Occupier's duty of care: is there a duty to enquire into insurance position of an independent contractor?

Raphoe Collins
(Solicitor)

It is well established that an occupier has a common duty of care to ensure that an independent contractor is competent to do the work for which he has been hired. But does this duty include a duty to enquire into the insurance position of the independent contractor? That was the question raised in the recent English case of *Gwilliam v West Hertfordshire Hospitals NHS Trust and Others* (Court of Appeal, 24 July 2002).

In dismissing the plaintiff's appeal, two of the Court of Appeal judges held that the hospital did have such a duty, which they had discharged. Curiously, the third appeal judge held that there was no such duty on the hospital but had there been, the hospital would have breached it.

The facts

The plaintiff, then aged 63, was injured at a fund-raising fair held on the grounds of the hospital. She was injured while using a "splat-wall" amusement activity which had been negligently set up by the second named defendant, (an independent contractor) Club Entertainments ("Club").

The hospital's fund raising manager telephoned Club to enquire about their insurance and made an arrangement with them whereby the hospital paid them an extra £100 so that Club would provide the operational staff for the "splat-wall". This ensured that the hospital would have the benefit of Club's public liability insurance. The manager did not ask to see a copy of the insurance certificate or policy nor did Club send him a copy. Subsequently, Club's insurance expired - just four days before the hospital fair.

Club agreed to pay £5,000 to the plaintiff in respect of damages and costs. She accepted the sum because of Club's financial position but sought further damages from the hospital.

The trial judge held that the hospital did not owe a duty to the plaintiff and the plaintiff appealed.

The appeal

The plaintiff contended she was entitled to recover from the hospital the difference between the sum which she would have recovered from Club (if they had been insured) and the sum at which she settled her claim. Her case against the hospital included a substantially broader claim that the hospital, as organiser of the fair, was under a duty to exercise reasonable care in the selection of persons responsible for operating entertainment devices, such as the "splat-wall". This included a duty to ensure that such persons were covered in respect of public liability and not to allow entertainments at the fair where there was no insurance. Alternatively, they could warn visitors that they would not be covered on entertainments at the fair that had no insurance.

The duty issue

Lord Chief Justice Woolf stated that the correct starting point for the case was section 2 of the Occupiers Liability Act, 1957. This imposed on the hospital a common duty of care to take reasonable care in all the circumstances to see that the plaintiff would be reasonably safe in using the premises to which she had been invited. The hospital could fulfil its duty if it employed an appropriate, competent independent contractor ie one sufficiently experienced and reliable to be entrusted with the operation of the "splat-wall". In selecting an independent contractor, the Court of Appeal held that it was fair, just and reasonable to impose on the hospital a duty to enquire as to their insurance position to meet any claim that might occur.

Breach of duty

Lord Chief Justice Woolf held that the existence of insurance would go to Club's competence. Lord Justice Waller held that the hospital would not be acting reasonably if it did not check the viability of Club. As the hospital had taken reasonable steps to enquire as to Club's insurance position, and not having any reason to believe insurance was not in force, both judges held that the hospital had fulfilled this duty. In contrast Lord Justice Sedley was critical of the enquiries the hospital made, dubbing them as "perfunctory and ineffectual."

Conclusion

The hospital had a duty to enquire as to the insurance position of the independent contractor and, having made reasonable enquiries, had discharged this duty. Each case will be decided on its own facts but prudence indicates that an occupier should obtain a copy of the independent contractor's insurance certificate or policy and not place too much reliance on verbal assurances.

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MARCH 2003

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Speeding and penalty points

The new penalty points regime came into operation in October 2002. Motorists who exceed the speed limit will incur 2 penalty points and a €80 fine providing they pay the fine within 28 days (€120 if paid within 56 days). If you contest the speeding summons and are unsuccessful the court will impose 4 penalty points and a fine not exceeding €800. Accumulation of 12 penalty points or more in 3 years will result in automatic disqualification from driving for 6 months.

