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Personal injury: Bouncing & bouldering

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Brent McDonald *discusses recent cases involving negligence and statutory duty*

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In Brief

· *Trustees v Poppleton*: "If the law required training or supervision in this case, it would equally be required for a mulitude of other commonplace leisure activities...such as bathing."

· *Perry v Harris*: freak and tragic accident which occured without fault.

· *Gravil v Carroll and another*: whether an assault carried out by a rugby player on a opponent during a match imposed vicarious liability upon his club.

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In *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646, [2008] All ER (D) 150 (Jun) the Court of Appeal was asked to consider a case where the claimant, Mr Poppleton, had suffered an injury at the defendant's activity centre.

Poppleton attended an activity centre on 12 February 2002 with a group of friends to engage in an activity known as "bouldering". Bouldering is a low level simulated rock climbing activity.

The claimant was a relatively inexperienced climber although he had used this particular bouldering wall three or four times before. The defendant did not show him any rules or ask him to sign a disclaimer notice, nor did it give him any instruction as to the risks of this activity. It made no enquiries as to his ability as a climber. The experts agreed that the rules prohibiting jumping off the walls and climbing on top of the structure should have been more prominently displayed.

Having seen a friend leap from one of the walls, grab hold of a girder and drop to the floor, the claimant decided to attempt a similar feat. Mr Poppleton leaped from the back wall of the climbing room, intending to grab hold of a buttress or the top rope bar of the opposite wall. He lost his grip, somersaulted in the air and fell to the matting below, landing on his head. As a result he was seriously injured and was rendered tetraplegic.

False sense of safety

His Honour Judge Richard Foster, sitting in the Winchester County Court, found for the claimant. He held that the defendant should have warned the claimant that the safety matting could induce a false sense of safety, as falls from the wall could still result in serious injury. Claims under s 2 of the Occupiers' Liability Act and the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) were rejected, as was an allegation that the defendant was in breach of duty in failing to provide the claimant with any safety training.

The first sentence of Lord Justice May's judgment of the Court of Appeal, tailormade for future citation, left no doubt as to the direction in which the decision was heading: "Adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so that they are injured."

Overturning the Judge's finding of liability, Lord Justice May (Sir Paul Kennedy and Lord Justice Richards agreeing) referred to cases such as *Tomlinson v Congerton Borough Council* [2002] EWCA Civ 309, [2003] UKHL 47 and *Evans v Kosmar Village Holidays* [2007] EWCA Civ 1003, [2007] All ER (D) 330 (Oct). In his lordship's view: "the risk of falling from the wall was plainly obvious...Evidence apart, it is to my mind quite obvious that no amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall, that possibility of an awkward fall is an obvious inherent risk of this kind of climbing."

His lordship observed that: "If the law required training or supervision in this case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk--as for instance bathing in the sea."

Bouncy castle incident

A similar result was reached on appeal in the case of *Perry v Harris* [2008] EWCA Civ 907, [2008] All ER (D) 415 (Jul). On 10 September 2005 the claimant, who was aged 11 at the time, was one of three boys playing on a bouncy castle. The castle was one of two inflatables hired and erected in a field at the back of the defendant's property for use at a birthday party.

The boys began somersaulting. The claimant had just performed a somersault when, before he had time to get back on his feet, a 15 year-old-boy who was approximately 5'9" tall, chose to perform a somersault of his own. While his body was rotating, the elder boy's heel accidentally struck the claimant's forehead. The claimant suffered a depressed skull fracture and a subdural haematoma in the left frontal-pariental lobe, causing severe and permanent cognitive behaviour, emotional and social impairment. The Court of Appeal observed it was impossible not to be deeply moved by the claimant's plight and the plight of his family.

In a decision well reported by the media, on 8 May 2008 Mr Justice David Steel found that the defendant had breached her duty of care in failing to maintain *"*uninterrupted supervision*"* of the bouncy castle, which would have prevented the accident. Further the defendant was held to have been in breach of duty in allowing the claimant to use the bouncy castle at the same time as the 15-year-old boy. The defendant appealed.

The Court of Appeal, in a careful judgment, underlined the importance of first impressions in this case. Lord Phillips CJ delivering the unanimous judgment of the court, (Lords Justices May and Wilson also sitting) said that the case: "does not turn on expert or special knowledge. Essentially we have to place ourselves in the shoes of the defendant and consider the adequacy of her conduct from that view point with the knowledge that she had. Each of us had the same reaction to the facts."

The standard of care was that which a reasonably careful parent would show for her own children, based on the facts which the defendant knew or ought to have known. Whether or not that standard was met depended upon the risks that a reasonable parent ought to have foreseen would be involved in the use of the castle.

