



Sense and Defensibility

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3 December 2008

Introduction

In *Stratton v Hughes*, (unreported, March 17, 1998), Swinton Thomas LJ said:

Many sports, such as motor racing, rafting, mountaineering, rock climbing and many others have innate dangers. That is part of their appeal.

Whilst the media continues with its frenzy in respect of the 'compensation culture', the courts themselves have made a number of sensible decisions when faced with claims arising from accidents involving leisure pursuits. This is heartening for the leisure industry because it shows that, even if the number of claims increases, if the correct steps are taken, these claims are defensible.

The Compensation Act 2006

The Better Regulation Task Force report of May 2004, *Better Routes to Redress*, identified a common misconception – that an injured claimant is entitled to a remedy against whoever caused the injury – and this was leading to risk-averse behaviour through fear of litigation. The Compensation Act 2006 was enacted to redress this misconception, and its stated purpose was not so much to change the law, as to improve awareness and to provide reassurance that those wishing to engage in socially-useful activities should not be discouraged from doing so through fear of litigation.

The Compensation Act, which came in to force on 25 July 2006, states at sections 1 and 2:

1 *Deterrent effect of potential liability*

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might —

a *prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or*

b *discourage persons from undertaking functions in connection with a desirable activity.*

2 *Apologies, offers of treatment or other redress.*

An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.

Section 1 of the Compensation Act 2006 now enables defendants to show that if they are required to meet a particular standard of care, on occasion this cannot be achieved without curtailing a desirable activity. It therefore permits an argument that pursuit of the desirable activity in itself is not possible if the standard of care is inflexibly enforced.

Perhaps this provision applies in respect of strategic, but not necessarily operational activities. For instance, a local authority could not argue that if a teacher driving a minibus was held liable for negligent driving, there would be no more school trips.

However, it would be an entirely different matter if the local authority received a claim resulting from a pupil wandering off and having an accident whilst on a school trip. It might be a good defence to say that if teachers are to be held liable for incidents such as this, there will be no more such trips and this would be socially damaging because ultimately all children benefit from learning outside the class room.

Similarly, if someone is awarded damages for tripping in a pothole on a guided forest walk, it is arguable that the risks of offering such guided walks is too high so as to effectively make them unviable. There is a social utility to such guided walks and therefore their potential cessation should be considered by the court when deciding whether to award damages for the pothole accident.

One of the particular difficulties with section 1 is defining what constitutes a 'desirable activity'. At the time that the government indicated that it intended to legislate in this area, the examples given of why legislation was required were local authorities failing to open public spaces, school trips not being provided and individuals not signing up for voluntary organisations like the scouts or girl guides, all because of a fear they might be sued. On this basis, the emphasis was being placed upon what were perceived as 'worthwhile' voluntary and public service activities.

It would seem logical to assume that the phrase is particularly relevant to sport and leisure.

It be noted that section 1 is not concerned with and does not alter the existing standard of care, nor the circumstances in which a duty to take that care will be owed. It is stated in the explanatory notes to the Act that it does no more than 'reflect the existing law' as expressed 'in recent judgments of the higher courts' and that it is solely concerned with the court's assessment of what constitutes reasonable care in the particular case before it.

I will examine the effect, if any, of the Compensation Act on recent leisure cases in more details below. However, it is worth considering some of the court's decisions leading up to the Act.

'Counter compensation culture' cases – pre-2006

Firstly, please be assured that I am not trying to mislead you in to thinking that all seemingly unjust claims fail, or that post-2006, claims became easier to defend. My intention is to offer hope to all leisure providers that, if the right evidence is presented, cases can be defended.

***Tomlinson v Congleton* [2007] EWCA Civ 1003**

The claimant was injured in May 1995 when he dived in to a disused quarry lake at Brereton Heath Park, which was owned and occupied by the local council, and suffered severe spinal injuries. There were notices by the lake stating: 'Dangerous water: no swimming', but the court accepted that people did swim there and that there had been previous accidents. In view of the signs, the court found that the claimant was a trespasser and at first instance dismissed the claim for want of a duty of care.

The Court of Appeal held in March 2002 that the seriousness of the risk of injury, the frequency of exposure to the risk, and the failure of warning signs to curtail the extent to which the risk was being run, led to the conclusion that the defendant owed the claimant a duty of care. Damages were reduced by two-thirds for contributory negligence.

