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Who could be liable for a car driving into a reservoir? Not the occupiers: possibly the highway authority

Brown and others v South West Lakes Trust and others (2022) EWCA Civ 18

This appeal raised issues about whether claims: (1) under the Occupiers' Liability Act 1984 ("the 1984 Act") against occupiers of land adjoining a highway; and (2) against the relevant highway authority; arising from a serious road traffic accident were reasonable causes of action or had a real prospect of success.

The deceased was driving her car on a highway which was subject to the national speed limit of 60 mph. The highway bordered a 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.

A claim was brought by Mrs Brown's husband, and their children for damages pursuant to the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934.

The claim was brought against South West Lakes Trust ("South West Lakes"); South West Water Limited ("South West Water"); and Cornwall Council ("the council"). It was common ground that South West Lakes had a licence to use the reservoir. South West Lakes was a charity

IN BRIEF

The Court of Appeal upheld a judge's finding that claims under the Occupiers; Liability Act 1984 against the occupiers of a reservoir and a highways authority could not proceed.

However, even though badly pleaded, claims against the highway authority in negligence could be pursued.

formed in 2000 to look after forty inland waters. The licence to use the reservoir was from South West Water, the owner of the reservoir. The council was the highway authority for the highway.

This was the hearing of an appeal against the order of a Deputy High Court ("the judge"), striking out and granting reverse summary judgment in respect of the claims made by Mr Brown and his children against each of the defendants.

So far as South West Lakes and South West Water were concerned it was pleaded that "on the offside of the deceased's direction of travel and immediately adjacent to the wire link fencing was the main body of the reservoir and its sloping stone-faced banks". It was also pleaded that "there was no safety barrier to protect against the risk of drivers losing control on the bend of the carriageway which crossed the reservoir and crashing into the reservoir".

The location of the accident was pleaded to be "on a section of the highway where there was a sweeping left-hand bend which ran across the southern end" of the reservoir. This part of the highway was pleaded to be "a causeway road which crosses the southern end of the reservoir ... albeit in recent years the area of land south of the highway at the accident locus has been marshland". It was pleaded in the Particulars of Claim that there was "a history of drivers losing control of their vehicles at or around the accident locus".

Also in the Particulars of Claim it was pleaded that "the Defendants (or each of them) were aware or ought to have been aware of the risk of vehicles leaving the carriageway at the accident locus at all material times; there had been accidents on the bend and the other accidents were said to have been referred to at the inquest into Mrs Brown's death.

In the defence on behalf of South West Lakes it was pleaded "the deceased did not crash through the fence on the sweeping left-hand bend but beyond it". The previous incidents were said to have been incidents in which drivers had only damaged the fence. It was stated in the defence on behalf of South West Water that "there had never before been an accident where a vehicle entered the water of the reservoir".

So far as the highway authority was concerned it was pleaded in the Particulars of Claim that the council "was responsible for the construction and/or design of the physical road and its surrounds which forms the material section of the highway". It was also pleaded that it was the council who had installed the vehicle restraint barrier erected after the accident.

In the Particulars of Claim it was stated that the vehicle restraint barrier erected following the accident, on both sides of the highway was installed where the accident occurred. In the council's defence it was pleaded that the installation did not mean that there was a legal duty to instal it.

The particulars of negligence and breach of statutory duty pleaded against the council included: "(a) caused and/or permitted the highway and/or reservoir to be designed and/or constructed and/or adopted without any sufficient assessment of the risks posed to motorists negotiating the left hand bend of the highway ..."; "(d) caused and/or permitted the highway to be designed and/or constructed with a radius on the bend which was significantly less than the absolute minimum prescribed by prevailing standards (including Memorandum No. 780 – Design of Roads in Rural Areas)"; and "(e) failed to heed, act upon and/or collate adequately all information and reports relating to previous accidents and incidents on the highway in the vicinity of the accident locus".

The council's defence pleaded that "no admissions are made as to the alleged or any involvement of the Third Defendant in the construction and/or design of the road and/or the reservoir and/or any other feature of the area in question. It was noted that no such allegations featured in the pre-action correspondence. Such matters dated back to the 1960's and would require further detailed investigation if these claims proceeded.

There were nine grounds of appeal. Grounds one to six related to the claim against South West Lakes and South West Water, as occupiers of the reservoir. Grounds seven to nine related to the claim against the council, as highway authority. Many of the grounds of appeal overlapped.

It was common ground that the relevant legal test to be applied by the judge below in respect of the claims against the occupiers and the claim against the highway authority was whether: the Particulars of Claim disclosed reasonable grounds for bringing the claims against the defendants; and the claimants had real prospects of succeeding on the claims.

The Court of Appeal held that 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 was 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 1984 Act built upon the development of the common law duties owed by occupiers of land to trespassers. The court was not prepared to distinguish *Tomlinson v Congleton (2003)* on the basis that the claimant in that case was carrying out some voluntary activity when he dived in the lake, whereas Mrs Brown's presence in the reservoir was inadvertent because she had not intended to drive off the road. It was accepted by South West Lakes and South West Water that 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.

This conclusion on section 1(1)(a) of the 1984 Act was sufficient to dispose of the appeal against South West Lakes and South West Water, but even the appellate court had been persuaded that 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, under section 1(3)(c) of the 1984 Act. This was because there was nothing in the duties of those occupying properties bordering the highway which extended to preventing drivers on the highway from driving off the highway on to their land.

The issue on the appeal against the council was whether the claim against the council for the negligent design and construction of the highway was properly struck out. The judge's decision to strike out the claim against the council appeared from his judgment to have been on the basis that it had not been pleaded nor evidenced that the sharpness of the bend "was dangerous in itself, or that it caused this accident".

Causation had been sufficiently pleaded in this case. The Particulars of Claim pleaded that the location of the accident was on the section of the highway with the bend. The accident was pleaded to have been caused by, among other causes of action, the negligence of the council. This included the plea that the council "caused and/or permitted the highway to be designed and/or constructed with a radius on the bend which was significantly less than the absolute minimum prescribed by

prevailing standards (including Memorandum No.780 ...)". It would be for evidence at a trial to establish whether the bend had anything to do with the way in which Mrs Brown's car left the highway.

It was accepted in the course of argument on behalf of the claimants that the Particulars of Claim were not as focussed 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 it was common ground on appeal were bound to fail and had been rightly struck out by the judge.

The pleading in this case did not contain some of the detail that might be expected in a claim for misfeasance on the part of a highway authority, for example by specifying the angle of the bend, and by specifying the angle recommended by prevailing standards. That, however, was a different thing from saying that the claim did not disclose a reasonable cause of action and that the claim did not have a real prospect of success. If the council (or its predecessor in title to whose liabilities it had succeeded) constructed a highway with a bend which was more acute than that recommended by prevailing standards for reasonable, prudent and competent builders of highways, and the acuteness of the bend was a cause of Mrs Brown's loss of control and the accident, then the claim made by Mr Brown and his children might have a real prospect of success, even if there would be an inevitable and substantial reduction for contributory negligence on the part of Mrs Brown. This was because such a claim against the council as the highway authority would be for misfeasance in negligently creating a danger, rather than an impermissible claim against a highway authority for nonfeasance. The judge was wrong to strike out the Particulars of Claim against the council and to give reverse summary judgment for the council only to the extent of the claim for negligently designing and constructing the highway with too sharp a bend.

The full judgment may be found at: [Brown & Ors v South West Lakes Trust & Ors \[2022\] EWCA Civ 18 \(17 January 2022\) \(bailii.org\)](#)

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