Personal injury

Lights out for excitement?

Matthew Snarr reports on the risks of having fun

IN BRIEF

- A court must weigh up the likelihood of injury, the seriousness of the injury which may occur against the social value of the activity and the costs of preventing the risk.
- A particular activity was not justified merely because it arises out of a generally, socially desirable cause.
- The addition of excitement, by itself, was held to be insufficient to outweigh the risk of a potentially serious injury occurring.

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Where does the proper balance lie between the competing interests of a risk of injury, the likely severity of injury, the social value of an activity and the cost of prevention?

In *The Scout Association v Mark Barnes* [2010] EWCA Civ 1476, [2010] All ER (D) 284 (Dec) the Court of Appeal considered where the judicial balance ought to lie between protecting the interests of injured parties by negligent conduct as against the social value of an activity which may give rise to a risk of injury. In a majority decision, the Court of Appeal considered how the courts should determine the standard of care of persons responsible for controlling a socially desirable activity which may gives rise to a risk of injury.

The factual background

The claimant was a 13-year-old boy scout at the time of the accident in 2001. He had been playing a game called "Objects in the Dark". Ten blocks were placed on the floor in the middle of a hall, one less than the number of scouts participating in the game. Eleven scouts ran around the outside of the hall. Half of the main lights were already turned off. At a given moment, the scout leader would turn off the remaining main lights. This was a signal for the scouts to rush and each grab a block. The scout who failed to grab a block would be eliminated. The game would be restarted with nine blocks and 10 boys. And so on. Eventually the last scout to grab the remaining block would be declared the winner. When the main lights were turned off, the hall was not in pitch darkness. Light was supplied by emergency lighting as well as other sources outside the hall.

The claimant collided accidently with a bench beside a wall of the hall. He injured his left shoulder. Fortunately, he was back playing rugby within a couple of weeks. He made an almost complete recovery and remained an active member of the scout group for the next couple of years.

> "The judgment underscores the importance of balancing risk with social value"

The judgment at first instance

The trial judge held that the purpose of turning the lights off was to add excitement to the game. He observed the game was also played in the light and called "Grab".

The trial judge held that the game was an activity which presented a foreseeable risk of injury. It was a competitive game. Boys were running at speed, sometimes with their heads down. Some boys may be inclined to push other boys out of the way. He held that the removal of light, while adding significantly to the excitement of the game, also added significantly to the risks of the game.

The trial judge considered the degree of likelihood of harm that might occur. He held that it was reasonably foreseeable that someone might not be able to stop or would not see the wall as quickly as one might hope and end up colliding with a wall, a bench or another boy, injuring themselves more seriously.

He found that there was a breach of duty due to the risk of injury and likelihood of a more serious injury occurring, but in making his finding recorded his regret at his conclusion because it might impinge on the activities of the scout group in the future.

The arguments on appeal

The defendant appealed the decision on three grounds:

- The reason the claimant did not see the wall is because he was looking at the floor. The lighting was not causative of the accident.

- The trial judge failed to weigh up the social benefit of the activity and consequences of the finding that the game was too dangerous.
- The risks of collision were present with or without lights. Since the game was not dangerous with lights it should not be considered dangerous without lights.

The decision of the Court of Appeal

The Court of Appeal dismissed the 1st and 3rd grounds of appeal unanimously. It did not accept that the risks of injury remained the same regardless of illumination. While it accepted the main cause of the accident was the fact that the claimant was looking down, it considered the lack of illumination was a subsidiary cause and a material factor in the accident because he would have appreciated the presence of the wall earlier if the lights had been on.

The Court of Appeal openly wrestled with the proper weight to be given to the four matters to be considered in alleged breach of duty cases involving personal injury. As Lord Hoffmann confirmed *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2003] All ER (D) 554 (Jul) what amount to reasonable care depends, "not only on the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measure. These factors have to be balanced against each other".

Lord Justice Jackson gave a strongly argued dissenting judgment. Jackson LJ held that because the trial judge had not explicitly directed himself to the task of balancing the risk, gravity and social value against one another, he had misdirected himself. Jackson LJ held that had the trial judge properly directed himself he would have concluded that the duty of care had not been breached. He found this for the following reasons:

- It was an established game which had been played without mishap both before and after the accident.
- The scout leader, aware of the full nature of the game, considered it was not dangerous but appropriate for scouts to play.
- The game was properly supervised by three adults.
- Many physical recreations involve a risk of injury such as rugby, cricket and skiing.
- The game played was, in fact, safer than many games played by children if left to their own devices.
- The increased risks were outweighed by the social value of the scout movement as a whole. The particular game with the excitement it offered was the sort of activity which attracts young people to join or remain in the scouts.
- The function of tort law is not to eliminate every iota of risk or to stamp out socially desirable activities.

Lady Justice Smith, giving the lead judgment, held that the trial judge had not failed to direct himself to weighing the social value of the activity. He had referred to the social value of the activity and scouting movement and the consequences of his findings. Although he had not expressly included the factor of social value when evaluating the risks, the judgment was *ex tempore*; it was wrong to criticise the reasoning of the judgment when he had implicitly weighed the risk, gravity and social value as the latter was clearly on his mind at the time he pronounced judgment.

