COMMON LAW PRACTICE UPDATE 79

Educational institutions/Occupiers Liability

The plaintiff was a ten year old junior school child attending a weekly swimming lesson at her local pool in *Woodland v Maxwell and Essex County Council* [2015] EWHC 273 (QB). Shortly after she entered the water the swimming teacher noticed her floating vertically in the water. The plaintiff did not respond to questioning or physical touch. By the time she was resuscitated she had suffered cardiac arrest and serious brain injury, with serious consequences. The second defendant was a lifeguard. The educational authority under whose auspices this school activity took place was the third defendant. The English Supreme Court had held in October 2013 ([2013] UKSC 66) that the plaintiff was owed a non-delegable duty of care by educational authority.

Although the pupils were accompanied by supervising teachers, given the large number of pupils, the lifeguard's role was of importance.

The plaintiff contended that the lifeguard and the relevant teacher failed to keep her under observation and failed to raise the alarm and effect a rescue within a reasonable time. Treatment after removal from the water was not in issue, even thought there was evidence suggesting that her rescuers wrongly assumed she was still breathing. The plaintiff's injuries were the consequence of a near drowning episode and she had been spotted and rescued earlier it was probable that she would not have suffered the injury that she did.

Expert opinion suggested that she was in cardiac arrest when first pulled from the water, and, if that was correct, the plaintiff would have had to have been in the water for a minimum of some 50 seconds and may well have been there for longer. Contemporaneous accounts from other pupils supported this contention, who also claimed that the pupils were shouting to her. This was denied by the teachers. Some contemporary records supported the other children's version of events. In contrast, the teachers' accounts differed from the case which had earlier been mounted on their behalf and found to be implausible.

In the circumstances, by failing to notice a pupil in difficulties in the water for more than 30 seconds the teachers' conduct fell below the standard of care to be reasonably expected. The lifeguard's role also required observation of the plaintiff, and although there was sufficient time for her to have done so, she failed to perform that role to a reasonable standard. Accordingly, both the second and third defendants were accordingly found to be negligent.

Duty to Patrons on Licensed Premises

The plaintiff suffered a serious injury and broke his leg after being evicted by security staff and falling down the front steps of a hotel in Gladstone in *Carlyon v Town & Country Pubs (No. 2) Pty Ltd t/as Queens Hotel Gladstone* [2015] QSC 13. He took action against the hotel owners in respect of the assaults and the alleged negligence of the security staff during the eviction.

The plaintiff was asked to leave in respect of an incident in which he had not been involved. The relevant CCTV footage had been lost after it was reviewed by police, although the notes of their observations were admitted.

The plaintiff's alleged that there had been an unprovoked assault upon him by staff. Although the police on the CCTV footage partially supported the plaintiff's contention, they also implied that he may have resisted being ejected.

The fact that the plaintiff slammed his glass down had been sufficient to justify him being spoken to and directed out of the venue. Accordingly, the plaintiff could not establish that he was deliberately injured by the hotel staff. By this time, the plaintiff had consumed at least 21 drinks. There was a reasonable basis for asking the plaintiff to leave, and accordingly Her Honour could not be satisfied on the balance of probabilities that the plaintiff established that excessive force was used in ejecting him from the premises.

Employment

In *Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47, a friend and colleague of the plaintiff used a cigarette lighter in his vicinity when his overalls had been sprinkled with a highly inflammable thinning agent. The plaintiff suffered very considerable injury as a result. The fellow employee could not be located but the employer was sued. Although the defendant asserted the incident was "horseplay", the trial judge found it was deliberate and "clearly reckless" although it was also held that the employer was not vicariously liable.

When the plaintiff went to the English Court of Appeal, applying *Lister v Hesley Hall* [2002] 1 A.C. 215, the question was whether the fellow employee's conduct was "so connected with acts which the defendants authorised that they may rightly be regarded as modes - though improper modes - of doing them".

The mere fact that the employer had an interest in its employee using the thinners carefully and in that sense could have been said to have created the risk, was sufficient to impose liability. The plaintiff's injuries were caused by the "no doubt frolicsome but reckless conduct" of the fellow employee, which could not be said to have occurred in the course of his employment.

Strict Liability/Vicarious Liability/Extension of Time

The plaintiff was sexually abused by a boarding house master at the college he attended in 1962, when 12 or 13 years of age in *A, DC v Prince Alfred College Incorporated* [2015] SASC 12. He failed to establish that the school was negligent in its supervision of the master. The trial judge accepted that the appropriate approach was that of Gleeson CJ in *State of NSW v Lepore* (2003) 212 CLR 511. Whilst the relationship between a boarding house master and a boarding student was closer than that of a day student and teacher, the ordinary relationship was not one of intimacy. The sexual abuse was so far from being the teacher's proper role that it could not be seen as an unauthorised mode of performing an authorised act nor could it be categorised as being in pursuit of the employer's business, nor in any sense within the course of employment. The primary judge said that the defendant did not, by means of any proven requirement of the teacher, create or enhance the risk of sexually abuse in respect of the plaintiff. This approach, whilst arguably open on the basis of *Lepore*, is wholly inconsistent with Canadian and particularly English authorities at the highest level. In any event, despite occasional periods of hospitalisation from time to time, the delay since 1996 in commencing proceedings meant that the plaintiff had the capacity to and should have brought the proceedings much earlier. There was substantial prejudice and time should not be extended in the plaintiff's favour.