Construction site safety

The director of a building company was recently jailed by the High Court for continued breaches of construction site safety regulations. The High Court released him after spending three days in prison and fined him €10,000 for contempt of court. The housing development, in Nenagh, Co Tipperary, had been twice closed down on the application of the Health and Safety Authority, in particular for failure to provide scaffolding on the outside of a building on which men were working on the roof. When ordering the imprisonment of the building company director, Mr Justice Kelly marked the disapproval of building contractors '*dicing with the lives and health of employees by taking short cuts, omitting to comply with the legislation, with one object in view – the maximisation of profit.*'

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MARCH 2003

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A broken link in the chain of causation: *novus actus interveniens*

Elizabeth Burke (Solicitor)

Latin terms still permeate legal language, sometimes creating confusion and regularly warranting clarification of their meaning and application. One example of this is the application of the doctrine *novus actus interveniens* - a term to describe a situation when an intervening act relieves an original act of legal responsibility.

This occurs where the causal link between the defendant's act and the plaintiff's injury is said to be broken by an intervening act, which is of such a kind that it must be deemed to be the sole or new cause of the plaintiff's injuries. In the recent decision of *Murray v Miller* (14 November 2001, Circuit Court) Judge McMahon examined the circumstances where the intervening act will have the effect of relieving the original wrongdoer.

Two determining issues feature in the judge's approach:

- the foreseeability of the intervening act.
- the attitude of the subsequent intervener.

In the High Court decision of *Breslin v Corcoran & Motor Insurers Bureau of Ireland* (17 July 2001), Mr Justice Butler made an important legal determination in questioning whether the casual connection between the wrong done and the plaintiff's injury had been severed by a *novus actus interveniens*. In this case, the first named defendant had left his car unlocked (with the keys in the ignition) outside a coffee shop in Talbot Street, Dublin, as he dropped into the shop to get a sandwich. An unknown person jumped into the car and drove off at high speed and turned into a laneway where the car struck and injured the plaintiff. While the first named defendant was guilty of negligence and breach of statutory duty, it had to be determined whether the unknown driver's action broke the link between the plaintiff's injuries and the first named defendant's negligence.

Butler J found that the chain of causation had been "*clearly broken*". He went on to say that the only type of circumstance in which he could envisage a successful claim against the owner of the stolen vehicle would be where there was "*actual and clear evidence that the vehicle was left in an area where it should be known to the owner that people routinely stole cars for the purpose of driving them around in a reckless and dangerous fashion*".

In the Murray case, Judge McMahon undertook an important analysis of novus actus non interveniens. One winter's evening while driving on the main road from Roscommon to Lanesboro, the third named defendant hit a cow which had jumped out in front of his car from the left side of the road. He pulled into his own side of the road, turned his lights to dim, put on his hazard warning lights and checked the state of the animal. He concluded mistakenly that she was dead. Aware of the hazards that the cow represented, he tried to stop passing cars but eventually decided to go for help to a nearby house. In his absence, the plaintiff, driving down the road, collided with the cow.

The cow was owned by the first named defendant and kept by her and her husband (the second named defendant), in a field adjoining the road. The issue of their liability in relation to the cow's escape was not problematic as the common law immunity from liability for damage caused by animals straying onto the highway has been abolished and, if negligent, they could be liable for damage caused by the cow. The argument made by the first and second named defendants' counsel was that of *novus actus interveniens*, stating that even where the first and second named defendants were initially negligent, the subsequent conduct of the third defendant negated their negligence.

The judge found that *novus actus interveniens* did not provide a defence to the original wrongdoers and stated that it was clear that they could reasonably foresee the kind of intervention that occurred where the intervener's act was not unreasonable in the circumstances. He stated that the first and

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Claimants' legal costs: does "no win, no fee" mean "no costs"?

Anne-Marie Kiernan
(Solicitor)

Recent newspaper reports on the decision of the Taxing Master in the case of *Mary Johnston v The Church of Scientology & Others* has led to the incorrect belief that solicitors who act on a "no win, no fee" basis are in danger of not receiving their costs from the losing party to an action. These reports have clearly misinterpreted the decision of the Taxing Master, which actually found against the plaintiff on account of the fact that she had failed to adduce sufficient evidence that she had a legal liability to her firm of solicitors to pay their costs.

