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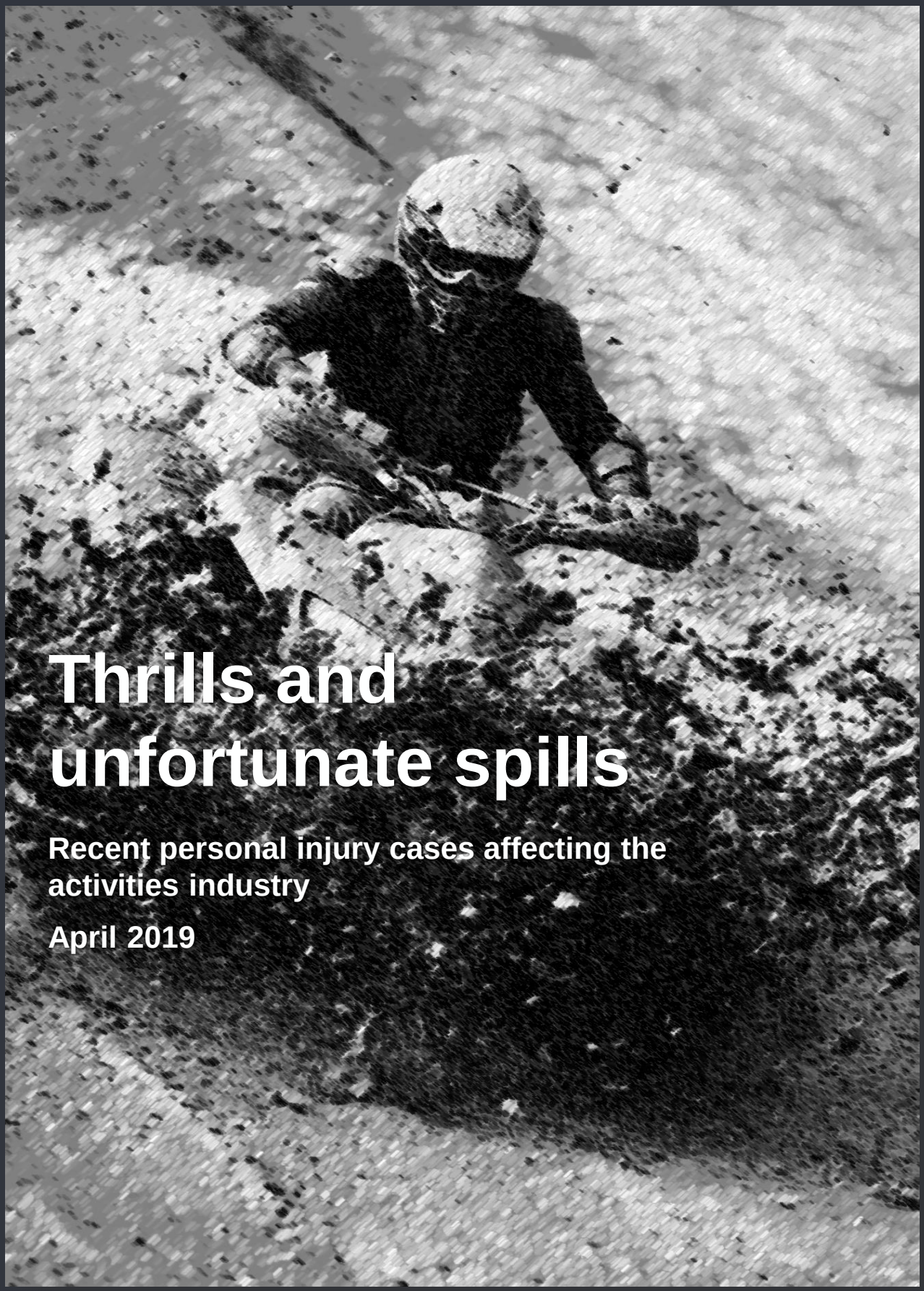

Thrills and unfortunate spills

Recent personal injury cases affecting the activities industry

April 2019

Introduction

The activities sector is growing. Outdoor inflatable courses are now common; trampolining is becoming ever more popular; and axe throwing is emerging as a leisure activity in the UK. All of these activities, as well as others, carry with them an inherent risk of injury.

