



BOUNCERS, BOLLARDS AND BUNK BEDS

A Personal Injuries Liability update

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Patrick has practised in personal injury, professional negligence and commercial and insurance litigation since 1994. His personal injury practice is divided roughly equally between Claimants and Defendants. He has wide experience of all types of personal injury claims, including catastrophic brain and spinal injuries, industrial and asbestos-related diseases, industrial and construction site accidents, and MIB and CICAP claims. He has considerable experience of all courts up to and including the Court of Appeal and regularly handles multi-million pound claims, both on his own and with leading counsel. Related work includes actions for damages for malicious prosecution, wrongful arrest and false imprisonment. He is frequently instructed in insurance policy coverage disputes arising out of personal injury accidents, such as whether a motor or EL/PL insurer is liable in respect of a road traffic accident. His professional negligence work includes actions against solicitors arising out of personal injury claims.

Highways

Shine v Tower Hamlets Borough Council [2006] EWCA 852. A child was injured when he tried to leapfrog a street bollard, which wobbled because it was not properly installed, causing him to fall. The local authority was not liable under the Highways Act 1980. Section 66(2) and s.66(3) bore all the hallmarks of being permissive provisions, allowing a highway authority to install barriers and other street furniture that it thought reasonably necessary to ensure public safety. The provisions were necessary as otherwise simply placing barriers on a public highway might be an unlawful obstruction of a public highway. Section 66 did not in itself create any liability for injuries caused by the incorrect

installation of the barriers. The statutory liability under the Act derived from s.41, which imposed a duty on a highway authority to maintain the public highway. As such the question of statutory liability in the instant case rested on whether the local authority had failed to maintain the public highway. The claim that liability under s.41 arose because of the actual hole in the pavement into which the bollard had been placed was highly artificial. The complaint was that the bollard had been insecure because it had not been properly installed. That was a complaint about the bollard, which was an item of street furniture, and was not a complaint about a failure to maintain the highway. This did not, however, preclude a claim in negligence, and the claimant's cross appeal to the effect that the Defendant's negligence had caused the accident succeeded.

Road traffic

Dawes v Aldis [2007] EWHC 1831 (QB, Eady J). The disqualified and uninsured defendant was driving a stolen car down a residential street. Police officers tried but failed to block his path but he eluded them and collided with the claimant on the wrong side of the road at about 50mph. The main dispute between the parties was whether the claimant was on the footpath or in the carriageway when he was struck. The defendant contended that the claimant was running across the road at the time of the collision and gave him no opportunity to stop. The judge found that the claimant was probably at least partly in the carriageway when struck, but there was insufficient evidence to determine exactly what had happened and even on the balance of probabilities there was insufficient evidence for a finding of contributory negligence against the claimant.

Farley v Buckley [2007] EWCA Civ 403. The judge had been entitled to find that a driver turning right at 5mph to 8mph onto a main road, who failed to "nose-poke" past a bus turning left onto the minor road, and whose car was in collision with a motor scooter recklessly overtaking the bus, was

not negligent. The Court stated the caveat that this could not be taken as authority for the proposition that a driver who failed to nose-poke would avoid a finding of negligence and that emerging from a minor road at 5 to 8mph was necessarily an acceptable manoeuvre.

Eyres v Atkinson Kitchens [2007] EWCA Civ 365. An employee who suffered serious injuries after crashing his employers' van when he fell asleep at the wheel was one third contributorily negligent on the grounds that he must have realised the risk of falling asleep. His employers bore the remainder of the liability, having caused him to be awake for 19 hours and done nothing to guard against the risk of injury.

Ehrari v Curry [2007] EWCA Civ 120. A truck driver had been aware of the presence of children on the pavement and crossing the road through the traffic, but had not seen the infant who stepped out from behind a parked car into the path of his truck. The Court of Appeal upheld the judge's finding that the driver had failed to keep a sufficiently careful watch and could, had he seen the Claimant, have swerved to his offside to avoid the collision.

Sharp v Ministry of Defence [2007] EWHC 224 (QB, Keith J). The Claimant was driving a military vehicle, the seventh in line in a close convoy of ten. The first vehicle has to stop suddenly and the following vehicles managed to stop with varying degrees of difficulty. The Claimant's vehicle struck the one in front, which had steel girders protruding from the back. The cab of the Claimant's vehicle was crushed, he was seriously injured and his passenger was killed. He contended that the braking system of his vehicle was defective and that he had received insufficient training and supervision in convoy driving, which is why he was driving so close to the following vehicle. The judge accepted the Defendant's answer that the braking system, though defective, had not contributed to the accident

because the Claimant would not have been able to stop in time anyway; rejected the allegation of insufficient training and supervision and therefore found the Claimant solely to blame for the accident.

Hawley v Luminar Leisure [2006] EWCA Civ 18. A nightclub was vicariously liable for the acts of a doorman supplied to it under an agreement for the provision of security services since the club had control not only over what the doorman did but how he was to do it. An assault by the doorman on a member of the public caused an "accidental" bodily injury for the purposes of the employer's public liability insurance.

