

Insight 214

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

In this week's edition of Insight, we report on the recent Court of Appeal ruling in the case of *Brown v South West Lakes Trust and others*. The Court of Appeal considered an appeal of the decision of His Honour Judge Gore QC (sitting as a Deputy High Court Judge).

The decision considers liability under the Occupiers' Liability Act 1984 in respect of claims from trespassers, the duty owed under the 1984 Act owed by landowners adjoining a highway and also highlights the consequences of failing to properly plead a claim.

Malcolm Henké
Partner & Head of LACIG
malcolm.henke@h-f.co.uk



Brown v South West Lakes Trust and others

Background

On 16 May 2017 Mrs Hazel Brown, then aged 29 was driving her Ford Fiesta motor car on the C164 highway near Redruth, Cornwall. The highway is subject to a speed limit of 60 mph. The highway borders the Stithians Reservoir. Mrs Brown's car left her lane, crossed the other oncoming lane and a grass verge, went through a wire fence on the verge, and then went down a stone-faced bank into the reservoir where the car was submerged. Mrs Brown was drowned.

The parties

The claim was brought by Mr Brown and his two children aged four years and one year. The claim was brought pursuant to the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934.

The first defendant was the South West Lakes Trust (The Trust) who had a licence to use the reservoir. The second defendant was South West Water, the owner of the reservoir. The third defendant was Cornwall Council (The Council), the highway authority for the C164.

The issues at trial

The defendants sought an order striking out the claim and requesting reverse summary judgment.

The Judgment of His Honour Judge Gore QC

It was accepted by all the parties that for the purpose of the hearing the responsibility of The Council was for the carriageway and the verge up to the fence and that the first and second defendants were the occupiers of the reservoir and the verge between it and the fence.

The judge noted that the claimants alleged that The Trust and South West Water were negligent at common law and in breach of the Occupiers' Liability Acts of 1957 and 1984. The claimants alleged The Council were negligent at common law and in breach of the Highways Acts of 1959 and 1980 and in breach of the Occupiers' Liability Acts of 1957 and 1984.

The judge held that the claim against The Trust and South West Water could only be made under the occupiers' Liability Act 1984 (The 1984 Act) as Mrs Brown was a trespasser over the bank and reservoir. There was nothing to show The Council was an occupier of the bank and the reservoir.

The judge stated that the central question regarding the liability of The Trust and South West Water was whether occupiers of land adjoining the highway were under a duty to prevent cars from leaving the road and coming on to their premises. The judge held that there was no such duty.





The judge held The Council was not an occupier of the highway and the only possible claims were under the Highways Acts or at common law. The judge concluded The Council had not failed to maintain the highway and there was no evidence that The Council had created a danger (the sharpness of the bend) or that it had caused the accident. The claim against The Council was dismissed.

The grounds of appeal against the occupiers of the reservoir

It was common ground that the relevant test for the judge to apply was whether the particulars of claim disclosed reasonable grounds for bringing claims against the defendants and whether the claimants had real prospects of succeeding on the claims.

The claimants' grounds of appeal

- The judge had misinterpreted the provisions of the 1984 Act and the decision of the House of Lords in *Tomlinson v Congleton Borough Council*. There was a distinction to be drawn between voluntary acts, such as diving into the water as in *Tomlinson*, and this case where Mrs Brown was an unintentional or inadvertent trespasser. She had not deliberately driven into the reservoir and this distinguished the case from *Tomlinson*.
- The reservoir was a danger due to the depth of the water and the risk of drowning. The judge should have found that occupiers of the reservoir knew or had reasonable grounds to believe that users of the

highway were in the vicinity of the danger from the water within the meaning of the 1984 Act and the occupiers should have offered protection to users of the highway by erecting warning signs or created a stronger fence between the reservoir and the grass verge.

- The judge should not have struck out the claim before trial as disclosure may have shown evidence of previous accidents and expert evidence might have assisted the court to assess the risk of driving off the road into the reservoir.