Background to the case

The plaintiff had taken a claim against the Church of Scientology and three named persons for damages. She claimed that she had suffered a distinct personality change after being apparently subjected to mind control techniques. Two Bills of Costs relating to the matter were entered before Master Flynn for taxation on 5 July 2002.

In order for a party to recover costs at taxation, they must fulfil the criteria laid down by Walsh J. in the matter *Attorney General (McGarry) & Ors v Sligo County Council (1991)*: The criteria are:

- that the Court has made an order for costs in favour of the party
- that the matters claimed had been properly incurred
- that the party in question is under a legal liability to pay them

At the opening of the taxation Mr. Halpin B.L., acting on behalf of the solicitors for the defendants, stated that he was putting the plaintiff on proof of all issues and disputes arising at the taxation and in particular those relating to the legal liability for the costs of the proceedings. He asked to see the 'letter of action', otherwise known as the 'section 68 letter' or the 'client care letter'.

The matter was adjourned on three occasions to allow the plaintiff's solicitors' legal costs accountant to furnish the necessary documentation. It transpired that there was no 'section 68 letter' on file or any document which could support the plaintiff's assertion that she had a legal liability to pay costs.

Accordingly, on 15 October 2002, the solicitor for the plaintiff (Ms. Murphy) was called to give evidence. Upon cross-examination it became clear that instructions were initially taken by a solicitor, (who had since left the firm) in or around October 1994 and that Ms. Murphy only became involved in the case some years later. The best testimony Ms. Murphy could offer was that she had discussed the matter of costs with the plaintiff in May 2000. However, there was no attendance note to substantiate this testimony. A letter from the plaintiff to her solicitors (dated 14 October 2002) was then produced, stating that she had a legal liability for costs but the plaintiff was not in court to prove its existence and accordingly, it could not be constituted as evidence that a legal liability existed. The only evidence that the plaintiff could produce was the testimony of Ms. Murphy. As Master Flynn put it, this was a '*mere assertion rather than evidence supporting a proposition of fact*'. In the circumstances, Master Flynn found that this was insufficient proof of a legal liability and therefore the plaintiff had failed to discharge the burden of proof required. He concluded that the defendant's can have no greater liability than the plaintiff and consequently taxed the Bills of Costs at nil.

Conclusion

Having read the decision of Master Flynn, it is clear that this case turned on its own facts and, in particular, on the rules of evidence in relation to proving the existence of a legal liability to pay costs. In referring to "no win, no fee" arrangements, the Taxing Master stated that, unless the client cannot prove legal responsibility "*such arrangements do not remove legal responsibility*". He stated that a 'section 68 letter', whilst not conclusive proof of a legal liability, is substantial proof which would be difficult to undermine. He also suggested that it might be of benefit to append such letters to Bills of Costs so as to truncate the proofs required at taxation. In this regard he referred to the case of *Bailey v IBC Vehicles Ltd* (2000) wherein it was suggested that relevant documents in

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Supreme Court scuttles "fear of asbestos" claims

In a decision likely to have far reaching consequences, the Supreme Court has set aside a €48,700 High Court award to a plaintiff exposed to significant quantities of asbestos. The plaintiff, while physically well, developed a reactive anxiety neurosis about the risk of getting mesothelioma (a rare lung cancer) despite his doctors' assurances that the chances of this were very remote. In its judgment of 21 February 2003, the Supreme Court held that without any physical injury, there is no entitlement to damages for psychiatric injury resulting from an irrational fear of contracting a disease where, in the opinion of the plaintiff's doctors, the risk is extremely remote. The judgment will be welcomed by employers and insurers involved in defending claims by public service and other employees alleged to have been exposed to asbestos.

Proposals to deduct collateral benefits

A recent report from the Law Reform Commission has proposed measures intended to curb double compensation. The Commission has proposed that certain collateral benefits, which are currently not taken into account in assessing damages, should be deducted from a plaintiff's award. Collateral benefits are payments made under an insurance policy whether the premium is paid by the plaintiff or someone else. These include permanent health insurance payments, pension payments and sick pay. The Commission has recommended the deduction of permanent health insurance payments and sick pay benefits and also where someone other than the plaintiff has paid the premium for the insurance payment. While the Commission advises against deducting pension payments, it does recommend that certain social welfare payments (which are not currently deductible) be deducted.