The House of Lords (HL) considered the claim in July 2003 and held that the relevant characteristics of the lake (*ie* its shallowness) were matters which were obvious to the claimant and he did not need to be warned against the risk of diving in. The warning signs gave the

claimant no information beyond what was already obvious. The risk of striking a shallow lake bottom from diving, 'was not one against which the defendant might reasonably have been expected to have offered the claimant some protection'.

The most important aspect of the HL judgment confirmed that:

It would be unreasonable to impose on public authorities a duty to protect persons from self-inflicted harm sustained when taking voluntary risks in the face of obvious dangers. Even if swimming had not been prohibited and even if the defendant had owed a duty of care, that duty would not have required the defendant to prevent the claimant from diving or warn him against dangers which were perfectly obvious.

¹In order to appreciate the strength of feeling in dismissing the Court of Appeal's ruling it may be useful to consider extracts from individual judgments:

Lord Hobhouse felt that:

It is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive or interfere with the enjoyment by the remainder of society, of the liberties and amenities to which they are rightly entitled. In truth, the arguments for Mr Tomlinson have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of an individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences, and one is certainly the interference with the liberty of the citizen.

Lord Scott of Foscote confirmed that he was in 'fundamental disagreement with the approach to this case by the majority of the Court of Appeal ... Of course, there is some risk of accident arising out of the joie de vivre of the young ... But that is no reason for imposing a grey and dull safety regime on everyone.'

Woodbridge School v Chittock (2002) ELR 735

This case involves a skiing accident during a school trip. Bruce Gardiner states: ²

The Court of Appeal summarised the principles relevant to personal injury claims brought by pupils against their schools as follows. The teachers owed a duty to the claimant to show the same care in relation to him as would have been exercised by a reasonably careful parent in all the surrounding circumstances including the teachers' responsibilities for the school group as a whole. It was not a duty to ensure his safety against injury from skiing mishaps such as those that might result from his own misjudgement or inadvertence when skiing unsupervised on-piste. A range of reasonable responses applies to teachers' decisions in relation to their pupils' safety.

Applying those principles, the school were held not liable for an accident sustained by a pupil as a result of momentary carelessness whilst heading down a red run, leading him

¹ JPI Law 339 (2008) – Rebecca Herbert

² JPI Law 16 (2008) – Bruce Gardiner

to fall down a slope. The same pupil had been noted skiing off-piste earlier in the holiday, but the teacher's response to give him a severe reprimand was one of a range of reasonable options. The fact that more serious options would also have been reasonable, such as barring him from skiing, did not render the school liable.

Mills Davies v RSPB QBD (Swansea) (Lawtel 21/5/2004)

The claimant tripped over a tree stump whilst walking his dog in an RSPB reserve, which was open to the public. The area was remote woodland and the path on which the accident occurred was a trail cut through the woodland, which featured a number of small sapling stumps which had been left behind after the path had been cleared two years previously.

The claimant specifically claimed that the stumps were a danger because they gave rise to a reasonably foreseeable risk of a penetrating injury to any visitor who fell onto them.

The court held that stumps are commonplace on woodland trails. The presence of such a stump on the footpath was not a breach of duty under the Act and in any event, the accident was not reasonably foreseeable. Judgment for the claimant would render all occupiers under a duty to:³

Remove from woodland trails or other such locations not only all protruding stumps, but also all sharp pieces of bracken, sticks and other materials resulting from path clearing and subsequent maintenance work which might conceivably cause some penetrating injury. That would go far beyond the duty to take such care as in all the circumstances was reasonable to see that visitors were reasonably safe in walking such trails or the purposes for which they were there.

Lewis v Six Continents [2005] EWHC 316

The claimant fell from a hotel window. The claimant argued that the hotel was liable because the opening of the window was less than 800 millimetres from floor level contrary to British Standards and there were no restraining bars to prevent the windows being opened too wide.

The window was 750mm above the floor and the court held that the window being 50mm higher would not have prevented the accident. Furthermore, if the claimant's suggestions were implemented, every building in the country would have to be altered and this was not a reasonable precaution to impose. Lastly, it should have been obvious to the claimant that leaning out of an open window was inherently dangerous.

