Case Comment

Baxter v Barnes

personal injury - liability - negligence[1]
(QBD, Judge Collender QC, January 12, 2015, [2015] EWHC 54 (QB))

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Subject: Personal injury . **Other related subjects:** Consumer law. Contracts. Negligence.
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Legislation:
Supply of Goods and Services Act 1982 (c.29) s.9(2)
Case:
Baxter v Barnes (t/a WE Barnes Tree Surgeons and/or Up and Out Platform Hire) [2015] EWHC 54 (QB) (QBD)

J.P.I.L. C185 Christopher Baxter was an arborist. He was engaged by the owners of a substantial residential property, the Old Rectory in Milborne St. Andrew, Dorset, to prune a large copper beech tree, overhanging the house. He and his employees commenced work on the job in November 2010 and worked initially by gaining access to the branches to be pruned by means of ropes and harnesses. However, Mr Baxter decided that he would need a platform, to safely prune the remaining branches, which were growing over the house and garden.

Access to the site where Christopher Baxter was working was limited, and the tree was close to a slope. In the circumstances he decided that the appropriate machine for the job was a specialised type of mobile elevated work platform ("MEWP") known as a "Spider" specifically designed for use in such situations. This had been hired by the claimant from the defendant tree surgeon. Access to the site was limited and the tree was close to a slope. The platform was specifically designed for such situations. It was suitable for working on sloping ground, provided that the feet of the outriggers were properly supported on ground that was reasonably level, firm and stable.

The defendant delivered the platform to the site and helped to set it up in the first position from which the claimant was going to use it. Together with the platform, he supplied the claimant with hard plastic plates, to support the feet of the outriggers of the platform. Those plates had not been supplied by the manufacturer for use with that platform. After using the platform at the first position within the site, the claimant's employees moved the platform to another position. On December 1, 2010 he was engaged in the pruning of the tree whilst the platform was in use, it overbalanced and toppled over. When this happened Baxter and one of his employees, Mr Milbourn, were working from the basket and sustained serious injuries.***J.P.I.L. C186***

Subsequent investigations revealed that two outriggers had lifted up from the ground. The experts agreed that, on the balance of probabilities, the platform had become unstable and toppled because one or more of the outrigger feet slipped off the edge of the plate into the soft ground. Baxter claimed damages for breach of contract and negligence from the defendant.

Baxter submitted that the accident had been caused by defects in the platform and/or instructions which the defendant had given to him in relation to setting up the platform. The defendant asserted that the accident was solely due to errors by the claimant in setting up or operating the platform.

The judge found that the claimant was an experienced arborist who was generally careful for his own safety and that of his employees. Whilst he had not previously hired that type of platform, he was knowledgeable about the principles behind its operation. Further, on the day of the accident his employees had set up the machine in essentially the same way and position as the day before. They had not set it up in a position which the defendant had advised was unsuitable and they had followed the defendant's instructions in setting it up.

The judge held that it was clear on the evidence that the position was not unsuitable for the positioning of a platform of suitable quality. In particular, the manufacturer's evidence was that the ground appeared suitable for the platform and that the movement of the outrigger foot was as a result of the operation of the platform, not the collapse of the plate into soft ground. The cause of the accident was the slippage of the outrigger foot upon its bearing

plate. That slippage occurred because the plate was not of suitable quality for the type of platform concerned. The platform was specifically designed for use on rough or soft terrain and on slopes and narrow or uneven surfaces, where it was liable to be subjected to lateral forces which could cause a foot, if unrestrained by its bearing plate, to move considerably. The platform should have been provided with bearing plates which were attached to the outrigger feet or so shaped or recessed that the feet were prevented from slipping off the plate. For that reason, the platform supplied by the defendant was not of a satisfactory quality for the purposes of the implied condition contained in s.9(2) of the Supply of Goods and Services Act 1982.
The platform also toppled over without any warning device or cut-out operating, whether because of a particular fault which had developed on that specific platform, or because the combination of the particular way the topple was initiated and the design of the platform resulted in the warning device and cut out not operating before the topple was initiated. The claim succeeded in contract, but the defendant did not have a separate liability to the claimant in negligence, nor was the claimant in any way negligent.
Judgment was entered for the claimant.

