Insight 181

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report cases relating to:

- Being hit in the eye by a cricket ball
- Jurisdiction over a claim originally brought in France
- A cyclist alleging that potholes in the road were the cause of his accident

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Public liability

Lewis v Wandsworth London Borough Council (2020) EWHC 3205 (QB)

At first instance, the claimant had succeeded in her claim against the defendant and had been awarded damages of £16,911.84, together with costs, assessed in the sum of £17,422.03. The claim related to injuries the claimant suffered while she was walking through Battersea park, when a cricket ball fell on her eye and caused a serious injury.

The defendant's grounds of appeal were:

a) The judge was wrong to find that a warning was necessary to discharge the defendant's duty under the Occupiers Liability Act 1957 ("OLA").

b) The finding that there was a greater risk of injury than usual at the time of the index accident was not open to the judge.

c) The judge was wrong to distinguish Bolton v Stone (1951).

d) The judge failed to give adequate weight to:

i) The claimant's evidence that she knew about the existence of the cricket pitch,

ii) The claimant's evidence that she had seen people on the boundary of the cricket pitch when first walking past the pitch,

iii) the defendant's evidence of signs that were placed in the park when hazards were sufficiently dangerous,

iv) the defendant's evidence on the time for which cricket has been played at the material location,

v) the defendant's evidence of the lack of knowledge of previous injury.

e) The judge was wrong to find that a warning would have been effective in the claimant's case so as to be an effective discharge of the Defendant's OLA duty.

f) The judge failed to consider S1 Compensation Act 2006.

g) Individually or together, these failings mean that the judge was wrong to find that the claimant had proved her case.

The claimant was walking through the park at about 6.20pm. She was walking with a friend at the end of a cricket pitch. She heard a cry from her left, turned her head to the left and inclined her head upwards, where upon she was struck on the left eye with a cricket ball, struck from the game of cricket being played on the cricket pitch.

The appellate High Court Judge held that it was important to consider the case of Bolton v Stone carefully. The facts there were that the claimant who was on a side road of residential houses was hit by a ball struck by a batsman on the cricket ground which abutted the highway. The ground was enclosed at the material point by a fence which stood 17 feet above the level of the pitch. From where the ball was hit to where the injuries took place was some 100 yards. The claim failed.

The important principles to be distilled from Bolton v Stone were:

i) Reasonable foreseeability of an accident was not sufficient to found liability.

ii) The court had to consider the chances of an accident happening, the potential seriousness of an accident and the measures which could be taken to minimise or avoid accident.

iii) Bolton v Stone was not a case which provided authority for a proposition that there was no liability for hitting a person with a cricket ball which had been struck out of the ground or over the boundary. It was clear from the decision that there needed to be careful analysis of the facts.

iv) On appeal a court had to consider the two-stage test referred to by Lord Porter, namely whether the facts relied upon were evidence from which negligence could be inferred; and secondly, whether if negligence could be inferred, those facts did constitute negligence. The first was a question of law upon which the judge must actually or inferentially rule; the second, a question of fact upon which the judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depended on all the attendant circumstances of the case.

It was never in dispute that the defendant owed a duty of care and/or a duty under S2 OLA. It was not suggested that there was any difference in the two duties.

At first instance the Recorder had said that the statistics as to how many games were played did not really matter. The defendant had provided evidence that in the years 2014 – 2016 the cricket pitches had 317 bookings, 225 bookings and 258 bookings respectively. The cricket fields have been laid out in Battersea park since the park was created. The path on which the accident occurred was still in the same location as it was in 1897 as was the cricket pitch in question. For a straight drive the distance to the path was some 50.6 metres, of which over 8 metres were between the boundary and the path. For a ball which was hit by the batsman at the end nearer the path, i.e. by a batsman whose shot would be behind the wicket, the distance was some 30.5 metres from wicket to path, of which some 3.3 metres were between the boundary and the path.

The Recorder was wrong to say that the statistics about the games played “do not really matter”. By expressly failing to take account of those statistics and other facts which did not appear in his judgment, the Recorder clearly failed to take account of a material factor or factors. Therefore, the appellate judge accepted what was said in ground (d) (iv) and ground (d) (v) of the grounds of appeal.

The Recorder found breach of duty of care in allowing pedestrians to walk alongside the boundary of a cricket pitch that was not reasonably safe. The defendant's statistical evidence, which the Recorder expressly failed to take into account, was germane to making the evaluation of the safety of pedestrians walking along the path.

There were three elements of the failure to warn.

The first element was a failure to warn the claimant that a game of cricket was in progress. There was, however, as the claimant accepted, a clear view for pedestrians using the path to see a cricket match taking place.

'The strong presumption must be that adult men playing a cricket match would be using a proper cricket ball.'