Clare v Perry [2005] EWCA Civ 39

The claimant attempted to leave hotel grounds via a perimeter wall without realising that there was a six foot drop on the other side. The trial judge held that the defendant should have put up a fence to prevent people jumping over the wall. The Court of Appeal disagreed overturned the judgment stating that the claimant should have checked the drop before jumping and the existence of a drop in itself was not a breach of the Occupiers' Liability Act 1957.

'Counter compensation culture' cases – post-2006

West v Telford & Wrekin Borough Council [2006] 11 CL 346

³ Lawtel Document No.AC0117613

The claimant (a novice ice skater) visited an ice-skating rink owned and occupied by the defendant. Like most ice rinks, the ice was surrounded by a barrier that, in addition to other functions, gave novice skaters something to hold on as they made their way around the rink. However, on this occasion, part of the rink had been cordoned off with cones to enable lessons to take place and as a result, the claimant could only hold on to the barrier for only two-thirds or so of the circuit. In attempting to bypass the cordoned area by skating (rather than leaving the ice and walking around), the claimant collided with the barrier and suffered an injured leg.

The judge dismissed the claimant's claim on the basis that the common duty of care owed had not been breached. There had been no hidden dangers, merely the obvious risks of ice-skating, which the claimant had freely accepted.

***Collins v Snowdome* [2006] 11 CL 347**

The claimant descended part of the defendant's artificial ski slope on an inflatable inner tube. She had been provided by the defendant with a safety helmet. At the foot of the main slope was a counter slope and foam filled buffers designed to stop tubes and their riders. The claimant suffered a neck injury when her tube hit the buffers. She alleged that the defendant should have done more in order to reduce the speed of the tubes (in particular, by raking the piste) and should also have warned participants specifically of the dangers of neck injuries and how best to avoid them.

The judge found for the defendant. The claimant had been given clear warnings to about the dangers inherent in the activity and had been provided with protective equipment and safety instructions. Furthermore, the defendant had undertaken a risk assessment which had identified the specific risk of injury at the moment of stopping the tubes and in the light of this had tested three different stopping methods and selected the one that offered the best protection. In addition, the risk that materialised was obvious and inherent in the activity.

***MacClancy v Carenza* [2007] EWHC 479 (QB)**

The claimant suffered serious head injuries after falling off a horse whilst attempting a 'drop down' from level ground to another level as part of a cross country exercise. The court was satisfied that the defendant was an experienced and competent instructor who had been carefully monitoring the claimant's progress and assessing her ability, and any risk had been reduced to what was reasonable. It would not have been possible to remove all risks facing the claimant otherwise she might not have been permitted to ride her horse on a cross country route – or indeed by logical extension – to ride a horse at all.

***Shirley-Parker v Levy* (QBD 20.07.2007 unreported)**

The claimant caught her foot in a small hole near the end of a pontoon and suffered a frightening injury. The holes were an integral part of the design of this type of narrow, mobile pontoon and inevitably there would be some risk facing anyone perched on the end. The court thought that the existence of a hole added little to the overall danger.

***Cole v Davis-Gilbert and others* [2007] EWCA Civ 396**

The claimant broke her leg after catching her foot in a hole on a village green which had accommodated a maypole. It had been alleged that the hole had not been properly capped off. The court took the view that it would be inappropriate to impose formal legal relationships on traditional celebrations which bring local communities together up and down the country, characterised by individuals working together voluntarily and on an informal basis. If the law were to impose a higher standard of care there would be no traditional British activities for fear

of what might conceivably go wrong, and the litigation that may follow. In each case above, the claimant was entirely free from blame and still failed to establish liability, despite the fact that more could have been done by the defendant to have minimised the risk.

Whilst the Court of Appeal did not specifically refer to the Compensation Act in their judgments, there is little doubt that they had a concern that ruling in favour of the claimant may prevent associations such as the British Legion from carrying out similar 'desirable activities' in the future. Laws LJ stated in his judgment:

The annual maypole celebration, like so many similar occasions in villages up and down the country, brought the village community together. In the photographs we have been shown, the intensity of concentration on the children's faces as they wait their turn to dance round the maypole can be seen. The proud smiles of their families watching them can also be seen. On these days in the villages up and down the country, general happiness and good fellowship abound. These occasions do not happen by accident. There is always a group of people in the village who come together to prepare for and make the arrangements for the day.

