AN UNUSUAL CASE

Ben Rogers and Matthew Stockwell explain the issues in the recent high-profile case brought by Mark Pollock

In the recent case of *Mark Pollock v (1) Enda Cahill (2) Madeline Cahill*, 39-year-old claimant, who is a well-known motivational speaker in his native Ireland, was injured when he fell through a second floor bedroom window. The accident occurred at about 11.30pm on 2 July 2010, while he was staying overnight at the defendants' home in Henley-on-Thames.

The claimant (who had previously lost his sight when 22 years of age) suffered a head injury and a catastrophic spinal cord injury, rendering him paraplegic as a result of this fall.

The claimant argued:-

i. The defendants caused or permitted the window to remain open in circumstances that objectively gave rise to a reasonable foreseeable risk of serious injury to the claimant; and

ii. Prior to his fall, the second defendant had specifically addressed her mind to the risk presented to the claimant by leaving the window open, but she decided not to close the window because it was a warm evening.

The claimant is a hugely impressive individual. After becoming blind in 1998, he went on to make a successful career for himself in business, and to achieve many impressive feats as an adventure athlete and as a rower.

He was the first blind man to race to the South Pole, he competed in many marathons, and participated in a variety of races in hugely challenging conditions. As a rower, he won two medals at the Commonwealth Games. In his judgment, Mr Justice William Davis said: 'His athletic achievements would have been notable for someone without any disability. Given his blindness they were and are remarkable.'

The room from which the claimant fell was fairly modest, with twin beds positioned either side of the only window in the room. The window was a double casement window of conventional timber construction. Each window was 135cms high and 55cms wide. The windows met at a central mullion. Each casement had a stay with five holes and a pin for locating the stay. Each window could be opened, with the size of the opening dependent on which hole was used when locating the stay. The height of the windowsill was 830 cms, ie. approximately mid-thigh on a man of the claimant's height. At first glance, the room and window layout were unremarkable – not an obvious cause for complaint.

Likewise, the claimant's evidential hurdles were by no means straightforward. He had no recollection of the accident and the fall was not witnessed. Would he not have been aware of the presence of the open window? How would he establish that the defendants created the risk by opening the window, failed to close it or, at the very least, failed to warn him about it?

The claimant also needed to establish that the open window posed a reasonably foreseeable risk of injury to him. The claim was pleaded in negligence and in breach of Section 2 of the Occupiers' Liability Act 1957, the relevant section of which provides:

(i) *An occupier of premises owes the common duty of care to all his visitors, except insofar as he is free to and does extend, restrict, modify*

and exclude his duty to any visitor or visitors by agreement or otherwise;

(ii) *The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there; and*

(iii) *The circumstances relevant to the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor so that (for example) in proper cases:*

(a) *an occupier must be prepared for children to be less careful than adults;*

(b) *an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so*

When assessing the standard of care therefore, particular consideration must be given to the characteristics of the visitor. If the Occupiers' Liability Act 1957 was redrafted, the revised modern instrument would undoubtedly contain a clause specifically addressing the position of disabled visitors (akin to that made under section 2(3)(a) for children) - not so much on the basis of the care that might be expected to be taken by a disabled person, but taking into account disability as one of the relevant circumstances for the purposes of section 2(2). It was necessary here to establish that the claimant's blindness was a relevant factor to which the defendants paid insufficient regard when considering the reasonableness of their actions.

In addition to the claimant's blindness, the following factors were relied on:

i) The windowsill was low and below the 'tipping point' of a man the claimant's size;

ii) The second defendant had consciously considered the risks posed to the claimant by the window being left open prior to his accident occurring, but for reasons of her own decided to keep the window open and not to warn the claimant about it because it was a 'warm night';

iii) The window stays which the defendants alleged were still securely located on their pins after the accident created a sufficiently large gap so as to permit the claimant to fall through it without disturbing the stays and/or the stays were not designed to prevent the window from opening in the event that a person was to push and/or fall against the window.

