Defences - Contributory Negligence

Negligence – Standard of Care – Intoxication

Campbell v Advantage Insurance Company Ltd [2021] EWCA Civ 1698

Facts:

The Claimant had been drinking alcohol at a nightclub with 2 brothers, Dean and Aaron Brown. The Claimant was assisted to get into Dean's car and placed in the front passenger seat. The Brown brothers returned to the club continuing drinking for an hour or so. Evidence on the balance of probabilities was that Dean had assisted the Claimant from the front passenger seat into the back seat before driving and then crashing into an articulated lorry killing Dean. The Claimant, who was most likely lying down, survived but suffered serious injuries. The Defendant admitted primary liability but alleged contributory negligence on the basis that the Claimant had knowingly allowed himself to be driven by Dean who he knew, or ought to have known, was too intoxicated to drive, and because the Claimant was not wearing a seatbelt.

Issues:

The Court of Appeal considered whether the judge was correct to apply an objective test of the reasonable, competent and prudent passenger when the Claimant was intoxicated to establish negligence.

The appeal was from the decision of HHJ Robinson (sitting as a High Court judge) who found that the Claimant was contributorily negligent using an objective test and reduced damages by 20%.

Dismissing the appeal, the Court confirmed that the test for whether someone has breached a duty of care in negligence is an objective standard and that, unlike age, intoxication was not a characteristic to be taken into account. Underhill LJ (at paragraph 50) stated, *"In my view it is clear that the law in this jurisdiction has come down against treating the fact that the claimant is drunk as a characteristic that can be taken into account in deciding whether he or she took reasonable care for their own safety."*

It is apparent that the factual questions of the condition of a passenger, and how they came to be in a vehicle being driven by a drunk driver would be important. There would be a need to consider the boundary between voluntary and involuntary conduct, as Underhill LJ explained (at paragraph 53) by his example of an unconscious passenger being involuntarily placed in the vehicle who would not be contributorily negligent because there was no consent to being driven at all (i.e. no voluntary act).

NB. The High Court case was considered in the November 2020 Tort Law update.

Damages

Paramount Shopfitting Company Ltd v Rix [2021] EWCA 1172

Facts:

The Claimant, Mrs. Rix brought a claim under the Fatal Accidents Act 1976 for financial dependency. Her husband had died from mesothelioma due to asbestos exposure when working for the Defendant company in the 1970s. He subsequently left their employment and set up a family business; at the time of his death, he and the Claimant each owned 40% of the shares of the business, with the remaining 20% shared between their children. The business continued to grow both its turnover and profit after Mr. Rix's death.

Issue:

Appealing the decision of Cavanagh J, the Defendant company argued that the Claimant, Mrs. Rix had no financial dependency claim under s.3 Fatal Accidents Act 1976 as the family business had been profitable since the death of her husband.

The Court of Appeal dismissed the appeal, finding that the whole of the profit available to the couple was classed as earned income and therefore was part of the financial dependency.

The Court clarified that the value of the dependency was assessed at the date of Mr. Rix's death and it was irrelevant how the business performed afterwards.

They considered the factual question as to how much loss arose because Mr. Rix was no longer alive and able to work, otherwise known as income derived from labour, and how much of the deceased's income derived solely from capital which the Claimant, Mrs, Rix as a dependant inherited. The factual conclusion reached was that all of the profit was derived from labour so was considered part of the financial dependency under the FAA 1976.

Defences – Contributory Negligence - A Child

Khadija Alabady (a minor by her ligitation friend Fatima Alabady) v Muhammad Ali Akram [2021] EWHC 2467 (QB)

Facts:

The 9-year-old Claimant was a pedestrian, walking with her mother and adult cousin, and began to cross a busy road with the pedestrian signal showing a red man (ie. do not walk). Her group stopped when they saw the Defendant's car, but the child Claimant continued walking for a little over 1 second before she was struck by the Defendant's vehicle. The Defendant was travelling at about 43mph in a 30mph zone and collided with the Claimant whilst driving at a speed of about 33mph.

Issues:

The Court decided a preliminary issue as to whether the 9-year-old Claimant could be contributorily negligent and the appropriate apportionment.