Society encourages people to enjoy the thrills of engaging in activities outside of their normal day to day life. An active lifestyle promotes physical and mental health. It is important to take risk.

It is equally important that businesses in the activities industry are not deterred by the threat of litigation from continuing to provide the services they offer.

Parliament has made these principles clear in its wording of the Compensation Act 2006:

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.*

It is with this background in mind, that we turn to consider some recent case law affecting the industry.

The following cases are summarised below:

(A Minor) v Maidstone Council

The Claimant, 17 years old at the time of the incident, was using a zip-wire located in a Council managed children's play area. She was given what she described as "*quite a firm push*" by her friend; footage of the later stages of the incident showed that the push was more likely to have been very hard.

As the Claimant reached the end of the line and encountered the spring-stop, her seat rotated upwards, she lost her grip on the pole and then fell to the ground. The Claimant fractured her back in four places, but fortunately made a good recovery.

A claim was brought under the Occupiers' Liability Act 1957 and in common law negligence. The Claimant alleged that Defendant had failed to:

1. assess the risk of users pushing each other;
2. install an adequate stop mechanism on the zip wire;
3. warn the user of the risks involved in travelling too quickly;
4. provide a mechanism to secure the user to the seat, to prevent falls.

There had been no other reported incidents like this one. The zip wire complied with the relevant British Standards and was subject to regular inspection. It had no faults. The Defendant argued that warnings would have made no difference.

The Court found in favour of the Defendant.

The Court reverted to the principles set out by Lord Hoffman in the regularly cited case of *Tomlinson v Congleton Borough Council (2003)* in particular that individuals are expected to accept the obvious risks associated with outdoor leisure activities that they freely choose to undertake.

Carter v Kingswood Learning and Leisure Group

The case involved a school teacher who attended the Defendant's premises as part of a school residential trip in 2013.

The Claimant, a 47 year old woman who had abseiled in the past, took part in abseiling down a purpose built tower. The lesson was overseen by two supervisors employed by the Defendant and they were each responsible for taking control of the user's descent and ensuring their safety, whilst giving the user the impression of being in control of their own risky activity.

There were no allegations that the tower was non-compliant with the appropriate standards or that it was defective in any way.

The Claimant wore a harness which had two ropes attached to it, the safety rope and the abseil rope. The safety rope was controlled by the supervisor.

The Claimant descended the tower without any apparent or reported incident. Neither of the supervisors noticed anything different to her descent than any other participant. After her morning abseil, the Claimant completed a session in fencing that afternoon.

The Claimant, several days after the experience, suffered a stroke. Her clinicians tried to identify the cause of the stroke and the possibility of a minor neck injury was explored. With the benefit of hindsight, the Claimant communicated that she had felt her neck jerk and her upper body 'flop backwards' at the start of the abseil.

She did not, initially, allege that the Defendant was to blame. She and her husband were in financial difficulty because of her condition and therefore began to explore whether there might be any insurance available to them. They contacted the Defendant to see if the Defendant could offer them the benefit of a personal-accident type of insurance. They specifically stated that they did not allege negligence. The Defendant advised that no such policy was available.

The Claimant then elected to bring a personal injury claim.

The Court was asked to determine two issues:

1. Did the stroke occur as a result of abseiling? There, they thought probably yes.

But, importantly:

2. Was the stroke caused by the negligent supervision of the supervisors?

No, probably not.

The case focussed specifically on how the rope system worked and what would have been needed to cause a slack in the safety rope such that the Claimant could have jerked in the manner that she later described. And the Court found on the balance of probabilities that it simply couldn't have happened in the way described and therefore it did not happen as a result of negligence.