Evans v Kosmar Villa Holidays [2007] EWCA Civ 1003

The claimant, aged 17 at the time of the accident, dived into the shallow end of the swimming pool whilst on holiday in Corfu and hit his head on the bottom resulting in tetraplegia. The pool was not safe for diving and there were 'no diving' signs. The judge at first instance held the defendant liable subject to a reduction of 50 per cent for contributory negligence.

The defendant appealed and the Court of Appeal held on 23 October 2007, that there was no duty to guard against an obvious risk, namely that diving into shallow water or water of unknown depth might cause injury. On the evidence, the claimant was aware prior to the accident that the water was shallow and 'people had to accept responsibility for the risks they chose to run and there was no duty to protect them against obvious risk'.

Again, the Court of Appeal relied heavily on *Tomlinson*, with the Compensation Act not receiving a single mention.

Samuel Harris v Timothy & Catherine Perry

This is the 'bouncy castle' case which went to the Court of Appeal in July this year.

The facts

The defendants Mr and Mrs Perry, had hired a bouncy castle and a second inflatable for a birthday party for their triplets who were 10 on that date. Both pieces of equipment were stated as being suitable for both children and adults. They were positioned outside the defendant's back garden on a long field which was open to the public and primarily used for football by the local school, attended coincidentally by the triplets. School permission was obtained by the defendants to pitch the inflatables on the field that day.

The claimant, who was not invited to the birthday party, was on the football field nearby with his father. There were around thirteen boys taking part in a football session which took place between 10.00am and noon on Saturday mornings. After the football session finished most of the team went home but some of them went over to ask Mrs Perry if they could play on the inflatable equipment. She agreed.

The claimant and his friend Simon asked Mr Harris, the claimant's father, whether or not they could go and play on the equipment. Mr Harris told them that the equipment was for use at a private party and they were not allowed to play on them. Instead they were given a ball to play with. Nevertheless a few minutes later they went over to the inflatables and directly asked Mrs Perry's permission to play on them.

The decision at first instance

At first instance there was a dispute as to whether or not Mrs Perry had given permission for the claimant and his friend Simon to use the inflatables. The judge at first instance found that she had given permission and as a result, therefore owed a duty of care to the claimant.

When the matter reached the Court of Appeal, the Law Lords noted that there was no appeal against the judge's finding on this point. It was therefore accepted in the Court of Appeal that express permission had been given by Mrs Perry.

In the course of supervising both inflatables, Mrs Perry turned her back on the bouncy castle, directing her attention towards the bungee run and it was in this very short period of time that the accident occurred. At first, the claimant and his friend Simon had bounced up and down on the castle but soon somersaulting began. It was Simon's evidence both written and oral that he did a first somersault, that the claimant did the second and then within a split second before the claimant was back up on his feet, Sam, a third child referred to by all as a 'gentle giant' as he was much larger than the other children his age, did the third somersault. It was during the course of the third somersault that Sam's heel accidentally struck the claimant's forehead. The claimant suffered a depressed skull fracture and subdural haematoma in the left frontal parietal lobe. The injury had severe permanent cognitive, behavioural, emotional and social consequences for him.

At first instance Judge Wilson concluded that the defendant had owed a duty of care to the claimant having given expressed permission to use the bouncy castle. Furthermore, the defendant had breached its duty in respect of three matters as follows:

- 1 Failure to maintain continuous supervision of those using the bouncy castle.
- 2 Failure to forbid children using the bouncy castle from doing flips and somersaults.
- 3 Failure to ensure that only children of a similar size and weight played on the bouncy castle at the same time.

The defendant was held liable for the accident as she had failed to maintain continuous supervision of the equipment, had failed to prevent children from doing somersaults and had failed to ensure that only those of a similar size and weight had used the bouncy castle at any one time. It was further held by the Judge at first instance that if the defendant had provided continuous supervision, she would have been able to prevent the accident by stopping the somersaults. In essence, her breach of duty was causative of the accident.

The appeal

The matter was appealed to the Court of Appeal by the defendant and was heard by the Law Lords, Lord Phillips of Worth Mall Travers (the Lord Chief Justice of England & Wales), Lord Justice May and Lord Justice Wilson.

