

The Court of Appeal find that Occupiers of Land Adjoining the Highway Owe No Duty to Prevent Drivers Accidentally Trespassing onto Their Land

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On 16 May 2017 Mrs Hazel Brown tragically drowned when her car left the C164 highway near Redruth in Cornwall and entered the Stithians Reservoir. This case concerned a fatal accident claim by her family against the two occupiers of the reservoir and against the local highway authority.

At first instance, before HHJ Allan Gore QC sitting as a Judge of the High Court, all three defendants applied successfully for strike out and summary judgment. The claimants appealed.

Against the occupiers the case raised interesting issues about the extent of the duty of care owed by occupiers whose land adjoins a highway. Against the highway authority the case raised case-specific issues concerning the adequacy of the claimants' Particulars of Claim.

Dingemans LJ delivered the only reasoned judgment, with which Lewison and William Davis LJ agreed. The Court of Appeal's judgment can be found [here](#).

The Case Against the Occupiers

On appeal there was no issue that Mrs Brown – however unintentionally – was undoubtedly a trespasser when her car entered the reservoir. The claimants sought to rely on the Occupiers' Liability Act 1984.

The relevant provisions of the 1984 Act are worth noting, with emphasis added, as follows:

s1(1). The rules enacted by this section shall have effect, in place of the rules of the common law, to determine—

(a) whether any duty is owed by a person as occupier of premises 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 or to things done or omitted to be done on them; and

(b) if so, what that duty is. ...

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

The claimants argued that the reservoir constituted a '*danger due to the state of the premises*', within the meaning of the 1984 Act, and that at trial they would have reasonable prospects of establishing the (onerous) above statutory criteria for the imposition of a duty of care upon the occupiers. Their key difficulty was of course the well-known decision of the House of Lords in *Tomlinson v Congleton Bough Council* [2004] 1 AC 46.

The claimants sought to distinguish *Tomlinson* by reference to the fact that the claimant in that case trespassed voluntarily (he had deliberately dived into the lake, knowing that swimming was prohibited) whereas Mrs Brown was an unintentional or 'inadvertent' trespasser.

The Court of Appeal held however that there was no sustainable basis for showing a duty under the 1984 Act. Even accepting that the words '*state of the premises*' in section 1 of the Act might include natural features, that did not mean the danger in this case arose from the state of the premises. In this case, the danger arose because Mrs Brown's car came off the highway and went into the reservoir: the danger was not due to the '*state*' of the reservoir at all. The fact that Mrs Brown trespassed inadvertently did not affect that.

That finding of itself was enough to dispose of the appeal against the occupiers. Interestingly however the Court of Appeal went further, indicating that even if there was a danger due to the state of the premises it would have found that it was not a risk against which the occupiers could reasonably be expected to offer some protection. This was because, as Dingemans LJ pithily observed at [40]:

"there is nothing in the duties of those occupying premises bordering the highway which extends to preventing drivers on the highway from driving off the highway on to their land".

The Court recognised that there had been cases of public nuisance caused by creating danger for highway users - for example by excavating an unfenced pit next to the highway or using spikes on a fence adjoining the highway. Those, however, it held, were based on dangers which '*may reasonably deter prudent persons from using the way*'. Here there was nothing to suggest that prudent persons were deterred from using the C164 by the presence of the Stithians Reservoir.

It followed that there was no basis on which the occupiers of the reservoir might have been expected to offer protection to Mrs Brown. The case against them was appropriate for strike out and summary judgment.

The Case Against the Highway Authority

At first instance the claimants alleged that the highway authority were negligent at common law, in breach of statutory duty under the Highways Acts of 1959 and 1980, and in breach of statutory duty under the Occupiers' Liability Acts. On appeal they accepted that claims against the council as occupiers, and/or under the Highways Acts, and/or for failing to exercise statutory powers to erect a crash barrier, were bound to fail and had been rightly struck out.

At [46] of the judgment Dingemans LJ noted the dangers of such unfocussed pleading, commenting that:

"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".

In amongst their legally hopeless causes of action, however, the claimants had also alleged that the highway authority negligently designed and constructed the highway back in the 1960s. There was an allegation that Mrs Brown's accident had been caused by, amongst other things, the highway authority constructing a bend which was (so it was said) significantly too sharp by the standards of that time. Admittedly, noted Dingemans LJ, the pleading did not contain detail that might be expected in such a claim. That however was a different matter from saying that the claim did not disclose a reasonable cause of action and/or have any real prospect of success.

The claim against the highway authority was reinstated, albeit only insofar as it related to the allegedly negligent construction and/or design of the bend.

Tom Panton acted for the Third Defendant highway authority at first instance and in the Court of Appeal.

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