The case for the occupiers

- The danger arose because Mrs Brown failed to drive with reasonable skill and care and drove into the reservoir.
- There was no risk of injury to anyone suffering injury "by reason of any danger due to the state" of the reservoir for the purposes of the 1984 Act. The appellants were wrong to attempt to separate the need to show that "the danger" was "due to the state of the premises"

Relevant Provisions of the 1984 Act

Section 1 of the 1984 Act sets out the duties of occupiers to persons "other than his visitors"

The Occupier owes a duty to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises if

- He is aware of the danger or has reasonable grounds to believe it exists
- He knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned and
- The risk is one against which in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

Where a duty is owed to another the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

The Court of Appeal Decision

Lord Justice Dingemans

- LJ Dingemans accepted that the “state of the premises” within the meaning of the 1984 Act might include references to natural features. However, he continued “the fact that the “state of the premises” can include natural features does not mean that the claim in this case might succeed. This is because it is necessary to show that there was a “risk of .. suffering injury on the premises by reason of any danger due to the state of the premises. In this case the danger arose because Mrs Brown’s car came off the highway, travelled across the verge, went through the fence and down the bank, and into the reservoir. The danger was not due to the state” of the reservoir.
- The attempt to distinguish Tomlinson v Congleton was rejected. It was accepted Mrs Brown did not



intend to drive off the road and into the reservoir, but that conclusion did not mean that the “danger was due to the state of” the reservoir rather than because of the driving. There was nothing in the “state” of the reservoir which posed a danger to Mrs Brown.

- Even if it was arguable that there had been a risk of suffering injury on the premises by reason of any danger due to the state of the premises it was not a risk in respect of which the occupiers might reasonably have been expected to afford the claimants some protection as nothing in the duty of those occupying properties bordering on a highway which extends to preventing drivers on the highway from driving off the highway on to their land.
- It is accepted that owners of buildings and trees adjoining highways may owe duties not to permit objects or branches to fall onto users of the highway but that is very different from a duty to prevent drivers driving off the highway.

LJ Dingemans concluded:

“In my judgment the claims against South West Lakes and South West Trust for breach of duties owed under the 1984 Act were bound to fail and were rightly struck out by the judge. There was nothing that could emerge in the trial process which might affect this conclusion. This is because there was no sustainable basis for showing a duty under the 1984 Act owed to Mrs Brown by the occupiers of the reservoir”.

The appeal against the order of the judge striking out the claim against the occupiers of the reservoir and the granting of reverse summary judgment was dismissed.