In the Court of Appeal's view the reasonable parent might see that there would be a risk that one child might collide with another and that there would be some physical injury of the type that can occur in contact sports; it was not reasonably foreseeable that such an injury would be likely to be serious, let alone as severe as the injuries sustained by the claimant. As such there was no justification for imposing a duty of care which required children playing on a bouncy castle to be kept under constant surveillance; the judge had imposed an unreasonably high standard of care.

The defendant had also been reasonable in keeping an eye on the other inflatable. She could not have reasonably foreseen that by helping to strap a child in on the inflatable "bungee run", she would expose the children playing on the bouncy castle to an unacceptable risk.

Further, the Court of Appeal was not convinced that the reasonably careful parent, in the absence of any express warning, would have concluded that children should not somersault on the bouncy castle. It was also open to doubt whether or not she would have been able to react in time to prevent the claimant's injury even if she had been watching events on the castle. That question was however academic, as the fact was that this accident occurred during a short period when, without fault, the defendant was concentrating her attention elsewhere.

Last, the Court of Appeal found that the judge applied a too high a standard of care by concluding that it was a breach of duty to allow the claimant to play on the bouncy castle with this particular 15-year-old child. The Court of Appeal observed that the bouncy castle had been used for two hours with nothing untoward happening. The elder child was known to be a responsible and gentle child, properly described in court as a "gentle giant". Their lordships' concluded that this was a freak and tragic accident which occurred without fault. The appeal was therefore allowed.

Breach of statutory duty

In *Spencer-Franks v Kellog, Brown & Root Limited* [2008] UKHL 46, [2008] All ER (D) 26 (Jul) a Scottish decision, the House of Lords considered the question of what is work equipment within the meaning of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) (the Regulations).

The pursuer worked on an oil rig in the North Sea. He was asked to inspect and repair a door closer in the control room on 12 October 2003. The closer consisted of a spring mechanism attached to the door, which was connected by a linkage arm onto the door frame. The pursuer decided to remove the closer and take it to the workshop for repair. Before doing so, he tried to assess the level of tension on the linkage arm by half a turn of the screw which held it to the door frame. This should not have disengaged the screw, but the screw pulled out of the linkage arm and struck the pursuer in the face. He lost four teeth as a result, which had to be replaced by implants.

The pursuer brought an action alleging breach of reg 4 of the Regulations, which imposes a duty on employers or persons who have control of work equipment (to the extent of that control) to ensure that it is suitable.

The defendant denied that the door closer was work equipment within the meaning of the Regulations. In doing so they relied on the case of *Hammond v. Commissioner of Police of the Metropolis* [2004] EWCA Civ 830, [2004] ICR 1467. In that case Lord Justice May had drawn a distinction between tools of the trade provided to an employee, which were work equipment, and items upon which they were working.

"Work equipment"

In their lordships' unanimous opinion, *Hammond* was wrongly decided. The question of what is "work equipment" should be approached simply and having regard to Directive 89/655/EEC, otherwise known as the Framework Directive. Lord Hoffmann pointed out that everyone using the control room was using it for the purpose of their work. They used the door to enter or leave the control room. In doing so they used the closer. Its purpose was for use by persons at work. Therefore, his lordship said, giving "work equipment" its ordinary meaning, as it was for use at work, the closer was work equipment.

Their lordships were not troubled by the submission that the door closer was not work equipment, forming instead part of the fabric of the oil platform. Lord Roger considered that it would not be wise to draw too sharp a division between work equipment and fabric. He observed that: "If an employer provides a clock for the use of his employees, then surely it qualifies as work equipment, whether it's freestanding or built into the walls."

Lord Hoffmann made reference to the decision of the Court of Appeal in *Reid v PRP Architects and ors* [2006] EWCA Civ 1119, [2006] All ER (D) 428 (Jul) in which (in Lord Hoffmann's view rightly) it was held that a lift was work equipment for the purposes of the Regulations. Lord Neuberger, while agreeing that there may well be cases where it could be difficult to decide whether or not an item should be treated as work equipment or part of the fabric of work premises; held that this was not such a case.

In contrast Lord Neuberger thought that there was much to be said for the view "that there is no limit to the class of persons to whom the duty is owed, as is implied by what Lord Hoffmann says in paras 19 and 20" as there "seemed to be nothing in the express terms of the Regulations suggesting the duties they impose are to be limited to fulltime employees or any other limited class of person."

Like *Robb v Salamis*, *Spencer-Franks* is another case where the House of Lords has extended the reach of statutory regulations. It indicates the willingness of the Lords to go further than inferior appellate courts in England and Scotland, having regard to their European origins.