Occupiers' Liability/ Workplace claims

Clough v First Choice Holidays [2006] EWCA Civ 15. The drunk claimant slipped from a wall between two swimming pools and fell, breaking his neck. The surface of the wall had not been painted with non-slip paint. At first instance the judge held that the wall presented an increased risk of slipping and that the defendant had been negligent in not painting it with no-slip paint, but that this had not caused the accident, and the claim therefore failed. The Court of Appeal upheld the decision. The judge had applied the correct test in finding that the defendant's negligence had not caused or materially contributed to the claimant's injury.

Parker v Levy (Lawtel 7.9.07, QB, John Leighton Williams QC) The claimant was standing on the end of a finger pontoon at a marina, assisting her husband to moor their boat. There was a gap at the end of the finger pontoon. The claimant got her foot caught in the gap, twisted and fell and was left hanging upside down with her head underwater and her leg broken. She sued the owner of the marina on the grounds that the gap should not have been there and had the marina been properly risk-assessed the gap would have been closed. The defendant submitted evidence that the finger

pontoon was of a common design. The claim failed on the grounds that the presence of the gaps did not give rise to a reasonably foreseeable risk of injury; the gap was small, readily seen and known by the claimant to be there; it served a useful purpose as a shock-absorber; no similar accidents had occurred and the defendant was not under a duty to cover avoid such a theoretical risk.

Piccolo v Larkstock Ltd (Lawtel 24.7.07 Altman J, QB) The defendant owner of a flower stall in a railway station concourse was liable to a commuter who slipped on a petal and sustained serious injuries, on the grounds that safety concerns had been expressed previously to the defendant; her “clean as you go” system was insufficient to deal with slip hazards on a busy concourse and in any event was not being operated at the material time; and she therefore had no safe and proper system in place to avoid a foreseeable risk.

Poppleton v Trustees of the Portsmouth Youth Activities Committee [2007] EWHC 1567. The adult Claimant went to the defendant’s leisure centre to use the climbing wall, which he had used previously. He was free-climbing, unsupervised, when he onto safety matting and sustained serious injuries. He failed to establish that the premises or equipment were defective or that there was any breach of the Occupiers’ Liability Act 1957; and he failed to establish that the centre should have assessed his abilities before allowing him to use the wall with a view to training or supervising him. He succeeded, however, on the grounds that he should have been warned of the danger that the matting gave a false sense of security, and that it did not render any falls onto it safe and free from the risk of injury; and had he been so warned he would not have carried out the manoeuvre that he did which failed and caused him to fall. His contributory negligence was assessed at 75%.

Ellis v Bristol City Council [2007] EWCA Civ 685. The Workplace (Health Safety and Welfare) Regulations 1992 reg 12(1) and (2) require that the surfaces of a workplace floor must not be slippery. It was held that this requirement is not restricted to permanent states of slipperiness but also applies to states of slipperiness occurring with a sufficient degree of frequency and regularity. The floors of the defendant's care home were routinely slippery with urine from incontinent residents. The claimant slipped and fell and the Court of Appeal allowed her appeal against the judge's dismissal of her claim, with a finding of contributory negligence of one third.

Siddorn v Patel [2007] EWHC 1248. The claimant rented a first floor flat from the defendant. During a party she climbed out of a window and onto the adjacent flat roof of the defendant's garage, which did not come under the tenancy. As she was dancing on the roof she fell through a Perspex skylight. Her claim against the defendant failed because (a) there was no evidence of a defect to the roof or skylight, or of failure to inspect or maintain; (b) the defendant had not given permission to the claimant to go out onto the roof, and there was no evidence that the defendant was aware that anyone would make use of the roof; and (c) therefore there was no evidence of a breach of a "premises" duty under s.1(1)(a) of the Occupiers' Liability Act 1984 dealing with the occupier's liability to trespassers.

Equipment

Ide v ATB Sales Ltd [2007] EWHC 1667, Gray J The claimant was riding his three-year-old mountain bike when, according to him, a handlebar fractured, causing him to fall off and sustain a serious brain injury. The defendant contended that the claimant had lost control of the bike and the handlebar had fractured in the subsequent crash. Both sides adduced metallurgical evidence. The judge concluded that the handlebar was weaker and more brittle than it should have been and was therefore defective; and the crash was unlikely to have been a coincidence. Accordingly the importer

of the mountain bike was strictly liable in respect of the claimant's injuries under s.3(1) of the Consumer Protection Act 1987.

Mason v Satalcom Lawtel 10.8.07, Reddihough J (QB) The claimant field service engineer fell from a ladder which he found on the premises he was visiting. He sued his employers under the Construction (Health Safety and Welfare) Regulations 1996 and the Provision and Use of Work Equipment Regulations 1998 on the grounds that the ladder was unsuitable and the defendant had failed to take suitable and sufficient steps to prevent the claimant falling. The judge found that the site was a construction site so that the defendant owed obligations under the 1996 Regulations; that the ladder was work equipment; and was unsuitable; and the defendant employers were liable because they could reasonably practicably have supplied with a suitable ladder. It was not sufficient for the defendants to leave the claimant to choose or obtain work equipment for himself and they would not thereby absolve themselves of the consequences of their breaches of the Regulations, nor could they argue that the chain of causation had been broken. The claimant was one third to blame for the accident; and the defendants recovered a contribution of 25% of the remaining liability from the owners of the ladder, at whose site the claimant was working, on the grounds that the owners were also under a duty under the 1998 Regulations to ensure that the ladder was suitable for the purposes for which the claimant might use it.