The second element was a warning that a hard ball was being used. The claimant had said in her statement that she did not know that cricket played in a public park was played with a real cricket ball, which is really hard. The strong presumption must be that adult men playing a cricket match would be using a proper cricket ball. The finding that the warning should have been that a hard ball was being used could not be upheld.

The third element of the warning finding was that the boundary of the cricket pitch was or went alongside the path. The claimant, on her own case, had walked along the path on many previous occasions. Precisely where the boundary was seemed to be largely irrelevant. No batsman would seek to hit the ball so that it just went over the boundary.

The case was very different from Bolton v Stone. The risk of balls being hit towards the path was so evident that any warning should have been superfluous.

The defendant's evidence was that there was no signage about cricket or any other sports being played in the open areas of the park because it is quite obvious that games were in progress as you approach them.

The Recorder's judgment was wrong. He failed to take account of material factors and there was a lack of logic in his analysis of the facts. In the circumstances which obtained, allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) being remote. The remoteness was reinforced by the statistics. Further and in any event the alleged breach by failure to warn the claimant in the terms suggested did not withstand proper analysis.

Given that the sole basis of the finding of negligence/breach of statutory duty was failure to warn, S1 Compensation Act did not come into play.

The claimant was represented by Taylor Rose TTKW

The defendant was represented by Clyde & Co LLP

Comment

This judgment has received a great deal of press coverage and will no doubt be of great comfort to those hosting cricket matches at all levels.

Jurisdiction

Tate v Allianz Iard SA (2020) EWHC 3227

This was an application by the defendant insurer to dismiss, alternatively stay, this action pursuant to the lis pendens provisions of Articles 29 or 30 of Regulation (EU) No. 1215/2012 ('Brussels 1 recast').

The claimant was a British national domiciled in the United Kingdom. The defendant insurer was domiciled in France. The claimant had suffered injury as a pedestrian in France when he was struck by a bus belonging to a local bus company and insured by the defendant. The claimant brought proceedings in France against the bus company and recovered compensation for his injury and loss. In the event of deterioration in a claimant's condition, French law allows a further claim, known as an 'action en cas d'aggravation', to be made for additional compensation.

By this action, commenced by Claim Form, the claimant sought damages against the defendant for the alleged deterioration in his condition. There was no dispute that the allocation of jurisdiction for this claim was governed by Brussels 1 recast; and that, subject to lis pendens, this court had jurisdiction pursuant to Articles 11 and 13(2). However, the defendant contended that, by reason of proceedings allegedly pending in the French Courts and the provisions of Articles 29 or 30, this court must decline jurisdiction, alternatively stay the action.

The claimant had issued a claim in the Tribunal de Grande Instance in Boulogne-sur-Mer ('the Boulogne Court') against the bus company for personal injuries and loss sustained in consequence of the accident. The Boulogne Court had given judgment for the claimant in the total sum of 234,770 FF, supplemented by 8,000 FF in a later 'rectifying judgment'. The first judgment also awarded the costs of fitting and replacing prostheses 'on production of supporting documentation'.

The claimant appealed the judgment to the Court of Appeal of Douai ('the Douai Court'). The appeal was successful in that the Douai Court increased the award to a total sum expressed in Euros and Sterling as €27,095.30 and £25,741.22. The Douai judgment recorded the claimant's reservation of his right to make a claim 'en cas d'aggravation' in the event that his condition should worsen.

The right under French law to commence an action 'en cas d'aggravation' was free-standing and did not depend upon any prior order or permission from the court nor require any reservation of right by the claimant.