In relation to contributory negligence, HHJ Bird found that the decision whether to cross the road was very unlikely to have been the child Claimant's. The judge considered her age and expected road sense and the fact that she was accompanied by her mother. It would not be reasonable to expect a 9-year-old girl to keep such a close eye on the group that she could stop within a second or so of them stopping whilst crossing the road. Judging her by the standard of children her age (following *Ellis v Kelly* [2018] 4 WLR 124) he held that she could not be said to have been "blameworthy" as she was with older and more responsible people.

Apportioning liability is decided by reference to the relative causative potency and moral blameworthiness of the Claimant and Defendant. Interestingly, in relation to apportionment, HHJ Bird noted that, in the alternative, if he had been wrong on the point of contributory negligence, the reduction would have been minimal and at most 10%. He regarded the reduction as de minimis and he would not therefore have found contributory negligence.

The judgment provides a useful summary of contributory negligence principles relating to child claimants.

Jones v Ministry of Defence [2021] EWHC 2276 (QB)

Facts:

In 2003, the Claimants bought land in rural Anglesey approximately one mile away from a Royal Air Force airfield (RAF Mona) which has been located in the area since the 1950s. The land was previously used for water supply, but after purchase and by 2007, the Claimants converted it into a holiday and leisure park business called "Parc Cefni" which was much more sensitive to noise; this required planning permission for "change of use" of the land.

The noise from the airfield did not get any worse over time, and in fact the number of flights diminished during the period of time that the Claimants owned the land. The Defendant's RAF officers took all steps that they reasonably could to accommodate the Claimants, including restricting flights over the area of the Claimants' land where there was a nursery building.

Issue:

Is there an actionable claim in nuisance?

HHJ Sephton QC (sitting as a Judge of the High Court) characterised the locality as being, *"largely agricultural, but one in which very loud noise from aircraft...is heard on frequent occasions"* (paragraph 61) as jets have taken off from RAF Mona for the last 70 years disturbing the tranquillity of the local area. He did this by adopting Lord Neuberger's "presumption of reality" from the leading case of *Lawrence v Fen Tigers* [2014] UKSC 13, in which the Defendant's pre-existing activities were considered to be part of the character of the locality.

The judge accepted the submission that, *"there is significant public interest in training fast jet pilots for the defence of the realm"* (paragraph 63) and that flying military aircraft at RAF Mona is an ordinary use of the land there. Further, that the Defendant had taken all reasonable steps to ensure that the noise was kept to a reasonable minimum. Therefore, no nuisance has been committed.

A useful summary of the case can be found at paragraph 71 of the judgment. *"If an occupier of land has conducted an activity in a reasonable manner for many years, I do not consider it fair that a new neighbour who wishes to start doing something that is sensitive to the occupier's activity can complain that the activity in question will disrupt the sensitive use of his land that the neighbour wishes to introduce."*

Human Rights Act 1998:

The judge also considered whether the aircraft noise breached the Claimants' rights under Article 8 of the ECHR. He found that whilst the aircraft noise disturbs the Claimants' lives and their home, that interference is reasonable, proportionate and necessary in the interests of national security. Article 8 is a qualified right and can be

overridden if the balance struck between the national security requirements and the Claimants' human rights is necessary.

Article 1 of the First Protocol to the ECHR was also considered, in which the Claimants argued that their peaceful enjoyment of their possessions was interfered with. Peaceful, in this context, means without interference, rather than quiet.

The judge dealt with this in the alternative, either the possessions were the land purchased in 2003, which was acquired at a time when the aircraft noise was already present, so the Claimants purchased the land with that knowledge (and arguably at a commensurately lower price) and the Defendant had not deprived them of anything, Alternatively, if the businesses at Parc Cefni are classified as the possessions, then when they purchased the land the businesses did not exist, so the noise did not deprive them of something they already had, but impeded them in developing something new (the businesses).

Both human rights claims therefore failed.

Causation in Clinical Negligence - Application of “But For” test

Toombes v Mitchell [2021] EWHC 3234 (QB)

Facts:

In 2001, the Claimant’s mother sought pre-conception medical advice from her doctor and asked about taking folic acid supplements. The Defendant doctor advised her that if she was eating a healthy diet they would not be necessary. The Defendant doctor’s note of the conversation stated, “folate if desired discussed”. She did not therefore take folic acid supplements, and shortly after became pregnant with the Claimant.

