wholly due to the fault of the person who suffered it

5(2) if the person has voluntarily accepted the risk of damage – (“*volenti*”) and to satisfy that, D has to show that (1) C fully appreciate the risk and (2) that they exposed themselves to it.

Mrs Bodey, who was an experienced horsewoman (and who had decided not to wear a riding hat) was perfectly aware of the possibility that a pony could bolt and was not allowed to recover.

So let’s see if claimants have been getting any more luck in other areas.

Product Liability/Duty of Care

Vicar of Spalding and the Churchwardens and Parochial Parish Church Council v Chubb

Late one afternoon in September 2006, three teenage boys sneaked into a fine medieval church in Spalding, Lincolnshire and let off a couple of fire extinguishers. One of these was a dry powder type and the contents settled all over the church, covering priceless tapestries, organ and other fittings and contents with a fine dry dust – and leaving the Church with a £240,000 clean-up bill.

Insurers paid but made a subrogated claim against Chubb, the fire extinguisher manufacturers. When the case went to the Nottingham County Court, Chubb were found liable; the Judge held that Chubb had given the Church no warning about the danger inherent in dry powder extinguishers: it should have done: had it done so, the Church would not have bought that type of extinguisher: and Chubb should have foreseen the possibility of the extinguisher being set off maliciously.

When you appeal a decision, ordinarily you have you find an issue of law – not fact - that the Judge had got wrong.

Chubb argued that:

- (a) the Church would not have acted differently had a warning been given and:
- (b) the damage was not foreseeable ; Chubb could not be responsible for the wrongful actions of another, an intervener in the proceedings. It broke the chain of causation. The vandal’s actions were a “*novus actus interveniens*”.

This is reminiscent of the textbook case of *Dorset Yachts*, where the Home Office was held liable when a group of 7 borstal boys under supervision on an island absconded and jumped on board the Plaintiff's yacht and cast it adrift. The Home Office tried to argue that its negligence was not the cause of the damage; however, the House of Lords held that damage of that nature was perfectly foreseeable.

Did the negligent act cause the damage or simply create the possibility that something else could? Aikens L.J. said it was the latter. Chubb could not be held responsible for the acts of vandals 7 years after the event. The damage was caused by the vandals and not by Chubb's failure to warn.

The Judges however found the first argument easier to deal with. In evidence, when asked what the Church would have done had it been told about the disadvantages of a dry powder extinguisher, the Vicar said "*I expect that we would then have wanted to have sought further professional advice*".

The Judge concluded that meant the Church would not have bought that type of extinguisher. The Court of Appeal held that read too much into the Vicar's evidence. The Church had to show on the balance of probabilities that it would have definitively rejected the dry powder type of extinguisher. It had not and the Judge had reached the wrong conclusion.

Road Traffic

Steadman v London United Busways

This is not a seminal case but one that is worth mentioning for a short while because it shows that CCTV footage can be effectively used as evidence – and also demonstrates that most fundamental of legal principles; if you have an awful witness, you really ought to keep him out of the witness box.

69 year old Mrs Steadman was travelling on a 49 bus along Kensington High Street when the bus violently stopped and threw her out of her seat. She was badly injured. The bus driver blamed the driver of a Ferrari who had allegedly braked hard in front of him. Said driver was a wealthy 53 year old consultant orthopaedic surgeon and performance car enthusiast.

The bus driver, in contrast, had some "previous". In his 2 ½ year career he had:

- collided with a car during his probation period and undergone re-assessment:
- whilst being covertly assessed on a journey, he sped round a corner causing a baby buggy to fall over and drove off with a boarding passenger still on the footplate:
- On another occasion, two inspectors got on his bus and asked why he had allowed passengers to alight other than at a bus-stop; his response was to swear at them and threaten to throw them off the bus:
- Finally, another set of inspectors had ticked him off for wearing jeans and not regulation uniform trousers and received the same treatment.

If ever you have wondered about how useless CCTV footage is when it comes to securing convictions, happily the front-facing camera on the bus caught everything of the alleged incident. The CCTV footage didn't suggest any bad driving by the Ferrari driver. The Judge weighed up the witness evidence thus;

“Mr Atkinson was a thoroughly unsatisfactory and unimpressive witness. He gave his evidence in a belligerent manner, insistent at all times that he was right and that everyone who held a view different from his own was wrong.... Whilst he accepted that he used verbal abuse towards the inspectors who boarded his bus, he made it clear that he regarded his conduct as both appropriate and justified”

“Mr Sala, on the other hand, gave his evidence in a calm straightforward and measured fashion, weighing each question carefully, making plain what he did and did not remember I found him to be an impressive and compelling witness.”

Non-Disclosure and Fraudulent means

Sharon's Bakery (Europe) Ltd v Axa

The Claimant owned a wholesale kosher bakery in North London which burned down.

The insurance claim would have been perfectly unremarkable had it not for the existence of a fake invoice that purported to show that some factory equipment had been purchased from a third party. And that fake invoice appeared to have been totally unnecessary.

