

Negligence Liability and the taking of obvious risks

Introduction

The outer boundaries of negligence law have been a constant battleground. Nowhere is this more so than where individuals suffer catastrophic and life-changing injury and seek to transfer the costs of that injury to a more financially robust defendant.

The facts

Such a case was *Wells v Full Moon Events*¹. The defendants operated an off-road motorcycle event called an Enduro Day, which involved participants riding in a group with a leader across varying types of terrain for some 20 miles. The claimant was a participant in an Enduro Day. He was an experienced off-road motorcyclist, describing himself in the booking form as an 'off-road legend'. The route to be ridden was not standard but would be chosen by the group leader on the day after having made an assessment of the competence levels of that day's participants. Towards the end of the day, when the group was returning to the centre, they rode down a byway open to all traffic. This was not the most challenging terrain of the day. The track was rutted in places and the presence of muddy water created puddles. The claimant was riding through one of these puddles when he came off his motorcycle and fell, suffering catastrophic injuries. He argued that the accident had happened because his front wheel had struck a large rock hidden beneath the surface of the water².

The claimant brought an action against the defendant alleging negligence, in particular that the defendant had failed to organise the Enduro Day with due regard to the safety of the claimant and other participants. The specifics of the defendant's alleged failure in this regard was that the defendant should have 'carried out a detailed examination and risk assessment of the track' in advance and warned the claimant of the presence of the concealed rock³.

¹ [2020] EWHC 1265

² n1, 4

³ n1, 7

The defendant admitted that it owed a duty to the claimant to organise the day with due regard to the claimant's safety but denied that it was in breach of this obligation⁴. The legal issue, therefore, was not the existence of a duty of care (such being admitted) but the extent and scope of that duty and whether the defendant had breached it.

The trial

At trial the judge heard from various witnesses, including the claimant himself and, expert witnesses called by both sides. The judge concluded that the claimant had failed to prove the mechanism of the accident, as alleged, namely that his wheel had struck a concealed rock. The accident was more likely to have occurred as a result of the claimant himself making an error in his navigation of the puddle⁵. Having decided that the claimant had not satisfied him as to the mechanism of the accident the judge, strictly, needed to go no further. That conclusion was sufficient to find against the claimant. Despite this, the judge did go on to discuss the legal issues that would have arisen had the claimant succeeded on the factual issue, and it is these remarks, albeit strictly *obiter*, that are of interest.

Tomlinson

The judge placed much weight on the House of Lords decision in *Tomlinson v Congleton Borough Council*⁶ and, in particular, the comments of Lord Hoffmann in that case⁷. These comments have come to be seen as important in the development of negligence law and have been much cited by judges in subsequent cases⁸. The main factual similarity between *Tomlinson* and *Wells* is that both claimants suffered serious injury while engaging in what could broadly be defined as leisure pursuits which carried with them some degree of inherent risk. In *Tomlinson* the claimant visited a country park occupied by the defendant local authority at which there was a lake which had formed in an old sand quarry⁹. Despite the presence of signs prohibiting swimming he dived into the lake, striking his head on the bottom and suffered serious injuries¹⁰. He

⁴ n1, 8

⁵ n1, 112

⁶ [2003] UKHL 47; [2004] 1 AC 46. See generally Jesse Elvin, 'Occupiers Liability, free will and the dangers of a "compensation culture"' (2004) 8 Edin LR 127

⁷ n6, commencing at 2

⁸ see, for example, *English Heritage v Taylor* [2016] EWCA Civ 448; [2016] P1QR P14, *Risk v Rose Bruford College* [2013] EWHC 3869, *Scout Association v Barnes* [2010] EWCA Civ 1476

⁹ n6, 2

¹⁰ n6, 3

claimed against the Council, alleging that they had not done sufficient to prevent access to the lake. He lost. The strict decision of the House of Lords was based on the narrow ground that once he had ignored the no swimming signs he had ceased to be a lawful visitor and had become a trespasser and, therefore, under the Occupiers Liability Act 1984 the Council would have been liable to him only in respect of dangers 'due to the state of the premises'. There was nothing wrong with the state of the occupied land and so no liability arose¹¹. Just like in *Wells* itself, however, the main interest in the case lies in additional comments made *obiter*.

These comments of Lord Hoffmann can be seen as having two distinct, but related themes. The first is that the provision of leisure facilities for people to enjoy is a community good which might be threatened if extensive liability were imposed on occupiers if someone is injured while using those facilities. Put another way, to impose liability might lead the Council to take the view that providing these leisure facilities was more trouble than it was worth and so close them down which would 'damage the quality of many people's lives'¹². This can be seen as part of a theme which makes the social utility of the defendant's activities a relevant factor in determining liability, a theme dating back at least as far as the well-known case of *Bolton v Stone*¹³.

The second theme is that individuals should be free to take risks with their own safety if they choose to do so. This is a concern for personal autonomy and free will and, also, for personal responsibility in risk taking. As Lord Hoffmann notes, the claimant was 'freely and voluntarily undertaking an activity which inherently involved some risk'¹⁴. He went on to say '[i]f people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair'¹⁵. This observation was cited with approval by the judge in *Wells*¹⁶.