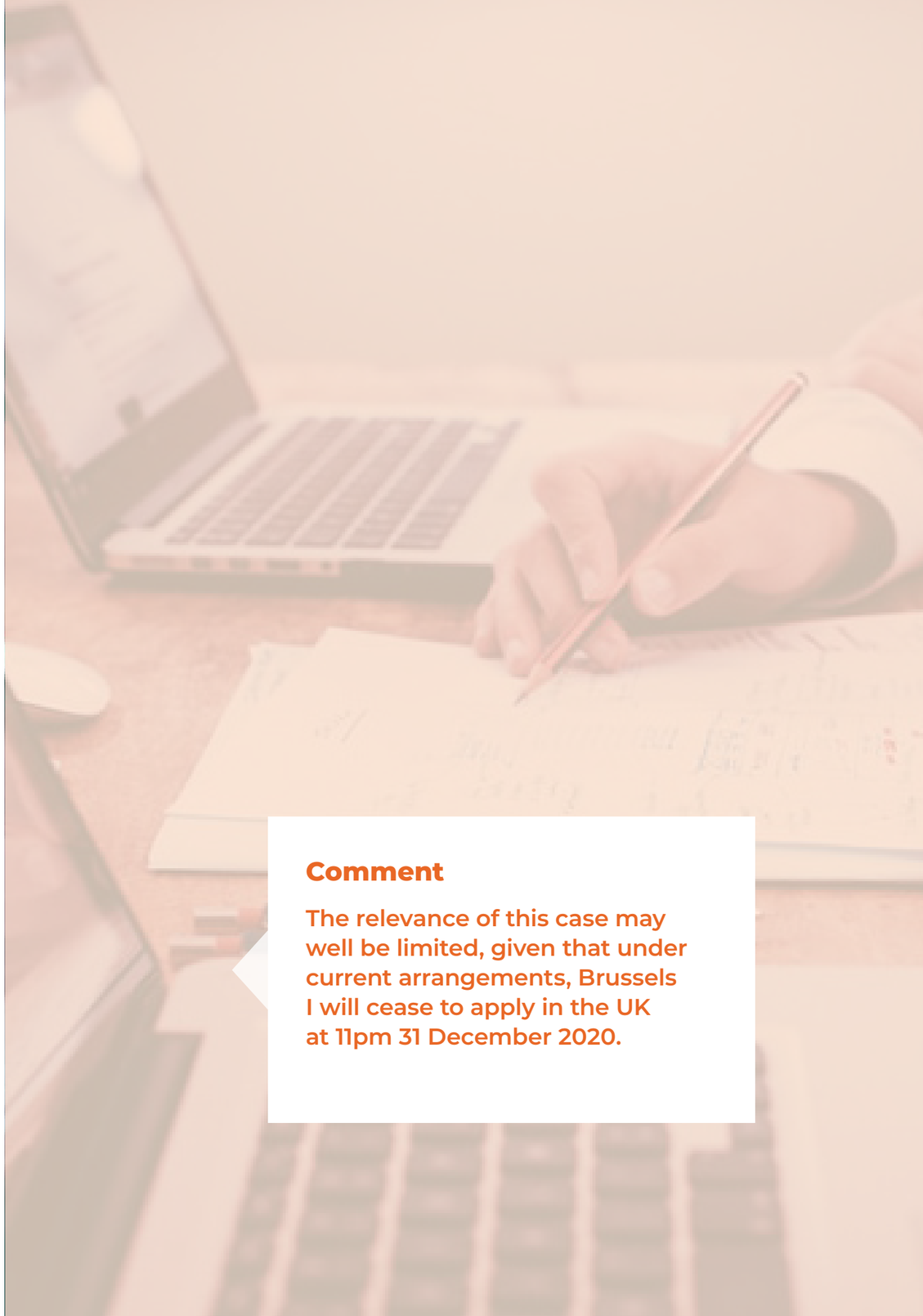
'...neither the Boulogne nor the Douai judgments left any issues to be resolved. Neither judgment was akin to an award of provisional damages, nor contained anything akin to a liberty to apply. The judgments were final.'

Finding in favour of the claimant, on lis pendens, the High Court Judge held that neither the Boulogne nor the Douai judgments left any issues to be resolved. Neither judgment was akin to an award of provisional damages, nor contained anything akin to a liberty to apply. The judgments were final. In any event there was no risk of irreconcilable or inconsistent judgments. Applying the necessary autonomous European law interpretation of the concept, there was no pending action in the French courts. It followed that neither Articles 29 nor 30 could have any application.

There was no pending action in the French courts. Accordingly, S9 of Brussels 1 recast was not engaged. In any event, the French and English proceedings did not involve the same cause of action (Article 29); nor was there any risk of irreconcilable or inconsistent judgments. The application to decline jurisdiction, alternatively for a stay, must be refused.

The claimant was represented by Pierre Thomas & Partners

The defendant was represented by DAC Beachcroft Claims Ltd



Comment

The relevance of this case may well be limited, given that under current arrangements, Brussels I will cease to apply in the UK at 11pm 31 December 2020.

Did potholes cause a cyclist's accident?

Nash v Hertfordshire County Council (2020) EWHC 3247 (QB)

The claimant suffered personal injury on 13/03/2016 when he was riding his road bike north along a main road. As he rounded, to his left, a 90-degree bend bounded by hedges, he collided with a Ford Transit van driven in the opposite direction. No fault was suggested on the part of the driver of the van but the claimant's case was that the accident was caused by the condition of the road surface. He claimed that while he did not hit or make contact with a pothole, he had to take avoiding action and swerved to avoid potholes on the inside of the bend (to his left as he approached) thus forcing him into the path of the oncoming van.

The claimant contended that the accident was caused by the defendant's negligence and /or breach of statutory duty to maintain the highway pursuant to S41 Highways Act 1980, in that:

(i) At the time of the accident there were defects in the road surface that represented a danger to road users and in particular cyclists. As a consequence, there was a breach of the duty imposed by S41.

(ii) Those defects were the cause of the accident.