While the fact of the claimant's blindness could of course not be disputed, issue i) was much less straightforward. The defendants relied on mechanical engineer expert evidence to suggest that as the windowsill itself was 21 cms deep, it would have acted to arrest the claimant's fall had he simply fallen, so rather than fall he must have done something extraordinary so as to cause the accident, such as to purposely climb out. No positive allegation of horseplay or misadventure was ever made, but as anticipated various insinuations were made in the course of cross-examination and submissions.

To avoid the prospect of an adverse finding, the claimant relied on biomechanical evidence to demonstrate the defendants' expert's modelling was unreliable. The computer modelling software relied upon by the defendants' expert was designed to test collisions between a car and pedestrian, so rather than having the claimant walk into the windowsill and falling, the defendants' expert 'drove' the windowsill into a stationary claimant. This model did not take into account the complex ergonomic factors involved in the claimant walking towards the windowsill, and it did not accurately take into account the claimant's centre of mass, which was above the windowsill as he walked towards it.

Ultimately, the judge derived limited assistance from the expert evidence owing to the constraints placed on their instruction at the case management stage, and the case was decided primarily with reference to objective material, photographs and measurements etc, and the witness evidence relied on by both parties.

The claimant's lay evidence on the issue of the second defendant's state of knowledge about the open window was given by the claimant's fiancée, her two sisters and the claimant's mother. These witnesses alleged that the second defendant had spoken to them in the early days after the accident when they were at hospital tending upon the claimant.

The substance of their evidence was that the second defendant had told them that she thought that it might be risky for the window to be left open in the claimant's room on account of his blindness, but that she had decided to leave the window open because it was a warm night. In her oral evidence, at trial the second defendant denied that she had told these witnesses that she had given thought to whether or not she should leave the window open because of the risk posed to the claimant, and she denied ever opening the window herself. However, somewhat crucially, she did say in oral evidence:

'...when I would have opened the windows it would have been when I was making up the room and at that point in time I did not know that Mark was going to be in there...'

David J concluded that he was '... *wholly satisfied on the evidence that Mrs Cahill opened the window in the bedroom used by Mr Pollock'.* He referred to the fact that:

'Although Mrs Cahill's evidence generally was that she did not recall opening the bedroom window, she did let slip the comment about opening the window when she was making up the room.... But the significant body of evidence that demonstrates that it was Mrs Cahill who opened the window comes from what she said at hospital.'

The liability experts agreed as part of the joint statement process that the gap created by the stays being positioned in the way that the defendants said the window was found after the accident was large enough for the claimant to fall through, and Davis J accepted this evidence:

'Even with the windows open in that position, it was possible for Mr Pollock to have fallen through the gap. That was the agreed position of the experts after two lengthy discussions'.

Davis J went further however in his judgment, and concluded that:

'On the balance of probabilities, to use the term adopted by Mr Grime QC in his closing submissions, there has been "some kind of attempt to distort or to hide evidence"'.

He went on to say:

'First, I cannot be confident that the space between the casement and mullion through which Mr Pollock must have fallen was as limited as shown on the photographs taken by Mrs Cahill. On the balance of probabilities I consider it was greater – although I cannot reach any clear conclusion as to how much greater'.

It was also agreed by virtue of some horse trading between the parties prior to the trial that the claimant did not require there to be evidence from a structural engineer, assuming the defendants were prepared to make an admission of fact, which they did; namely:

'The defendants admit that when the window that the claimant fell from on 2 July 2010 is partially opened on its stays, the stays and pegs on the window in question are not designed [for] preventing the window from opening in the event that a person were to push and/or fall against the window'.

The judge concluded that the claimant had not done anything extraordinary so as to fall out of the window, but that:

'I am satisfied that on a balance of probabilities that Mr Pollock fell through the open window as he was trying to make his way to the bathroom having just woken.'