It is perfectly possible to see Lord Hoffmann's 'autonomy' point as merely an element of the broader social utility point. There is a social utility in allowing people the autonomy to take risks if they choose to do so. Indeed, it appears that Lord Hoffmann himself seems to have regarded these two points as being interlinked in this way. It may, however, be preferable to consider social utility

¹¹ n6, 29

¹² n6, 48

¹³ [1951] AC 850. See Keith Patten. 'Public benefit, private burden? The role of social utility in breach of duty decisions in negligence' (2019) 35 PN 230

¹⁴ n6, 44

¹⁵ n6, 45

¹⁶ n1, 117

as a facet of the defendant's conduct (is the defendant engaged in doing something which is socially useful) and to treat the autonomy point as distinct, focusing as it does on the conduct of the claimant, rather than of the defendant.

Discussion

The distinctiveness of the autonomy point may be key to appreciating the importance of Lord Hoffmann's comments in *Tomlinson* and their application in *Wells*. For long we have been accustomed to seeing negligence liability as a balance between freedom of action and security. Commonly, however, this is regarded as a balance between the freedom of action of the defendant to engage in whatever conduct they wish to and the claimant's security from suffering injury or loss. So, in a case like *Bolton v Stone* the balance to be drawn was between the defendant's ability to continue to play cricket and the claimant's interest in not suffering injury by being struck by a cricket ball hit out of the ground. The claimant herself was engaging in no risky activity, merely being present on the public highway. To impose liability on the defendant might inhibit its ability to act in the way it wished.

In a case like *Wells*, by contrast, the issue is how far the claimant should be able to impose on the defendant the inherent risks of activities the claimant himself has voluntarily elected to undertake. Put in more prosaic terms, how far is a defendant under a duty to protect a claimant from the consequences of that claimant's own behaviour?

The answer given by the court in *Wells* is that where the injury or loss materialises from a risk which was both inherent in the activity undertaken and obvious to the claimant then no liability will arise¹⁷. This leaves open the question of when liability might arise in cases involving a claimant who is participating in risky activities. It was common ground in *Wells* that a duty of care was owed, so if that duty did not extend as far as the claimant contended, what then might the scope of the duty be? What emerges from *Wells* is that there might be three broad categories of cases in which such liability might arise.

The first is where the claimant, although a participant, is not really exercising an informed choice. This category is set out by Lord Hoffmann himself in *Tomlinson*. He puts into this category two sub-groups, employees 'whose work

¹⁷ n1, 141

requires them to take the risk' and those lacking in some relevant capacity 'such as the inability of children to recognise danger'¹⁸. Into this second subgroup Lord Hoffmann puts the child trespasser cases, like *Herrington v British Railways Board*¹⁹ and, perhaps more controversially, the case of *Reeves v Commissioner of Police of the Metropolis*²⁰, in which a prisoner in custody inflicted harm on himself.

The second category is those risks that are not obvious to the participant but, presumably, are known or ought reasonably to be known to the defendant.²¹ In *Wells* this could have included the presence of hidden obstacles along the way, but not the possible presence of submerged rocks in a puddle as this was a risk obvious to the claimant, a matter admitted in cross examination²².

The third category is, as stated by May LJ in the case of *Poppleton v Trustees of Portsmouth Youth Activities Committee*²³, where the defendant 'has in some relevant way assumed responsibility for the claimant's safety'²⁴. This concept of an assumption of liability is a nebulous one which has been used many times in the law of negligence as a filter for the imposition of liability²⁵. In *Poppleton* May LJ offered as an example of such a case *Watson v British Boxing Board of Control*²⁶, where a professional boxer was injured during a bout and successfully sued the sport's governing body because of the lack of adequate medical facilities. For May LJ the assumption of responsibility arose from the regulatory function undertaken by the defendant. In the context of *Wells* we might assume this could have arisen if, for example, the defendant's group leader had taken the participants over terrain unsuitable to their level of expertise having misjudged their competence at the introductory assessment.

On the facts, *Wells* fell into none of these scenarios so no liability arose.

Conclusion

Negligence liability is always an issue of balance between competing interests. Seriously injured claimants have an interest in compensation but if they are to

¹⁸ n6, 46

¹⁹ [1972] AC 877

²⁰ [2000] 1 AC 360

²¹ n1, 142

²² n1, 127

²³ [2008] EWCA Civ 646; [2009] P!QR P1

²⁴ n23, 17

²⁵ *Customs & Excise Commissioners v Barclays Bank* [2016] UKHL 28; [2017] 1 AC 181

²⁶ [2011] QB 1134

receive this that requires the imposition of the risks they take onto others to guard against. *Wells* is an example of how unwilling the courts are to permit such an imposition. As it has been put by Richards LJ, 'people should accept responsibility for the risks they chose to run and...there should be no duty to protect them against obvious risks²⁷'. So, for example, when a customer in a bar was injured having chosen to slide down a bannister at the premises, no liability on the occupiers was found²⁸. Similar outcomes have been reached when adults have been injured having dived into swimming pools which were too shallow²⁹. *Wells* is a further example of the application of this principle deriving from *Tomlinson*, a principle of the autonomy of individuals to take obvious risks if they wish to do so, and that they must bear the consequences should those risks materialise in injury.

²⁷ *Evans v Kosmar Villa Holidays Ltd* [2007] EWCA Civ 1003; [2008] 1 WLR 297

²⁸ *Geary v JD Wetherspoons* [2011] EWHC 1506

²⁹ *Grimes v Hawkins* [2011] EWHC 2004