The Claimant was born in November 2001 with a form of spina bifida, leading to impaired mobility and incontinence.

It was agreed that to tell the Claimant’s mother that folic acid supplements were “not necessary” was negligent advice.

Issue:

The issue here was one of causation. The judge (HHJ Coe QC) found that if the mother had been given the correct advice, she would have delayed conception until she had taken a course of folic acid supplements.

“But for” the negligent advice, the mother would have delayed conception for 6 weeks and, it was agreed between the parties that, on the balance of probabilities, had this occurred, the conception would have been of a healthy baby. The Court noted that the mother subsequently conceived the Claimant’s healthy sibling whilst taking folic acid supplements and there was no genetic cause to the Claimant’s disability.

This case is fact specific, and it is important to bear in mind that there remains a requirement to prove a causal link between the conception and any disability.

It should be noted that this was the second part of the case, the first decided by Lambert J in December 2020, [2020] EWCA 3506, in which the Claimant was allowed to bring a claim relating to the application of s.1 Congenital Disability (Civil Liability) Act 1976. Typically, these are “wrongful birth” claims brought by parents, whereas the Claimant here was the child in question and the Court decided she was not precluded from bringing the claim. This second case confirmed the factual basis upon which that case was decided.

Defamation – Slander

Hwang v Kim [2021] EWHC 3327 (QB)

Facts:

Both parties belong to the Korean community in the UK and are based in South London. They have both been politically active and held leadership positions at national or European level in the community and political organisations. There appeared to be a longstanding quarrel between the parties.

The Claimant alleged that the Defendant slandered him on 3 occasions (whilst speaking in Korean), at Korean political community events, and he has as a result lost his good standing in the community.

The nature of the defamatory comments were that the Defendant is alleged to have said, in front of at least 10 people, that the Claimant would stab her, or stab her to death, with a knife. A second statement was that the Claimant had had an intimate personal and sexual relationship with a North Korean woman that was so distressing that it caused her psychological damage sufficient to hospitalise her.

The Defendant did not materially dispute the content of 2 of the allegations. She stated that they were potentially defamatory allegations but did not allege criminal conduct and were substantially true, so argued that she had a complete defence under s.2 Defamation Act 2013.

Issue:

The question for the Court was whether this was slander "actionable per se".

Mrs. Justice Collins Rice emphasised that this is a question of mixed fact and law (paragraph 3): *"What is said has to convey an imputation of criminal conduct to ordinary reasonable people (neither naïve nor scandal-hungry) hearing it in context; and as to that a common-sense, and not overly lawyerly or analytical, approach must be taken. At the same time, what is said must add up to something which really is, in law, recognisable as criminal conduct, specific or general."*

She found that considering the factual context of what was said, neither allegation amounted to an imputation to him of recognisably criminal conduct punishable by imprisonment.

In relation to the "stab him with a knife" allegations, the Claimant, *"has to show... that ordinary reasonable hearers of her words would understand he did not just say he would knife her, he literally meant he would knife her or at any rate put her in real fear of that."* (paragraph 38). This was a high barrier, and the Claimant failed to discharge his burden of proof, showing at best that ordinary and reasonable people would have understood that he was, *"an aggressive bully with an ugly and highly-coloured vocabulary for expressing it, which he had deployed to intimidate and distress her...but a long way from being thought of as putting Ms. Kim in fear of 'immediate violence' or indeed being murdered by Mr. Hwang."* (paragraph 43)

Meanwhile, the “inappropriate sexual relationship” allegation, was considered in the context of the criminal offence of coercive and controlling behaviour under s.76 Serious Crime Act 2015. The judge concluded, at paragraph 61, that, *“I am quite satisfied that Ms Kim branded Mr Hwang's relationship with Ms X as immoral, selfish, irresponsible and highly damaging to the point of victimisation. I am not satisfied she alleged the components of the s.76 offence or any other criminality. She roundly blamed him for having the relationship at all, and for Ms X's mental health predicament. She did not call him a criminal. These allegations are not slanders 'actionable per se'.”*

It is clear from the judge’s analysis that the bar to cross for a Claimant alleging a slander actionable per se, is a high one, and not made out on the facts of this case. Slander cases are rarely seen in the Courts, so this is an unusual and helpful illustration of just how difficult it is to make out such a claim.