Robb v Salamis [2006]UKHL 56. On an offshore oil platform the claimant slept in a bunk with a detachable ladder at the end of the bed. When he was descending from the top bunk the ladder, which was not properly hooked over the top of the bunk, slipped, and he fell and was injured. He sued, alleging that the accident was caused by breaches of regulations 4 and 20 of the Provision and Use of Work Equipment Regulations. At first instance his claim failed because the accident was not

foreseeable and was entirely his own fault. The House of Lords decided that the defendant ought to have been alert to the possibility that the ladder might not be properly replaced; and that the ladders were plainly unsuitable for the purpose for which they were provided because of the risk that workers might be injured if the ladders were not located properly. The ladders should have been clamped or otherwise fixed to the beds. The claimant was 50% to blame.

Stress and Harassment

Deadman v Bristol City Council [2007] EWCA Civ 822. The defendant council investigated a claim of sexual harassment made against the claimant. In doing so it breached its own guidelines on how to conduct such investigations. The claimant suffered psychiatric harm. At first instance the judge held that although there had been no breach of the defendant's duty of care in tort, there had been breaches of the guidelines which amounted to breaches of the employment contract; and these breaches had caused the injury. The Court of Appeal allowed the council's appeal on the grounds that there was no separate contractual obligation, as the judge had in effect found, to act sensitively; but there was merely an obligation on the Council not to undermine the relationship of mutual trust and confidence and a duty to take reasonable care to avoid causing the claimant foreseeable harm. On *Hatton v Sutherland* principles the council had not been in breach of such duties because it could not reasonably have known that the Claimant would be adversely affected by the breaches of the guidelines; and the council's appeal was allowed.

Manual Handling

Hughes v Grampian Country Food Group (Lawtel 4.6.07, Inner House). A corrective to the often-held assumption that any movement of a load constitutes a "transporting or supporting of a load" within the meaning of regulation 2. On the facts the manipulation of chicken carcasses by a process

worker to truss wings and legs on a production line did not fall within the definition of manual handling and so the 1992 Regulations did not apply. The Court commented that the pursuer's construction of "manual handling" would make every human activity other than the purely cerebral, one of manual handling.

Lane v Disabilities Trust Ltd Lawtel 20.4.07, HHJ Simpkins in Brighton County Court. The claimant disability assistant was helping a wheelchair-bound man to the lavatory. As the man stood on the footplates of his wheelchair (which the claimant had checked for stability by tapping them) one of the footplates shifted slightly, causing the man to lurch forward and strike the claimant's shoulder, causing her injury. The claimant sued under reg.4(2) of the Manual Handling Operations regulations 1992, alleging that the defendant had failed to carry out a proper assessment in relation to the wheelchair and in particular as to whether it was safe to allow the man to stand on the footplates; and under the Provision and Use of Work Equipment Regulations 1998. The judge found that no risk assessment under the MHOR was required because there was no foreseeable risk of injury from the operation that an employee was expected to undertake; and in any case the claimant had failed to prove that the accident would not have occurred had a proper risk assessment been carried out. The judge also found that the wheelchair was not "work equipment" for the purposes of PUWER; and even if it was there was no relevant defect.

Miscellaneous

MacClancy v Carenza [2007] EWHC 479(QB). A defendant horse-riding instructor was not negligent in failing to warn her student of an alleged hazard on a riding school cross country course, as it was not dangerous and it was not foreseeable that anyone would perceive it as dangerous. The

claimant swerved to avoid what she thought was a dangerously low branch, fell from her horse and suffered very serious head injuries, brain damage and facial disfigurement.

Cole v Davis-Gilbert [2007] EWCA Civ 396. The claimant was injured when she stepped into a hole left after the removal of a maypole. The hole was subsequently filled, but two years later the infill had disappeared, perhaps through the actions of children. In dismissing the claimant's appeal against two defendants and allowing the cross appeal of the one unsuccessful defendant the Court of Appeal said that there was a danger in setting too high a standard of care as it would lead to inhibiting consequences, namely the reduction in or prohibition of traditional activities on village greens.

Mountford v Newlands School [2007] EWCA Civ 21

A school was vicariously liable when a member of staff had selected a boy who was well over the age group for an under-15s rugby team, and his far greater height and weight had contributed to a boy on the opposing team being injured in a tackle. The Junior Rugby Guidelines of the England Rugby Football Schools Union required that players should not "normally" be allowed to play other than in their own age grouping. There was no justification or legitimate reason for the older boy's selection and certainly not so as to justify a departure from the "normal" rule.

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