Comment

In contrast to the more usual personal injury action involving a fall from height—which generally concerns breaches of health and safety legislation or occupier's liability—this was essentially a product liability claim directly founded in contract. The claimant also relied upon negligence but, as noted above, the judge did not find there to be a separate liability in negligence though there was little analysis in the judgment as to his reasoning. Given that the claimant had himself hired the "Spider" directly from the defendant he was able to avail himself of the terms implied into the contract pursuant to the Supply of Goods and Services Act 1982.
The law applicable to the case was uncontroversial: there was an oral contact; there were statutorily implied terms as to satisfactory quality and fitness for purpose; on the facts of the case, the term as to fitness for purpose added nothing to the requirement for satisfactory quality; there could generally be no contributory negligence for breach of contract unless the contractual obligation in question was one to take reasonable care—which was not the present case.
The judge's finding of fact as to the cause of the Spider tipping over—i.e. the slippage of an outrigger upon its bearing plate which was not suitable for the application to which the Spider was supplied—meant***J.P.I.L. C187*** that he could readily find the product not to have been of satisfactory quality. As it happens, the judge held that the claimant had done nothing wrong in his operation of the Spider, and hence there was no basis for a finding of contributory negligence. In any event, the contractual nature of the claim meant that contributory negligence was no defence. There is a distinct advantage for claimants with such contractual claims as they would potentially be subject to the defence of contributory negligence if the product liability claim were founded only in negligence or under the Consumer Protection Act 1987.
The finding of fact as to the cause of the accident was based predominantly on expert evidence, though the judge did reject the defendant's factual contention that he had advised the claimant not to erect the Spider where he had. The judge preferred the evidence of the claimant's expert whom he noted had considerably more experience of MEWPs of this kind than the defendant's expert. This reminds us of the importance of selecting suitably qualified and experienced experts.
A particular handicap suffered by both parties' experts, however, was that the Spider had been destroyed by the defendant before it could be inspected by either of them. This meant that they could not test the machine to check whether it operated correctly. An HSE inspector had tested it shortly after the accident, but the parties' experts considered the HSE inspection to be deficient.
The judge was not prepared to attribute blame for the fact that the machine was disposed of prematurely. He noted that the claimant's solicitors had not specifically requested its preservation in their letter of claim, and that the defendant's solicitors had not advised the defendant not to dispose of it.
It is worth observing, however, that in suitable claims, the court can draw adverse inferences against a party who inappropriately disposes of or destroys relevant evidence. In the case of *Malhotra v Dhawan* [2] the Court of Appeal approved the trial judge's ruling that:

"in a situation where one party is responsible for the unavailability of relevant evidence, the Court should not be slow to make such inferences or assumptions against that party's interests as are consistent with the other available evidence."
In conclusion, this case turned very much on its own facts, but being a product liability claim it is out of the norm for many personal injury lawyers. There is no magic in product liability claims, but they often do involve analysis of causes of action beyond the narrow confines of negligence.

Practice points

- PI lawyers should never forget to consider potential claims in contract, or the terms that can be implied into such contracts.
- Solicitors on either side of PI claims must be prompt to ensure the preservation of relevant documentary or real evidence. Early correspondence should be sent requiring such preservation and a request that disposal only takes place with the consent of all parties concerned.
- Ensure any liability expert instructed has adequate experience and expertise. This is where it is advantageous to see the proposed name (and possibly CV) of the other side's expert before committing to an instruction of one's own expert.
- Ensure that liability experts examine the accident site and/or equipment involved at the earliest opportunity. Often it is helpful to have a joint visit by each party's expert so long as the experts are instructed not to disclose their opinions prematurely.***J.P.I.L. C188***
- If relevant evidence has been destroyed and foul play is suspected, adverse inferences may be drawn.

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J.P.I. Law 2015, 4, C185-C188

1.
T/A WE Barnes Tree Surgeons and/or Up and Out Platform Hire.
2.
Malhotra v Dhawan (1997) EWCA Civ 1096; [1997] 8 Med. L.R. 319.