(iii) The last inspection of the road carried out on the 20/08/2015 was defective and not performed correctly. There were defects at the scene that should have been noted and recorded as category 2 defects in the defendant's Code and repaired.

(iv) The defendant's highways maintenance policies were deficient because category 2 defects were not considered and repaired appropriately and therefore the S58 Highways Act 1980 defence available to the defendant was not proved.

(v) In addition, the road in question was incorrectly classified and due to the traffic use, location and nature of the road it should have been designated as a class 4a Link Road in accordance with the Code. If so, a quarterly inspection regime would have been adopted for the road and not annually as had taken place. Thus, it was said defects in the carriageway would have been found and repaired before the accident.

The defendant submitted that the sole cause of the accident was not the surface of the road but the riding of the bike by the claimant. They said he rode too fast and too wide around the corner. Specifically:

(i) The potholes at the scene were not dangerous given their size and location and accordingly there was no breach of S41.

(ii) Even if there was a breach of S41 the potholes were not the cause of the accident.

(iii) The road was correctly designated as a 4a rural access road and that the annual inspection on the 20/08/2015 was carried out correctly. The defects that were at the scene at the time of the accident had developed over the intervening seven-month period from August 2015 to March 2016.

(iv) If they are wrong about (ii) above and there were potholes located on the nearside of the bend that may have been of such depth that they were in a state of actionable disrepair and therefore dangerous, the defendant had taken such care in all the circumstances as was reasonably required of them to ensure that the lane was not dangerous to traffic and therefore can rely upon the statutory defence of S58 Highways Act 1980.

On the basis of the factual, expert and written evidence from the parties, the Deputy High Court Judge found as follows:

Was the highway dangerous?

(i) There was no reason to doubt the defendant's highways' inspector when he said that on the day of his inspection on the 20/08/2015 there were no recordable defects at the bend in question. He was a highly experienced, conscientious and well-trained Inspector. He was a reliable witness despite the criticisms made of him.

(ii) On balance the defects that were present on the day of the accident emerged over the seven months between the inspection and the incident. There was no defect present in the carriageway on the 20/08/2015 that would have been categorised as a category 1 or 2 defect.

(iii) Given the above, the evidence led to the conclusion that the depth of the three larger potholes was less than 40mm but on balance more than 30mm.

'Balancing the private and public interests and bearing in mind all of the circumstances…these defects did not represent the sort of dangers which an authority might reasonably be expected to guard against'

(iv) In assessing danger, the following had to be taken into account. The road was a country lane where vehicles would struggle to pass each other. Some defects in the carriageway were to be expected. The defects were to the side of the road and allowed approximately two thirds of the road width to pass without the need to make contact with the defects. Although the section of road had defects, the level of risk was low. Balancing the private and public interests and bearing in mind all of the circumstances, on the balance of probabilities these defects did not represent the sort of dangers which an authority might reasonably be expected to guard against. The road was not in a condition which exposed to danger those using it in the ordinary way.

The potholes and other defects individually or collectively did not present a real source of danger.

Accordingly, there was no breach of S41 Highways Act 1980.

Even if there had been a danger to persons using the road and a breach of S41 what was the cause of the accident?

On the balance of probabilities, the claimant's account was not correct. The accounts he gave at the time to a police officer reflected what happened. The claimant was unfortunately riding his bike too fast and too wide as he came around the bend thus preventing him from stopping in time and he collided with the van. The potholes played no or no material part in the cause of the accident. He was not travelling at around 10mph as he stated but considerably faster.

Although the precise point of the collision could not be determined with any degree of accuracy, the expert witnesses agreed that the claimant was over the centre of the road at the point of collision. They also agreed the claimant was travelling faster than his stated speed of around 10 mph and the judge held that he was probably travelling in the region of 16 to 18 mph. If he had been travelling at his stated speed he could have stopped and there would not have been a collision.

As he rounded the bend, the claimant was leaning inwards hence his bike fell under the van and ended up turned and facing in the opposite direction trapped under the front near side wheel. The claimant fell to his left nearside and did not pass under the van. The greater his speed the more he was leaning inwards. That in turn meant any or any significant swerve to the right was unlikely.

The physical evidence was more consistent with the account given to the police i.e. travelling too wide and going too fast rather than swerving to his right.

It was not necessary to consider the S58 defence.

The road was correctly classified as a 4a rural access road within the roads' hierarchy at the time. There was, no doubt, an increase in some traffic and the perceptions of local residents were that traffic levels and usage had increased. That said, the evidence adduced showed that the classification was correct given the definition applicable and the normal and regular use of the road and its setting.

The claimant was represented by MW Solicitors

The defendant was represented by DWF Law

Comment

Contrasting this case with *Colar and another v Highways England*, which we reported in the last edition of Insight, it can be seen that here the defendant's evidence as to its system of inspection and that the system was adhered to was accepted by the judge.

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