Burden of proof in personal injury is on claimant (Carter v Kingswood Learning and Leisure Group Ltd)

09/07/2018

Personal Injury analysis: Angus Piper, barrister at 1 Chancery Lane Chambers, points out that the decision in Carter v Kingswood is a reminder of a claimant's obligation regarding the burden of proof, and that a breach of a duty of care needs first be established to the court's satisfaction for a claim to succeed.

Carter v Kingswood Learning and Leisure Group Ltd [2018] EWHC 1616 (QB), [2018] All ER (D) 05 (Jul)

What are the practical implications of this case?

Foskett J's decision in *Carter* is a reminder that the burden of proof is on the claimant, and if claims are to succeed then the salient facts upon which the court can find a breach of an applicable duty of care must first be established on the evidence which is before the court. By the time the claim (which concerned an injury suffered during an abseiling experience) came to trial, and particularly following an amended particulars of claim which was foreshadowed in the claimant's opening, but only produced in written form at the end of the claimant's oral evidence from her lay witnesses, the live issues were relatively constrained and there was much common ground.

In particular, it was apparent (and had been expressly agreed by the abseiling experts) that there were only two potential mechanisms by which the accident could have occurred as contended for by the claimant—ie that her upper body was caused to flop backwards.

That was because, for the upper half of the claimant's body to have been caused or permitted to 'flop backwards', the instructor who was controlling and 'feeding out' the safety rope would either have had to switch his hands from the 'dead' side of the rope and deliberately pull on the 'live' side to force the rope through an 'Italian hitch' knot and thereby create the necessary degree of slack rope to permit the 'flopping' of the claimant's upper body (which was not in the event put as part of the claimant's case). Or, there would have needed to be a scenario where the claimant was holding herself stationary on her abseil rope, thereby supporting her body weight on that rope, while simultaneously pulling her safety rope down towards her chest, thereby creating a degree of slack rope between her chest harness and her hand on the safety rope. This was the scenario relied upon at trial.

The claimant accordingly needed to establish the (innocent) creation of a slack rope on her part by the positive action of pulling the safety rope towards herself while held on her abseil brake. She failed to establish that evidence on the facts, given that the judge held that she was a confident individual who (as described in her own witness statement) proceeded down the purpose-built abseiling tower without stopping or pausing at the transition point, and without pulling down on the safety rope. Hence there was no slack rope and the accident cannot have happened as described by her, and was on balance due to a permissible neck movement that was not consequential on any negligence or breach of duty on the part of the defendant.

There was in addition a causation hurdle for the claimant, which she cleared on the narrow balance of probability in the view of the judge, but causation was irrelevant absent any breach of duty on the part of the defendant.

What was the background?

The claimant had been part of a school activity trip to the defendant's premises. She was a school teacher who, as well as assisting and supervising the children on the trip, was invited to take part in such activities as she wished, time permitting, once all the children who wished to do so had themselves had a go at each activity. The claimant elected to join in both with abseiling (which took place on a purpose-built tower, designed to make the activity safer), and, an hour or so later, with a fencing activity. She had abseiled many years before on a couple of occasions, but not on a purpose-built tower such as the one provided by the defendant to make the exercise easier. The experts agreed that with a chest harness and a taut safety rope, participants were effectively lowered down by an instructor, and that they were engaged in an abseiling experience, rather than actually learning to abseil, which would have been a very different type of exercise.

As regards causation aspects, the neurological experts agreed that neck movement in the course of either abseiling or fencing was potentially causative of the vertebral artery dissection (VAD) which they agreed had occurred, and hence also of the stroke suffered by the claimant which the neurologists agreed was consequent on the VAD. Equally, they agreed that VADs could occur spontaneously, or as a consequence of some minor prior trauma over a period of weeks prior to the manifestation of neurological symptoms, which innocuous event of trauma might have been since forgotten by the claimant. The claimant's expert contended that, given that she had expressly remembered suffering minor neck trauma when she jerked her neck while abseiling, this was the most likely explanation overall, and the judge agreed on the narrow balance of probabilities with that opinion.

What did the court decide?

Foskett J held that the claim should be dismissed, because although the claimant had (on a narrow balance of probabilities) established medical causation, she had failed on the facts to establish any breach of duty on the part of the defendant, and in particular she had failed to make out the central allegation that the upper half of her body was caused to 'flop backwards' by instructor negligence or inattention. Indeed, the judge held that the instructor's evidence was impressive, and that proper instruction had been given to the claimant.

Further, the judge held that the claimant's evidence as to having been caused to 'flop backwards' needed to be treated with caution, particularly in the light of a letter written by a treating neurologist a year or so after the event, in which he recorded that the claimant had 'put her neck in an unusual position' (but did not describe her upper body as having 'flopped backwards'), together with a letter from her husband a year after that, in which he said that the claimant was not holding the defendant responsible for negligence or any liability, but that she had suffered an accident while abseiling and wished to claim on any applicable insurance for that accident that the defendant might hold.

The judge went on to look at the facts of the case from another perspective before reaching any conclusion, and held that absent any evidence that she was either braking at the point of transition and/or that she pulled the rope towards her while doing so, there cannot have been a slack rope such as to cause a 'flopping backwards', and the claim accordingly had to be dismissed.

He quoted in particular the passage in the claimant's witness statement which stated that: 'I walked steadily backwards at a normal pace and went straight over the vertical edge without stopping.'

The claim was dismissed.

Angus specialises in professional and clinical negligence, education negligence, personal injury, insurance matters, contractual litigation and regulatory work. He represents accountants, architects, barristers, doctors, engineers, financial advisors, insurance brokers, surveyors, teachers and valuers. He also acts for a number of local authorities and NHS Trusts. Angus is recommended as a

leading senior junior in the clinical negligence, personal injury and professional negligence sections of the current leading legal directories.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.