12
King's Bench Walk

Next Talk: 12:00 – 12:40

Liability for Breach of Statutory Duty: Where are we now?

Michael Brace
Brace@12kbw.co.uk

Dan Tobin
Tobin@12kbw.co.uk

Where have we come from?

- Actions for breach of statutory duty often have significant advantages from a claimant's viewpoint over actions based in negligence.
- The most obvious being that it is not usually necessary to prove fault.
- Moreover, the duties owed under the statute may be virtually absolute and/or not require any reasonable foresight of harm.

Where have we come from?

- In broad terms, to succeed, what is required is:
- (i) the provision must give rise to civil liability;
- (ii the claimant must have suffered the damage contemplated by the statute;
- (iii) defendant has breached the duty and that duty is owed to the claimant; and
- (iv) the breach was the cause of the claimant's damage.

What happened to us?

- Enterprise and Regulatory Reform Act 2013
- Section 69 amended s.47 of the Health and Safety at Work etc Act 1974
- “Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.”

What happened to us?

- With effect from 1st October 2013

- Important to bear in mind that it applied only to legislation passed under the 1974 Act; so, for example, an 'exception' to it was the Employer's Liability (Defective Equipment) Act 1969 (for an example of this, see *Johnson v. National Platforms* (2021))

What has been the Court's Response?
Cockerill

- *Cockerill v. CXK Limited* [2018] EWHC 1155 (QB)

- Mr C had his accident on 1st October 2013!
- Fell down a 7" doorstep at a school
- Claim against her employer forced to proceed in negligence.
- Before Ms Rowena Collins Rice, sitting as a Deputy High Court Judge

What has been the Court's Response?

Cockerill

- "However by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s.69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent. It is no longer enough to demonstrate a breach of the regulations. "

What has been the Court's Response?

Cockerill

- *"Not all breaches of the statutory regime will be negligent. Before the 2013 Act, the statutory regime had produced results in which employers were fixed with legal liability for accidents even where they had taken reasonable precautions against them. Stark v. Post Office [2000] EWCA Civ 64 became a well-known example. A component in a postman's bicycle gave way even though the machine had been sensibly maintained and checked; the Post Office was held liable to the claimant even though it had not been negligent. Section 69 changed that framework, with a view to producing different results."*

What has been the Court's Response?

Cockerill

- Emphasis was placed by C on the duties under regulation 3 of the 1999 Regulations
- "*every employer shall make a suitable and sufficient risk assessment*"
- and regulation 12 of the Workplace (Health, Safety and Welfare) Regultions 1992
- the floor – construction and marking.

What has been the Court's Response?
Cockerill

- C's claim failed

- "*I do not accept that it was a part of the duty of care owed to the claimant by either defendant, employer or occupier, to take reasonable steps to keep her safe from falling over the doorstep, that this door should be kept shut*"

What has been the Court's Response?
Chisholm

- *Chisholm v. D&R Hankins (Manea) Limited* [2018] EWHC 3407 (QB)

- C injured as a result of striking an overhead power cable

- Allegations were that the employer failed to adopt and enforce a safe system of work, undertook an insufficient risk assessment, failed to provide adequate training and failed to react to previous accidents or near misses

What has been the Court's Response?
Chisholm

- D defended on basis that it had a safe system of work and C failed to comply with it, and that the risk was an obvious one.

- For today's purposes, the case is interesting because of the emphasis C placed in its claim upon HSE guidance about the dangers posed by overhead power cables and the steps taken to protect against those risks

What has been the Court's Response?
Chisholm

- Jeremy Johnson QC, sitting as a Deputy High Court Judge (prior to becoming a full-time High Court Judge)

- "*If a sufficient risk assessment had been carried out into the task of cleaning then it would have been appreciated that it was reasonably foreseeable that drivers would tip their trailers. This would then have resulted in drivers being expressly forbidden from tipping their trailers, or from doing so beyond a very limited degree*."

What has been the Court's Response?
Tonkins

- *Tonkins v. Tapp* [2018] 12 WLUK 716
- Scaffolder injured by a fall.
- HHJ Gore QC sitting as a Deputy High Court Judge
- Dismissed the claim on the facts but said this:

What has been the Court's Response?
Tonkins

- *" … in those circumstances it is unnecessary for me to decide the unresolved issue of whether breach of a statutory duty rendered non-actionable by Section 69 of the Enterprise and Regulatory Reform Act nonetheless constitutes negligence ipso facto."*

- HHJ Gore took issue with *Cockerill*

What has been the Court's Response?
Tonkins

- If it had been Parliament's intention to render irrelevant those duties they would have repealed them.