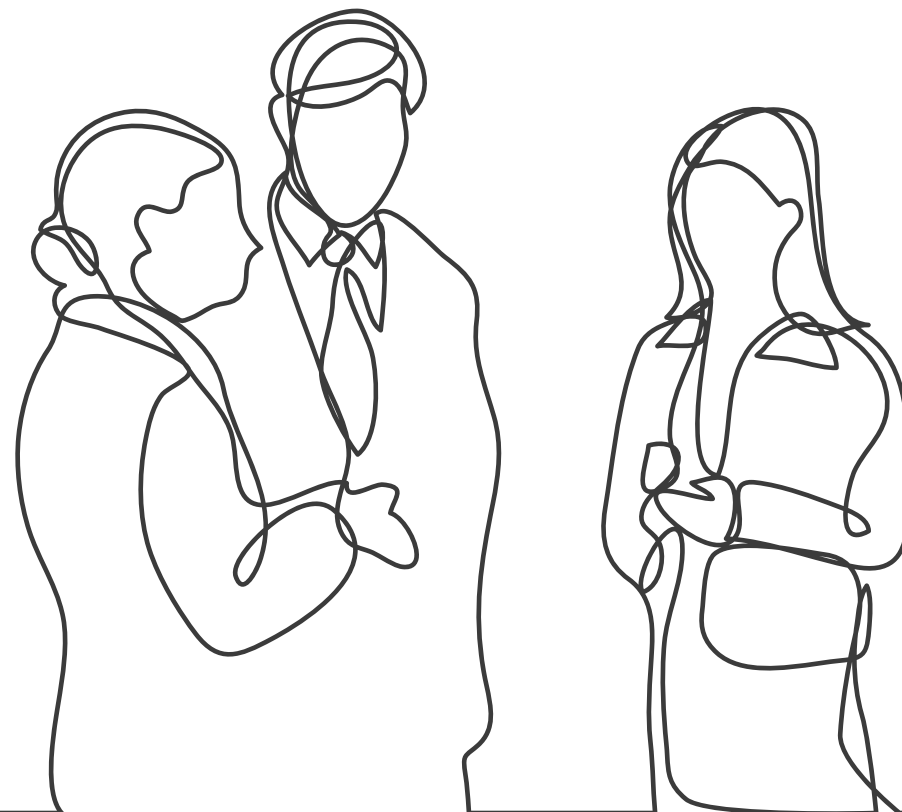


The claim against The Council

His Honour Judge Gore QC struck out the claim against The Council on the basis the particulars of claim or any evidence did not allege that the sharpness of the bend was dangerous in itself or that it caused the accident.

There was no sufficient pleading of the detail against The Council.

LJ Digneman disagreed. Causation had been sufficiently pleaded. It was alleged the location of the accident was on the section of the highway with the bend. It was specifically pleaded that The Council had caused or permitted the highway to be constructed with a radius on the bend significantly less than the absolute minimum prescribed by prevailing standards.



LJ Dingemans commented:

“It was accepted on behalf of the claimants that the particulars of claim were not as focused as they might have been and that the particulars of claim included claims against The Council; as an occupier of the highway; for failing to maintain the highway and for failing to exercise powers to erect a crash barrier which was common ground on appeal were bound to fail and had rightly been struck out by the judge. Quite apart from potential costs consequences, an approach to pleading where unsustainable claims are pleaded with viable claims increases the risk that a good claim might get struck out with the bad causes of action”

The claim that The Council may have constructed a highway with a bend more acute than that was recommended by prevailing standards and that had in some way had been causative of Mrs Brown’s loss of control might have a real prospect of success.

The judge was wrong to strike out the particulars of claim against The Council.

The appeal against The Council was allowed to the extent of permitting the claim for negligently constructing the highway to proceed.