Southern v Adventure Forest (t/as Go Ape)

This case involved the Tarzan swing on a high ropes course owned by the Defendant. The Claimant caught her finger in the metalwork of the swing as she swung from a platform onto a catching net.

At first instance, the Court determined that each party held 50% of the blame. The Defendant appealed.

It was agreed:

- The swing had three ropes attached to it.
- The claimant was told in a pre-briefing to hold the three ropes and not the metal work.
- A Pictogram in the pre-briefing area gave the instructions to "*hold all three lines*". The Claimant said she had not looked at that pictogram.
- The platform from which the Claimant jumped also had a pictogram – that had a picture of someone holding the three lines, tinged in green, but did not have any words.
- Warnings were also given in the Safety Rules which advised the user to follow the rules or risk having a serious accident which could be fatal. The Claimant had also signed a general disclaimer.

At first instance, the Judge held that the signage should have been clearer, i.e. that it should have expressly warned the user not to touch the metal work. It was his view that the specific warning given in the oral briefing showed the importance of telling the user, specifically, not to touch the metalwork and therefore that instruction should also have been reiterated later. The Judge considered that the Defendant could amend its signage at modest expense to say "*only*" hold onto the 3 ropes.

He did however consider the Claimant was equally to blame because she had of course been given an oral warning and therefore failed to take account of her own safety.

The Court of Appeal did not agree. They did not consider the addition of the word 'only' to the pictogram message would have made any difference. They considered whether the Claimant ought to have had another warning in another manner, perhaps verbally as she embarked on the swing, but this would have come at significant cost to the Defendant. The Court had in mind that at the time of the accident 46,000 people had embarked on the activity without injury.

The Court held that the warnings given were adequate in the circumstances.

The Court held:

"*Plainly any judge and any court would have sympathy with a Claimant who has suffered injury, although this, as has been pointed out, was not an employee's injury, it was an injury suffered by someone who was setting out on what, on any basis, is a risky activity, and for her own enjoyment, but, nonetheless, of course placing a duty on the Defendant to take reasonable steps to ensure her safety. On the other side, there is the important duty on a court not to impose too high an obligation on a Defendant of this kind such as to render it impossible or too expensive or impracticable to continue to offer to the public the opportunities which this kind of adventure park avails…*"

Maylin v Dacorum Sports Trust 2017

The Claimant fell from a bouldering wall at the Defendant's climbing centre.

She was a novice climber but she met the Defendant's rules for entry because she was accompanied by a "buddy" - someone who had completed a rope test.

She signed a disclaimer on arrival which highlighted to her that she was about to embark on a risky activity. She was also advised that she should climb within her abilities and to descend by down climbing.

Although there was a mat placed at the foot of the bouldering wall, she was advised that the mat did not prevent injury.

She had a couple of goes on the wall, using the yellow route which was the easiest available. On about her third attempt, she had almost reached the top when her right foot slipped and she fell to the mat, sustaining a serious back injury.

The Claimant conceded when questioned that she was relying on her buddy to guide her rather than the staff at the centre.

The Claimant sought to argue that the Defendant had not drawn to her attention the risks involved in the activity or to give her proper safety information. She relied on a document from the Association of British Climbing Walls which says that novice boulderers must receive a safety induction or be supervised by a competent person.

Since this accident, although the judgment did not make clear whether this was a direct consequence, the Defendant required boulderers to have an induction before starting on the activity.

In any event, the Court found in favour of the Defendant, ruling:

"*There being, in my judgment, inherent and obvious risks in the activity which Miss Maylin was embarked upon, the law, as May LJ makes clear in Poppleton, does not require the Defendant to train, supervise or warn and again, as is made clear in Poppleton , it makes no difference that the Defendant charged Miss Maylin to use the bouldering wall and, as it seems to me, that the claim fails on that ground.*

Even if I am wrong about that, this claim would also fail because the Defendant did in fact, in my judgment, take sufficient steps to draw Miss Maylin's attention to the risks inherent in climbing and in particular the risk that the presence of matting would not prevent injury in all cases."