Upon establishing this fact, the judge needed to consider whether or not there had been a breach of duty by defendants, and he accepted that the test set out in the Occupiers Liability Act 1957 required the occupier to have regard to any known vulnerability, such as the claimant's blindness.

The defendants sought to argue that although a fall through the window was possible, the likelihood of it occurring was not a real risk – rather, it was a *'mere possibility which would never influence the mind of a reasonable man'*, referring to the position in *Bolton v Stone* [1951] A.C. 850 as summarised by Lord Reid in *Overseas Tankship (UK) Limited v Miller Steamship Co PTY Limited (The Wagon Mound)* [1967) 1 A.C.617 at 642 G.

The judge, however, concluded that:

'An open window did create an obvious risk to a blind person, particularly when it was on the second storey of a house with nothing to prevent a fall to the ground below'.

It was admitted in the defence that it was reasonably foreseeable that a person who fell from the window might sustain serious injury. The defendants sought to make much of the fact that the claimant, before his accident, was engaged in various adventurous pursuits - so it was not reasonable for the defendants to consider he might be at risk of falling through an open window. But the judge concluded:

'The fact that he was a resourceful blind person was irrelevant to the risk created by an open window'.

Davis J considered that the open window did as a matter of fact pose a risk to the claimant. It was after all admitted by the second defendant in oral evidence that she would not have allowed a child to be left unattended in the bedroom with an open window. But the judge went further, and was clear in his finding that the second defendant had in any event considered that there was a risk that was apparent to her before the accident, albeit she clearly misjudged the extent of that risk. He found:

'I am satisfied that the Cahills failed to discharge the common duty of care they owed as occupiers. The open window was a real risk to Mr Pollock. They created that risk. They ought to have appreciated the risk and taken steps to prevent it by keeping the window closed or by warning Mr Pollock about it by particular reference as to the extent of the drop from the window'.

Insofar as the defence of volenti raised by the defendants (as incorporated into the liability of the occupier by Section 2 (5) of the 1957 Act), the judge concluded that for Section 2 (5) of the 1957 Act to apply, there must have been a willing acceptance of the risk by the claimant. However, the judge found that in essence the claimant could not have accepted a risk which he did not know about. There was no finding of contributory negligence because the judge did not criticise the claimant for failing to make specific enquiries about the details of the window in the room and whether or not it was open, or for failing to use his bed as a guide to the door.

This particular case is a good illustration of how an occupier is under a duty to take into account the particular nature of the visitor, and it is a somewhat salutary tale to defendants and their legal teams about the importance of needing to continually reassess the prospects of success as the evidence in a case evolves.

Practice points

The following practice points are reinforced by the claimant's experience in this litigation:

- Judges instinctively place particular weight on objective material and lay witness evidence (especially where the latter is corroborated, consistent with other documentation or has the elusive 'ring of truth' about it), compared to expert evidence.
- Claimants (and, in some cases, defendants) have a unique opportunity to manage and assess the quality of their lay witness evidence before trial.
- Expert evidence can be as important to rebut another party's case as it can be to prove your own.
- Expert evidence will not necessarily strengthen an otherwise weak case or weaken an otherwise strong case.
- It is important, whether in terms of instruction or case management, that experts cover all of the important issues and are not unduly constrained.
- Cases involving unusual circumstances call for a correspondingly careful assessment. Particular characteristics of the claimant (or defendant) must be taken into account, but the standard of care remains an objective one.
- Use your lay client's knowledge to inform your assessment of the case. The claimant's experience as a blind person was particularly important when evaluating and presenting his case, ie. how he walked, how he negotiated hazards, how he anticipated risks and the information he would ordinarily request of others. This exercise might be equally apposite when making a quantum assessment in a case involving pre-existing disability.

Ben Rogers, personal injury partner at Stewarts Law LLP, and Matthew Stockwell, counsel at Outer Temple Chambers, both acted for Mark Pollock