

The Risk of Ice

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Summary:

In recent weeks snow and ice have swept across the UK. The appeal case of *Mr Ivor Cook v Swansea City Council* [2017] EWCA Civ 2142 concerns a claim arising from slipping on the latter.

The facts

On 8 December 2012 the Claimant, aged 78 at the time of the accident, had parked his car shortly after 10:30 in a small unmanned 24 hour pay and display car park ('the car park') in Swansea owned and operated by the Defendant. When walking to the ticket machine, there being a slight downward incline towards it, he slipped on black ice. The Claimant pleaded negligence and/or breach of duty under section 2(2) of the Occupiers' Liability Act 1957 ('OLA 1957') and sought £10,000 in damages for his injuries.

The Defendant operated 46 car parks in total and they are unmanned bar 3 multi-storey car parks, and 3 park and ride car parks. In bad weather the manned car parks will be gritted, but there is a reactive system of gritting in relation to the unmanned car parks - they are only gritted when a report from a member of the public about a dangerous area is received.

Two wardens, who ensure that drivers have paid and displayed, attended the car park at 10:51 on 7 December 2012. In addition, cashiers had collected money from the machines on both 7 December 2012 and 8 December 2012. All were employees of the Defendant.

The Decision below

HHJ Vosper QC found that a reactive system was the only proportionate and reasonable way of dealing with the problem of ice in car parks, save for those rare occasions of heavy snow fall, which are exceptional and call for different decisions. In turn he concluded that by adopting a reactive system the Defendant did discharge the common law duty to take such

care as in all the circumstances of the case was reasonable. He accepted that they could have issued instructions to cashiers and wardens, prima facie there would be no difficulty in implementing such a system, but they would have been part of a reactive system and there was no evidence that such instructions would have prevented the Claimant's accident.

The Appeal

The Claimant appealed.

Ground 1 - Breach of Duty:

'18 ... (1) Having found as a fact that the Defendant did not put in place a system whereby cashiers and wardens would report ice, and having found that prima facie there could be no difficulty with such a system, the judge erred in failing to make a clear and explicit finding of breach of duty under section 2(2) of the 1957 Act.'

The first ground was dismissed. The Defendant considered the following matters as being especially relevant, and Lord Justice Hamblen found them compelling reasons for upholding HHJ Vosper QC's decision that there was no breach of duty:

'(1) The likelihood that someone may be injured;

The risk of ice in cold weather is an obvious danger. People out and about in cold weather can be reasonably expected to watch out for ice and to take care. The Car Park did not pose a particular risk compared to any other of the Defendant's car parks. There had been no previous reports of dangerous ice conditions at the Car Park, nor any previous accidents due to ice.

(2) The seriousness of the injury which may occur;

Injury due to slipping on ice may be trivial or serious.

(3) The social value of the activity which gives rise to the risk;

The Defendant's car parks provide the useful facility of 24 hour parking. If gritting of unmanned car parks, such as the Car Park, is required whenever there is a report of icy

conditions the Defendant is likely to have to prohibit their use in all its unmanned car parks in periods of adverse weather, to the considerable inconvenience of local residents and visitors.

(4) The cost of preventative measures.

The alternative to closing the car parks would be manning them or arranging regular gritting. Such gritting would have to be by hand and would involve significant use of staff and material resources. This would be a disproportionate and costly reaction to the risk and would have diverted such resources from situations where attention was more urgently required.'

Grounds 2-4 - Causation:

'18 ... (2) The judge was wrong in law in his approach to the issue of causation in finding there was no burden on the Defendant to establish that the accident would have occurred in any event;

(3) If the judge's approach regarding the question of causation was correct the threshold he adopted in respect of proof of causation was too high and presented an insurmountable hurdle for the Claimant.

(4) The judge failed to accord sufficient weight or to consider adequately evidence before him establishing causation. There was ample evidence that any reactive system would or should have sought to address the condition of the car park before the time of the accident on 8 December.'

It was not necessary for Lord Justice Hamblen to determine the Claimant's challenge to the conclusion on causation, but he did observe that in order for the accident to be prevented, given the judge's finding that gritting could not begin until midnight on 7 December 2012, an employee would have had to attend the car park early on 8 December 2012 and considered conditions sufficiently hazardous for a report to be made, and the Defendant would then have to decide to act on the report and arrange for manual gritting. Such gritting would have to be undertaken before the time of the accident/10:30. Lord Justice Hamblen found that inherently implausible [38]. With regards to an evidential burden on the Defendant to establish the accident would have occurred in any event, Lord Justice Hamblen reiterated

what was observed by HHJ Vosper QC in that this is not a case *‘where proof of the circumstances leads to the conclusion that something has gone wrong ... it cannot seriously be said that something must have gone wrong to explain the presence of ice on the ground in December.’*

Lord Justice Henderson and Lord Justice Longmore agreed that the appeal ought to be dismissed.

Comment

As the wintry conditions continue, this case is highly topical. In certain circumstances a breach of duty could be difficult to prove where occupiers are operating a reactive system, as long as that system is working. Equally, one should look out for any faults within the reactive system as that could point to something having gone wrong.

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