- The EU roots of these duties was not a reason why Parliament could not have repealed them at the same time as it passed the 2013 Act.

What has been the Court's Response?
Tonkins

- *"I would not have been prepared to find, without much more analysis and argument, that the effect of Section 69 was to deprive an accident victim of entitlement to rely upon a finding that breach of statutory duty constituted ipso facto negligence as constituting breach of the scope and standard of care reasonably required of the alleged tortfeasor by the statutory duty even if no civil right of action was available for its breach."*

What has been the Court's Response?

White Lion Hotel

- *James v. White Lion Hotel* [2020] 1 WLUK 39
- HHJ Cotter QC (as he then was)
- Guest fell from the window of a second floor room and died
- Occupier's Liability Act 1957, so no strict application of s.69

What has been the Court's Response?
White Lion Hotel

- *"It is my view Parliament cannot have intended that by the interaction of sections 2(2)and 2(5) of the 1957 Act, an occupier could fail to take a positive act required by the criminal law (here to reduce the risk created by the window to the lowest level reasonably practicable) and yet be found to have taken such care as was, in all the circumstances of the case, reasonable. The risk may have been obvious but following a risk assessment the criminal law required steps to be taken. If such steps had been taken the accident would not have occurred. In my judgment section 2(5) cannot be used to negate a specific, mandatory health and safety requirement upon an occupier to Act."*

What has been the Court's Response?
White Lion Hotel

- It become relevant because the hotel had pleaded guilty to various criminal offences under the 1974 Act, and the Court was at pains to examine the relationship between civil and criminal law.

- HHJ Cotter identified the differing views expressed in *Cockerill* and *Tonkins* and said:

What has been the Court's Response?
White Lion Hotel

- *"In the present case I do not have to resolve the issue raised in these two Judgments. It seems to me that the example given by Rowena Collins Rice of Stark v. Post Office [2000] EWCA Civ 64 may well provide circumstances where civil liability may no longer follow a breach of regulations. However, in other cases liability must surely still follow breach of the regulations, "ipso facto"."*

What has been the Court's Response?
White Lion Hotel

- C succeeded.
- The Defendant appealed - [2021] 2 WLR 911
- *"Did the judge err in holding that, as a matter of law, an occupier who is in breach of his statutory duty under section 3(1) of the 1974 Act was ipso facto in breach of his duty to a visitor under the 1957 Act?"*

What has been the Court's Response?
White Lion Hotel

Nicola Davies, LJ

"It is important that the civil and criminal law should be internally consistent. That said, each assessment will be fact-specific and it does not follow, and I do not find, that civil liability axiomatically follows an unchallenged criminal conviction in civil proceedings. "

What has been the Court's Response?
White Lion Hotel

- *"It follows, ... I accept the appellant's contention that the judge erred in holding that, as a matter of law, an occupier who was in breach of his statutory duty under section 3(1) of the 1974 Act was ipso facto in breach of his duty to a visitor under the 1957 Act ."*

- Appeal failed on other grounds.

What has been the Court's Response?
Jagger

- *Jagger v. Holland* [2020] EWHC 46 (QB)
- C run over by an articulated lorry
- Mr Geoffrey tattersall QC, sitting as a Deputy High Court Judge
- Issue arose as to application of Construction (Design and Management) Regulations 2007

What has been the Court's Response?
Jagger

- *"It should be noted that in any event a breach of CDMR gives rise to no civil right of action for breach of a duty under CDMR [see section 69 of the Enterprise & Regulatory Reform Act 2013] but he conceded that the Regulations and the guidance issued thereunder inform the duty of care owed at Common Law."*

So, where are we now?

- We suggest that the position is as follows:
- The duties remain relevant, but are not determinative
- As they inform the common law duty, plead as much supportive detail as possible

So, where are we now?

- The absence or adequacy of risk assessments remains highly relevant – see *Chisholm*

- See the Scottish case of *Birch v George McPhie & Son L*td 2020 S.L.T. (Sh Ct) 93, in which a labourer brought an action for damages against his employer for a scalding injury. It was noted that although s.69 meant that a breach of regulations alone was not enough for a cause of action, that change in the law did nothing to dilute the importance of a risk assessment in considering whether an employer had exercised its common law duty of care for its employees.