It concerned kosher bakery equipment at the premises of a company called Sharon's Bakery (Wholesale & Retail) Ltd (“Sharon Wholesale”). The owner of that company closed those and proposed to transfer the equipment to the new company, the Claimant (“Sharon Europe”), which was a joint venture between himself and another individual. The actual ownership of the equipment was a bit “uncertain”.

They asked for the equipment to be valued; however, instead of providing something that said for example “this equipment is valued at £156,000”, the valuer gave Sharon Wholesale a fake invoice for the purchase of the equipment for £156,000; and then on request, amended it to read Sharon Europe.

The invoice was used as part of a bundle of documents in support of an application to Lombard for finance and was also given to underwriters after the fire.

The Claimant portrayed it as something of a white lie and it didn't really matter anyway. The equipment had a value of £156,000 and it was within cover.

However one man's white lie is another man's whopper.

Insurers rejected the claim on 2 grounds

- Non-disclosure of the use of the fake invoice to help raise finance; i.e. “moral hazard”

- The use of the fake invoice involved “fraudulent means or devices to advance the claim”

Moral hazard has for a long time been capable of being a material circumstance for disclosure by an assured to an insurer; it amounts to dishonesty on the part of assured that gives rise to a concern that there will be dishonesty in the reporting and presentation of claims. But it can be an elusive concept; it isn't enough simply to say that the assured is a rotten egg.

In *Insurance Corporation of the Channel Islands v The Royal Hotel Ltd (1998)*, the assured created false invoices designed to create a more favourable impression of the hotels' trading position if and when it was necessary to show the accounts to bankers; this was a material circumstance to be disclosed to a prudent underwriter.

The Claimant argued that (a) he did not realise his conduct amounted to dishonesty (b) even if there was a suspicion of dishonesty, the ultimate question is – has there been any dishonesty?

The Judge side-stepped those niceties by holding that of course the document served a fraudulent purpose, namely to give the impression that the Claimant had title to the assets in question.

Turning now to the “fraudulent means” defence, the policy conditions provided that “*if any claim upon this policy shall be in any respect fraudulent or if fraudulent means and devices be used by or on behalf of the insured to obtain any benefit under the policy, all benefit under the Policy shall be forfeited*”. This effectively follows the position at common law.

This wasn't a fraudulent claim as such – i.e. one where the insured has suffered no loss or only a lesser loss than which he claims. It was however (so argued Insurers) one where fraudulent means or devices had been used to obtain benefit under the policy; but what does that actually mean? The Court's answer was: “*if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie*”.

And the test to be applied is whether “*that lie would, if believed, have tended objectively to yield a not insignificant improvement in the insured's prospects of obtaining a settlement*”.

The use of the fake invoice satisfied that test and insurers were entitled to avoid.

Zurich v Hayward

Mr Hayward suffered a bad back at work. He claimed lots of damages and his claim was supported by the aptly named orthopaedic surgeon, Dr Bracegirdle.

His employer's liability insurers took a surveillance video of him which suggested his injuries were not quite as bad as he claimed. This resulted in his accepting a payment into court of £135,000 and a consent order was duly agreed to dispose of the action.

However, a few years later, his next door neighbours snitched on him and told his employers that he had been shamming his injuries all the way along. Insurers issued proceedings to claw back the settlement. Mr Hayward argued that insurers couldn't do this, as they had already settled a case in the knowledge that there had been some bad faith on his part. Therefore, they were estopped as the

consent order was determinative of the dispute; this is the concept of res judicata, meaning that you can't re-litigate something which has already been determined.

It was held that Insurers were not prevented from bringing the action.

Finally, we move to one case where claimants were successful - and with no respect for false modesty, we acted for the successful party.

Mysterious Disappearance

AXL Resources v Antares

The Claimant was a metal trader who owned 80 drums of cobalt which had been kept in long term storage at a bonded warehouse in Belgium. The drums were placed in a separate enclosed area which was only intermittently inspected. When the Claimant asked for the warehouse owner to arrange for a sample to be sent to a potential purchaser, they realised the whole lot had disappeared.

It was pretty obvious that the consignment had been stolen but by whom and when, no-one could say. However, evidence came to light of a criminal investigation by the Belgian police authorities into the activities of a gang which was stealing cobalt and other heavy metals from storage; it turned out that the cobalt had been placed in the particular area because the police had tipped off the warehouse owners of its concerns for the safety of the consignment; also that the alarm system had been compromised and that gang members had approached employees of the storage company.

The Claimant had all risks cover under a Lloyd's Marine Open Cargo policy which provided; "*excluding mysterious disappearance and stocktaking losses*".

Insurers argued that this was a "mysterious disappearance" in that the Claimant couldn't actually prove exactly how or when the consignment went missing. The Claimant retorted that it was pretty obviously a theft, the sort of peril that an all risks policy was supposed to insure against.

Whilst the case was proceeding, some gang members were arrested for the theft.

And after the hearing, the Claimant was allowed access to the police file that showed that 2 people had actually signed confessions in relation to the actual theft. This meant that the Claimant had to take the unusual step of submitting new evidence after the hearing.

The Judge gave summary judgement to the Claimant, holding that the obvious inference was that the cobalt had been stolen – and that this was only backed up by the subsequent evidence.