The Law Lords considered the judge's judgment and were fairly dismissive of it! They made the following findings:

- 1 The judge at first instance had interpreted Mrs. Perry's duty of care to the claimant too strictly.
- 2 There was a duty to supervise but this meant actively overseeing the children on the bouncy castle with a readiness to address any problem which arose. There was no need for continuous supervision. This was too high a standard of care.
- 3 The judge at first instance had been wrong to conclude that even if there had been a continuous watch, Mrs Perry could have stopped the sudden somersaulting in time to prevent the accident. Having reviewed the evidence given at the trial, the Law Lords concluded that there would simply not have been time for Mrs Perry to have anticipated and prevented the somersault and accident.
- 4 The likelihood of injury to any child during the short period and during which Mrs Perry's back was turned was minimal. The risk that an injury to the extent of the gravity sustained by the claimant would occur was entirely unforeseeable in their opinion.

Conclusion

So, what precautions should the defendant have taken to protect itself against the risks of this accident happening?

The Court of Appeal held that the duty of care was that which a reasonably careful parent would show for his/her own children. The risks inherent in the activity were those a reasonable parent ought to foresee would be involved in the use of that bouncy castle. It was not reasonably foreseeable that such an injury would be likely to be serious, let alone as severe as that sustained by Master Harris.

There is a useful paragraph of the Law Lords judgment which is worth producing in full.

Children play by themselves or with other children in a wide variety of circumstances. There is a dearth of case precedent that deals with the duty of care owed by parents to their own or other children when they are playing together. It is impossible to preclude all risks that, when playing together, children may injure themselves or each other, and minor injuries must be common place. It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so. Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance. Adults who expose children to such circumstances or activities are likely to be held responsible for ensuring that they are subject to such supervision or surveillance as they know, or ought to know, is necessary to restrict the risk to an acceptable level.

To sum up, in respect of the three issues determined by the Judge at first instance, the Court of Appeal found as follows:

- i Supervision – There was no need for continuous supervision. The duty on Mrs Perry was to provide care which a reasonable parent would do by way of active overseeing and a readiness to intervene.
- ii Somersaulting – The Court of Appeal was not convinced that in the absence of any express warning, a reasonably careful parent would conclude that children should not

somersault on the equipment and therefore, there was no requirement for Mrs Perry to give such a warning to the users.

- iii Size of the children – The equipment was designed to accommodate both children and adults and the Judge had applied too high a standard of care in determining that the defendant should ensure that only children/adults of a similar size and weight should use the castle at any one time.

It is interesting to note that the case is destined for the House of Lords and is likely to be heard by the House of Lords in 2009. BLM will keep you updated as to the decision.

Poppelton v Trustees of The Portsmouth Youth Activities Committee

Again, this is a good decision insofar as defendants are concerned and one which is probably well known to most indoor climbing activity providers. Similarly with the previous case, this one also went on appeal to the Court of Appeal.

The facts

By way of background, Garry Poppleton was a relatively inexperienced climber, having only climbed the indoor climbing wall some three to four times before the accident on 12 February 2002.

The premises comprised a purpose built artificial climbing wall which at a maximum height stood at 16 feet above the floor level. The floor itself was covered from wall to wall with shock absorbent matting which was at least 12 inches thick. On one wall there was a buttress feature protruding into the room to form an overhang at approximately 5.5 feet height. The remaining walls had various indentations, protrusions and bolted sockets providing appropriate climbing features.

Despite having used the wall on three to four occasions prior to his visit on the 12 February 2002, Mr Poppleton had not been given any instruction or explanation as to the risks of using the bouldering wall; he had not been shown any rules nor was he ever asked to sign any disclaimer notice. He was not asked about his ability as a climber. The climbing wall rules were situated on a board outside the climbing room. One rule provided for climbers not to jump from or off the wall.

In any event, Mr Poppleton did not read the rules and did not appreciate that he was not supposed to jump from or off the walls. Indeed, he saw others doing so and imitated them. Unfortunately, in trying to do a similar leap from the back wall to grab hold of the buttress or top rope bar on the opposite wall, he did not manage the leap successfully and lost his grip. He somersaulted in the air and fell to the matting below, landing on his head. He was very badly injured and rendered tetraplegic. It was agreed by the Judge at first instance that the manoeuvre which he was attempting was dangerous and risky for a novice climber such as Mr Poppleton.