Bosworth Water Trust v SSR

The Claimant was 9 years old at the time of the accident. He attended a crazy golf course which was owned and operated by the Bosworth Water Trust. He was there with three friends. During the course of the game, his friend, who was 10 years old, became frustrated. He swung his club high and it hit the Claimant in the face. The Claimant was blinded in one eye.

The Claimant sued Bosworth Water Trust as well as the parents of the older boy, who were there supervising the children at the time. The 10 year old is referred to in the judgment as "J".

J's mother did not see the incident but she was standing nearby with her dog.

At first instance, the Court held Bosworth Water Trust liable but not the parents. The Court of Appeal was asked to re-examine liability.

The Court considered evidence on whether J's actions could have been foreseen. It appears his behaviour could be considered as challenging, not to a great extent, but to the extent that he required 'firm handling'. His challenging behaviour however tended to be at school rather than in his home environment. He was not a 'dangerous' child. The Court accepted that if appropriate instructions had been given on how to use the clubs, J would not have swung his club as he did.

The Court focussed on what instructions the boys were given about how to conduct themselves while playing golf.

As for Bosworth Water Trust, there was no risk assessment; there was no signage and no written rules; and it simply relied on adults to supervise play. The Trust had made some changes since the accident by replacing the metal putters with plastic ones; carrying out a risk assessment; and putting up a notice with the rules of play.

As for J's mother, there was no clear evidence about what warning if any she had given to the boys. It appeared to be accepted that she had not specifically warned of the risk of swinging their clubs too high.

The Court of Appeal agreed that the Trust should be liable. It said there should have been a risk assessment and if one had been done, appropriate instructions would have been given. Here the Court said the duty to risk assess was 'basic' and that it would have made a difference.

The Court accepted that the risk of harm was obvious but it also emphasised that children lack the insight of adults and need to be told how to keep safe and this included the warning to not swing their clubs above a certain level.

The Court then turned to look at the liability of J's parents. The Court held that J's parents had also failed to give J any warning and that they knew no instructions had been given by the Trust. In addition, neither parent followed the boys around the course so as to give ongoing ad hoc supervision. If that level of supervision was not being given, then a warning at the start was required.

J's parents were therefore, also, liable.

The Court held:

"*While accepting that the risk of harm was obvious, I reject the proposition that it was so obvious that it did not need to be the subject of mitigating measures. This was a recreational activity aimed at children. Children lack the insight of adults into what is or may be a risky activity. Children on Bosworth's crazy golf course needed to be told how they should keep safe and they needed to be told not to raise their clubs above a certain level*."

"*I cannot reconcile that conclusion with the Judge's own findings of fact and reasoning based on her findings. She had found that it was appropriate that the boys should have clear instructions on how to behave and how to use the putters ([55]). She concluded that Bosworth was responsible for its failure to give those instructions. She found that J was a boy who had character traits which meant he required firm handling. She found that J would not have swung his club if he had been told not to. All this is accepted. But this leads me to conclude that the failure to provide firm handling, in the form of a clear instruction to J, was a negligent failure by J's mother which put her in breach of her duty of care which caused the injury to SSR*."

Conclusion

The recent case law is positive for the activities industry.

It strikes a balance between protecting claimants from negligence whilst recognising the inherent risks involved in the activities. The common theme is clear; provided individuals are appropriately advised of the risks associated with a given activity, then they must accept that risk.

Businesses within the activities industry can put themselves in the best position to defend litigation, such as the cases above, by ensuring that (a) equipment in use complies with the relevant British Standards; is inspected regularly and is in good working order and (b) that customers are appropriately warned of the risks associated with an activity and that they acknowledge receipt of such warnings.

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