Vicarious liability

In *Gravil v Carroll and another* [2008] EWCA Civ 689, [2008] All ER (D) 234 (Jun) the Court of Appeal was asked to consider whether or not an assault carried out by a rugby player on an opponent during a match imposed vicarious liability upon his club, after both the trial judge, His Honour Justice Harington and on appeal, Mr Justice Gray had found that it did not.

The facts were relatively straight forward and were not in dispute. On 29 October 2005 a rugby union match took place between Halifax and Redruth. The claimant was the prop forward for Halifax and the first defendant was a second row forward with Redruth. In the 46th minute there was an altercation between several players after a scrum. Redruth's hooker wisely moved away but the first defendant threw a punch at the claimant.

The claimant suffered a blow-out fracture of the right orbit, which required reconstructive orbital surgery leading to a good but not complete recovery. The first defendant was shown a yellow card by the referee. After the match an RFU disciplinary hearing took place. Mr Carroll was suspended for eight weeks upon admitting the assault.

Carroll took no part in the trial and was unsurprisingly found liable for the claimant's injuries in battery. The Judge, and on appeal to the High Court, Gray J, rejected the claimant's case that it the club was vicariously liable for the actions of its player. The claimant was granted permission to bring a second appeal before the Court of Appeal.

Sir Anthony Clarke MR, delivering the judgment of the court (Smith and Richards LJJ also sitting), noted that Carroll and the club had entered into a contract of employment with Redruth. He was paid a match fee, a bonus fee when they won and some expenses. It was an express term of his contract that he would not physically assault opponents. The contract also provided that the club may be vicariously liable for the actions of the first defendant, and required him to indemnify the club against loss for negligent conduct or conduct which was in breach of the employment contract.

Fact of employment

The court focused on the key fact that the claimant was employed by the club to play rugby; it did not matter that the club made no profit, that players would play for their club anyway for the love of the game, that the first defendant also had another, fulltime job, and that the principle purpose of the contract was to prevent poaching.

The court referred to the relevant passages from *Lister v Hesley Hall Limited* [2001] UKHL 22, [2001] All ER (D) 37 (May), *Dubai Aluminium Co Limited v Salaam* [2002] UKHL 48, [2002] All ER (D) 60 (Dec),*Mattis v Pollock (trading as Flamingos Nightclub)* [2003] EWCA Civ 887, [2003] All ER (D) 10 (Jul), and *Bernard v Attorney General of Jamaica* [2004] UKPC 47, [2004] All ER (D) 96 (Oct). On the authorities the question was whether or not the tort committed by an employee was so closely connected with his employment, that is with what was authorised or expected of the employee, that it would be fair and just to hold his employer vicariously.

In this case their lordships' considered that there was very close connection between the punch and the first defendant's employment. The claimant was employed to play rugby and was doing so when the fight broke out. The melée was of the kind which frequently occurs during rugby matches, despite the fact that the whistle has gone. It was part of the game and was certainly not in any way independent of it, being just the kind of thing that both clubs would have expected to occur. Such fights and the throwing of punches: "can fairly be regarded as an ordinary (though undesirable) incident of a rugby match."

Further, the contract had envisaged that such conduct might occur, had required players to refrain from breaches of the rules and physical assaults, and had foreseen that the club could be vicariously liable for the actions of the first defendant. This could only be on the understanding that the player might commit such acts in the course of his employment.

The court considered that the close relationship between the punch and the first defendant's employment meant that it was fair and just to hold the club liable. Serious injury could result from such altercations. It was incumbent on players and clubs to take steps to stamp foul play out. Otherwise: "There is an obvious temptation for clubs to turn a blind eye to foul play. They naturally want their side to win and, no doubt, to play hard to do so. The line between playing hard and playing dirty may be seen as a fine one. The temptation for players to cross the line in the scrum may be considerable unless active steps are taken by clubs to deter them from doing so."

Disciplinary action

The court found it striking that despite provision being made in the contract for sanctions to have been imposed by the club on the first defendant, it took no disciplinary action against him at all. It was suggested that perhaps in the future, and following the judgment, it might choose to do so. Imposing liability on clubs in such situation would serve policy considerations of providing an adequate and just remedy and deterrence.

A submission that the claimant was aware of the risks he ran in playing rugby from being punched, and therefore it was not just and reasonable to make the club vicariously liable, was given short shrift. *Volenti non fit injuria* had not been pleaded, and as the first defendant was liable, the claimant's state of mind did not provide any reason why the club should not also be vicarious liable. The appeal was therefore allowed and judgment entered for the claimant against the club.