> "Excitement by itself, if it adds risk to an activity, is unlikely to justify the additional risk"

Neither did Smith LJ consider that the judge had misdirected himself in placing the appropriate weight to the factors to be balanced in favour of avoiding risk. She held this because:

- The trial judge had observed that turning off the lights add excitement to the game, nothing more. It did not add educational or social value.
- Turning off the lights had significantly added to the risk of injury.
- The trial judge recognised that it might impinge on other activities.
- The social value to be weighed was not the scouting movement as a whole but the social value of the particular activity under scrutiny. Merely because the activity of scouting is a worthwhile aim does not mean any scouting activity, however risky, is acceptable.

Smith LJ reiterated Jackson LJ's observation that the role of tort law is not to stamp out socially desirable activities and that whether the social benefit of a particular activity justifies the risk posed is a question of fact, degree and judgment.

Ward LJ, in common with Jackson LJ, expressly admitted it "uncommonly difficult" to reach a confident judgment. He agreed with Smith LJ that the trial judge had overtly kept in mind the social value of the scouting in general as well as the game itself. He observed that there was no educational or instructive element to the game. Ward LJ specifically observed that the preventative cost of reducing the risk was simply not to turn the lights out. He observed that the trial judge had taken into account that it was part of the fun of the game that harm might occur.

Ward LJ concluded that scouting would not lose much of its value if the game was not played in the dark. Ward LJ appears to have been torn between the opposing judgments of Jackson LJ and Smith LJ. He eventually held that the trial judge had the better feel for the case having heard the evidence and that the trial judge's analysis was sufficiently impressive that he did not feel it was justified to interfere with the finding of liability.

Analysis and impact

In the current media age of news headlines focusing on child obesity and children's addiction to computer games, this judgment, by its own admission, runs the risk of negative public perception as a blow to organisations that organise child activities involving risk of harm. However, it should not necessarily be taken as a disincentive to supervise children in activities associated with risk. The judgment underscores the importance of balancing risk with social value.

This case provides a useful insight into how the courts are likely to approach balancing risk, gravity, cost and social value. It re-emphasises the requirements to consider all four factors explicitly. Section 1 of the Compensation Act 2006 is mentioning in passing by Jackson LJ as support for his approach. He confirms that the need to have regard to the deterrent effect of potential liability has always been part of the common law, which is evidenced by Lord Hoffmann's approach in *Tomlinson*.

The short lesson is that excitement by itself, if it adds risk to an activity, is unlikely to justify the additional risk. The court attached little weight to excitement for the sake of excitement. It is suggested that an important factor in this case was that it concerned the care of children. The judgment demonstrates that the courts will

adopt a cautious approach towards the safety and wellbeing of children. Children by their very nature import a degree of risk into activities which is not often associated with events in which adults participate.

An interesting difference of analytical approach emerges between Jackson LJ and Smith LJ on the issue of what weight to apply to the social value of the activity. Smith LJ sought to focus narrowly on the particular activity itself rather than on the scouting movement as a whole. She did so predicated on the proposition that the social value of the scouting movement does not justify all levels of risks. Jackson LJ, however, was not prepared to divorce the particular activity from the scouting movement as a whole. He used the particular game as an example of the type of excitement and enjoyment which both attracts and retains young people in the scouting movement. His analysis went beyond the immediate reward of the particular activity but across the whole scouting movement.

The Court of Appeal was aware of how its judgment might be perceived by the public but it did not consider in detail the potential impact of its finding on the future of the enterprise under scrutiny. Scouting troops may now be forced to reconsider a plethora of games traditionally played in the dark either in halls or in woods. This will incur expense. The lack of excitement or a sense of danger may lead to a decline in numbers. The consequence of such a finding may be likely to lead insurers to increase their premiums regarding scouting movements as more susceptible to litigation.

Interestingly, Ward LJ directed himself to the scouting movement's own risk assessment which stated: "We seek to provide excitement but not danger, adventure but not hazard." It will be instructive when balancing the social value of an activity or group, to consider the aims and objectives of the particular association.

Neither Smith LJ nor Ward LJ commented in weighing up the risk of injury and potential gravity of injury on the fact that the game had been played on many occasions before and after the accident without mishap. Much was made of the seriousness of a potential head injury but little attempt was made to gauge the probability that such an injury might occur. Once the threshold of reasonable foreseeability had been crossed the majority of the Court of Appeal did not look back to consider how probable it was that such an injury might occur. This may demonstrate that the courts will not place too much weight on the lack of incidents arising out of the activity under scrutiny.

Comment

As a result of *Barnes* it may be difficult to justify playing games in darkness where a risk of injury is present, if there is no additional benefit other than excitement.

While this judgment strikes the balance in favour of a cautious approach to weighing up the factors to be considered in establishing whether the duty of care have been breached, it was equally concerned to reinforce the philosophical groundings of tort law not to eliminate every iota of risk or stamp out socially desirable activities and that each case must be judged on its own facts.

In the future, the more interesting question may well be whether, in the light of Jackson LJ's present proposals for the civil costs regime, an injured claimant such as in the present case would be able to seek redress in the courts at all. NLJ

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