The County Court decision

The case was pleaded under the statutory provisions of the Occupiers Liability Act 1957 and also at common law. The nature of the duty of care imposed by the Act was and 'occupancy duty' or 'activity duty'. It was agreed by the judge at first instance that there was absolutely

nothing wrong with the state of the premises. Therefore, the question of an occupancy duty did not arise. The activity duty related to an activity that the occupier permitted to take place which might endanger others. It was argued that this was not the scenario at the material time and had no relevance to the circumstances of the accident. The defendant was therefore not in breach of their duties either occupancy or activity under the Occupiers Liability Act.

The reason why the case against them failed was because the trial Judge concluded that there was a common law duty to inform and warn Mr Poppleton that there was a danger of falling on to the matting and indeed, he may have been misled into believing that falling off the wall was safe by the virtue of the presence of the matting.

As Mr Poppleton did not know of this danger, he could not have consented to it and, the judge at first instance held that Mr Poppleton should have been warned of that particular danger *ie* that the matting gave participants a false sense of safety. It was the claimant's argument that had he been made aware that the matting did not make any falls on it safe and free from the risk of injury, he would not have carried out the dangerous manoeuvre which he did.

It was not unusual for climbers not to be asked about their ability. In that respect, the defendants operated the facilities along the lines of other similar providers, providing suitable premises and equipment but leaving it to the participants to use them sensibly and without supervision.

Rules were displayed outside the climbing room and it was accepted that these should and could have been more prominently displayed. The rules of course included an injunction not to jump off the walls. It is questionable as to whether or not, even if he had read these rules, Mr Poppleton would have obeyed them. He had seen others successfully completing the manoeuvre which he attempted and his leap was as a result of imitating them.

The claimant's expert evidence at first instance supported the claimant's allegation that appropriate supervision was important especially for inexperienced climbers using the equipment. One of the experts suggested that the matting did not significantly reduce the likelihood of injury but it usually reduced the severity of the injuries sustained. It was the claimant's evidence that he would not have attempted to make the disastrous leap if he had been climbing outside without the security of safety matting. He asserted that the defendant had a duty to warn him of the dangers which were not obvious and this was one of those dangers. Whilst they may not have had a duty to supervise him, they did have a duty to warn him. The judge at first instance held:

- 1 That the defendant had not breached either the occupancy or activity duties under the Occupier's Liability Act 1957.
- 2 It was not just, fair or reasonable to impose upon the defendant the duty of care to assess the claimant's abilities as a climber before allowing him to use the facilities and thereafter provide him with supervision or training.
- 3 The defendant was liable to the claimant however for failing to warn him that the matting would not prevent a fall nor would it protect him from injury from an awkward fall.

The claimant was held 75% to blame for the accident as he had carried out a dangerous manoeuvre that he knew was well beyond his capabilities. His decision to attempt that manoeuvre was the immediate cause of his injury. The defendant was therefore liable for the remaining 25%.

The defendants appealed against the decision of His Honour Judge Richard Foster.

The appeal

The defendant appealed with the basis of the appeal challenging the first instance judge's finding that they were liable to Mr Poppleton for failing to warn him about the potential inadequacy of the matting. They argued that any such warning would not have acted as deterrent to Mr Poppleton, similarly to his ignoring the rules.

The appeal was heard by Lord Justice May, Lord Justice Richards and Sir Paul Kennedy. The judgment was delivered by Lord Justice May. The other two Law Lords simply confirming their consent.

The defendants contended that it was obvious that if you fell awkwardly on the matting, you might be injured. Why should there be a duty to explain the obvious to an adult who had consented to using the facilities and who did not ask for either advice or supervision especially when none was offered?

Lord Justice May considered the decision in *Tomlison v Congleton Borough Council* [2004] 1AC46 in deciding whether or not the defendants were under a duty to train and/or supervise adults whom they allowed to use the climbing wall. May LJ considered whether or not the risk to Mr Poppleton was inherent and obvious. There was an obvious risk that he would fall from the wall. May LJ found that it was quite obvious to him that no amount of matting would avoid absolutely the risk of possibly severe injury from an awkward fall and that the possibility of an awkward fall was itself an obvious and inherent risk of this type of climbing activity. He cited Mr Poppleton's own evidence that he did not think that the activity was 'that' risky. May LJ felt that this indicated to him that Mr Poppleton knew that there was a risk.