Commentary

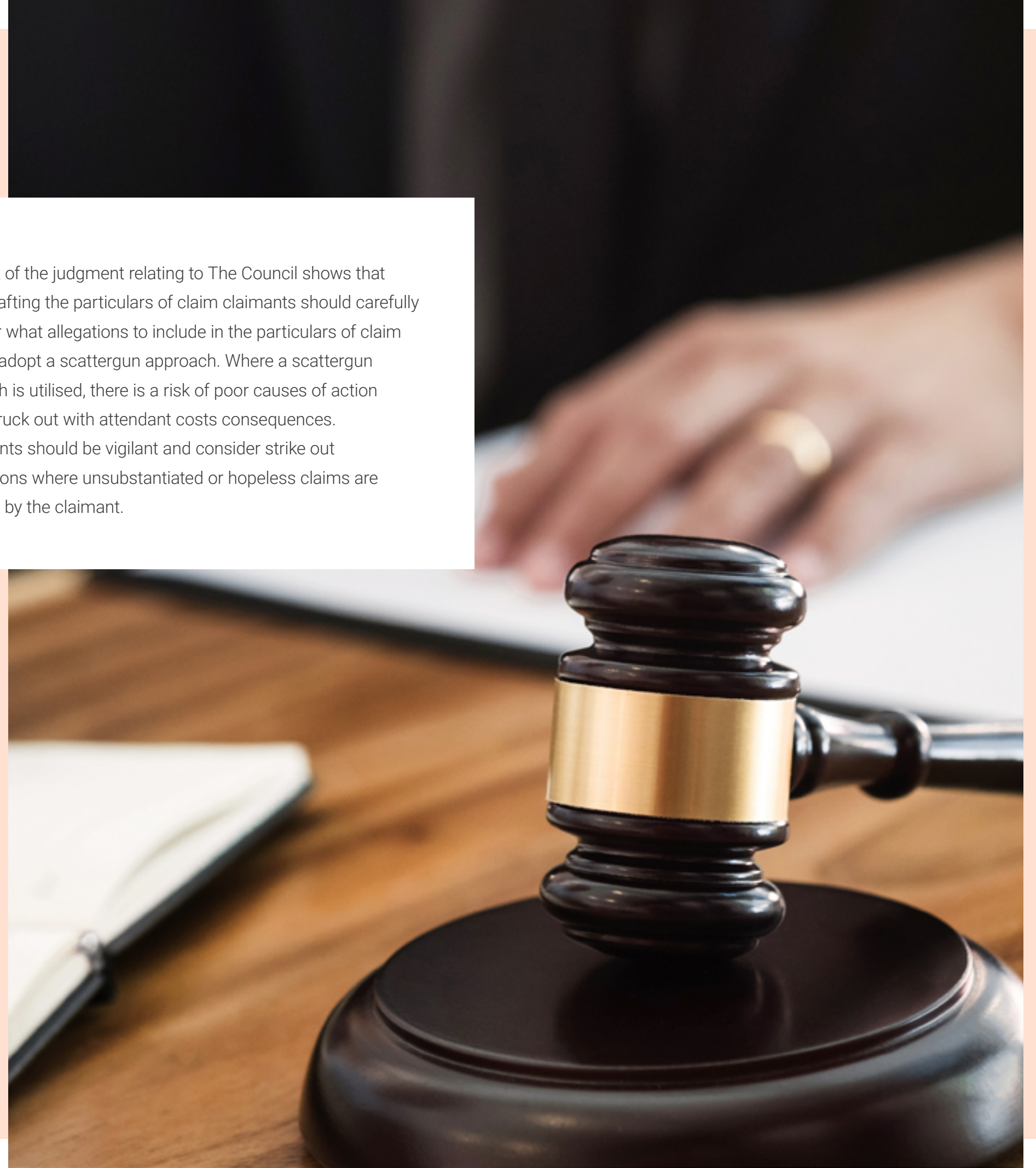
The case is of interest as the claimants attempted to distinguish Tomlinson v Congleton on the basis the trespass onto the land of the occupier by Mrs Brown had been inadvertent and not a deliberate trespass as in Tomlinson. This was always going to be a weak argument and was rightly rejected by the Court of Appeal.

The Court of Appeal also concluded there was no duty on landowners adjoining the highway to take any preventative measures to stop vehicles exiting the highway and driving onto the landowner's property.

The case does emphasise that in order to succeed in a claim under the Occupiers' Liability Act 1984

- The claimant must prove that on the occupier's property there is a danger due to the state of the premises. In the present case the reservoir was held not to be a danger and as such the claim was bound to fail.
- The claimant must prove that if a danger does exist which carries with it a risk of injury the occupier must be aware of the danger and it is reasonable for the occupier to provide the claimant with some form of protection against the danger. In the present case this did not extend to taking measures to stop drivers driving off the highway into the reservoir.

The part of the judgment relating to The Council shows that when drafting the particulars of claim claimants should carefully consider what allegations to include in the particulars of claim and not adopt a scattergun approach. Where a scattergun approach is utilised, there is a risk of poor causes of action being struck out with attendant costs consequences. Defendants should be vigilant and consider strike out applications where unsubstantiated or hopeless claims are included by the claimant.



Disclaimer & Copyright Notice

The contents of this document are considered accurate at the time of delivery. The information provided does not constitute specific legal advice. You should always consult a suitably qualified solicitor about any individual legal matter. Horwich Farrelly Limited accepts no liability for errors or omissions in this document.

All rights reserved. This material provided is for personal use only. No part may be distributed to any other party without the prior written permission of Horwich Farrelly Limited or the copyright holder. No part may be reproduced, stored in a retrieval system or transmitted in any form or by any means electronic, mechanical photocopying, microfilming, recording, scanning or otherwise for commercial purposes without the written permission of Horwich Farrelly or the copyright holder.