Lord Justice May concluded that adults who chose to engage in physical activities which obviously gave rise to a degree of unavoidable risk may find that they have no means of recompense if that risk materialises so that they are injured. Quote:

There being inherent and obvious risks in the activity to which Mr Poppleton was voluntarily undertaking, the law did not in my view require the appellant (defendants) to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so. If the law required training or supervision in this case, it would equally be required for a multitude of other common place leisure activities which nevertheless carry with them a degree of obvious inherent risk – as for instance bathing in the sea. It makes no difference to this analysis that the appellant (defendants) charged Mr Poppleton to use the climbing wall, nor that the rules which they displayed could have been more prominent.

There is something of contention between an unchallenged finding that the matting was entirely adequate and the critical finding that it constituted a hidden danger. But the essential point is that that finding is not sustainable. The risk of possibly severe injury from an awkward fall was obvious and did not sustain a duty in the appellant (defendant) to warn Mr Poppleton of it.

Lord Justice Richards and Sir Paul Kennedy agreed.

Conclusions and common strands

- 1 The bouncy castle case of Harris and Perry and in particular the appeal decision show that the courts are reluctant to raise the standard of duty of care above that which a reasonable parent/person would provide.

- 2 Poppleton demonstrates that the courts are equally reluctant to absolve claimants from all blame where they have voluntarily undertaken activities, albeit with inherent risks.
- 3 These decisions are good news as far as defendants and in particular you as activity providers are concerned. There is no suggestion that the Court of Appeal's decision in Poppleton is to be appealed to the House of Lords and therefore this is an extremely useful decision for defendants.
- 4 The courts also appear reluctant to take us into the 'nanny state'. Responsible adults voluntarily undertaking activities are responsible for themselves. Provided the equipment is checked and maintained, the defendant's duty of care towards a potential claimant extends only as far as providing safe and suitable equipment.

Practical considerations

- i Do ensure that you display any rules prominently in your facilities, at more than one location if necessary. Changing rooms are always a good place to locate them as well as both inside and outside the climbing wall area.
- ii Get each participant to read a set of the centre's rules and any terms and conditions. Ask each participant to sign a check sheet evidencing that they have received and been asked to read these rules and terms and conditions *ie* that they *are* aware of them.
- iii Warn participants that falls do occur and that the matting provided will not prevent a fall; neither will it prevent an injury if that fall is an awkward one. The matting is there to limit the severity of any injury from a normal fall.

Claimant's successes

Whilst It is stated above that this is not intended to be a balanced analysis of the proportion of leisure cases that succeed/fail at trial, it is only fair to mention a few cases where the defendant was unable to resist the claim.

Fowles v Bedfordshire County Council (CA) (Lawtel 17.5.1995)

The claimant attempted an unsupervised forward somersault in the Bedford Youth House suffering injury. It was held that the defendant did not have in place a proper system of instruction because:

- a There was no express prohibition against practising forward rolls in the absence of a supervisor.
- b Insufficient guidelines were in place to monitor the safe positioning of crash mats (at the time of the accident they were wrongly positioned).

Staff were aware that young persons were regularly performing all kinds of gymnastics without any supervision and as such liability attached.

Slack v Glenie, unreported, April 19, 2000 (CA)

The owner of a motorcycle circuit was held liable when during a motorcycle and sidecar race, the claimant collided with a chain fence on the inside of the track, which was found to be an

unacceptable hazard. It was argued that the claimant had consented to the risk by taking part in the sport. However, the court held that although the claimant knew of the existence of the fence, he did not know that the regulations stipulated that a clear 'in-field run-off' was necessary and therefore the position of the fence was unacceptable. He would have had to have been aware that the fence was wrongly positioned and yet chose to compete anyway in order to consent to the resulting risk.

Conclusion

Irrespective of the 2006 Act, recently reported public liability decisions have exhibited a welcome underlying thread of common sense, and generally in the cases where the courts have found for the claimant it is not difficult to understand why. One view is that there is an increasing reluctance of the courts to compensate voluntary risk-takers or to impose ridiculously high burdens on defendants flows not from the codification of a 'desirable activity' defence, but from the strongly-worded HL judgment in *Tomlinson*.

However, it would be unwise to conclude from this that the desirable activity provisions in the Act have proved to be superfluous. They are exerting a discernable covert effect as evidenced the language used in the judgment on *Cole*. The dearth of reported decisions citing the Act should not by any means deter defendants from pleading section 1 as an additional cautionary reminder that the preservation of desirable activities undertaken reasonably has, as a matter of principle, the statutory seal of approval.

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