Crackdown on claims fraud

The Tánaiste, Mary Harney, recently launched the Irish Insurance Federation's anti-fraud awareness campaign. The campaign involves advertisements which are intended to persuade the public to report fraudulent and exaggerated claims to the Federation. The Tánaiste has also promised legislation to combat claims fraudsters. In another move to crack down on suspect claims, the Federation and An Garda Síochana will shortly announce protocols for reporting and investigating fraudulent claims.

A view from the Leeds Office: Negligent doctor wins case

Paul Townshend (Solicitor, Leeds Office)

Should a doctor have to pay for his medical negligence if the only consequence of it is to reduce the patient's prospects of a successful medical outcome (loss of chance)? Or does the patient need to attribute an injury to the negligence also? In the recent decision of *Gregg v Scott*, the UK Court of Appeal held (by majority) that in a claim for personal injuries loss of chance on its own is not actionable damage. While doctors may breathe a sign of relief, it may be short-lived as the Court of Appeal granted leave to appeal to the House of Lords.

The facts - " doctors differ ... " !

The defendant GP misdiagnosed a lump under the claimant's arm which was a cancerous tumour and failed to refer him to a specialist. Nine months later the claimant attended another GP and following referral to a specialist the tumour was diagnosed. By the time treatment had commenced the tumour had spread.

The trial judge found that the defendant's negligence resulted in a nine-month delay in treatment and the delay reduced the claimant's chance of surviving for five years from trial from 42% (but for the defendant's negligence) to 25%.

Nevertheless the trial judge dismissed the claim holding that as a matter of probability the tumour was of such a nature that the claimant would not have been cured in any event. He based his reasoning on the House of Lords decision of *Hotson v East Berkshire Health Authority*. By a majority (2-1) the Court of Appeal dismissed the claimant's appeal.

The appeal

In *Hotson*, the defendant hospital failed to diagnose an injury correctly for five days. The House of Lords held that regardless of the defendant's negligence there was a 75% chance that the claimant's injury would have followed the same course and developed avascular necrosis. The defendant was liable to compensate the claimant for his five days pain and suffering but not for the avascular necrosis.

In Gregg the Court of Appeal explained the *Hotson* decision as one concerning causation ie a past fact to be proved on the balance of probabilities and none of the Law Lords hinted that loss of chance on its own was actionable. While all three appeal judges felt that there were good policy reasons for declining to extend the law to speculative actions where the only damage was loss of chance, one appeal judge felt that the House of Lords should resolve the issue in a clear and principled fashion.

The majority held that the claimant's loss was diminution of life expectancy and he could not show on the balance of probability that he was not already going to suffer it independently of the defendant's negligence. The dissenting judge held that the development of an enlarged tumour was an actionable injury as the tumour was amenable to treatment in the period of delay. The majority rejected this argument.

Conclusion

The Court of Appeal was mindful of opening the floodgates for personal injury claims in general, such as industrial disease exposure, were it to allow the appeal. Should a special case be made in medical negligence claims permitting claimants to recover damages where their only loss is loss of chance? The House of Lords may soon be asked to answer this question.

Claimants' legal costs: does "no win, no fee" mean "no costs"?

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relation to costs (or a written explanation) should be attached to a Bill of Costs in order to avoid unnecessary skirmishes at taxation.

There is little prospect of Bills of Costs being regularly taxed at nil as a result of Master Flynn's decision - a possibility which was alluded to by the media. If anything, it is likely to result in a more cautious attitude to the issue of costs, particularly on the part of solicitors who offer their services on a "no win, no fee" basis. Furthermore, the plaintiff has entered objections to the decision of the Taxing Master and there is every possibility that the decision might be overturned. The appeal shall be heard later this year.

A broken link in the chain of causation: *novus actus interveniens*

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second named defendants must have foreseen that if the cow escaped onto the road, it was likely to cause an accident and that more than one vehicle might eventually become involved. He had no hesitation in saying that the stray animal was the sole cause of the accident.

In the more recent case of *Horton v Taplin Contracts Limited* (8 November 2002) the UK Court of Appeal held that the doctrine of *novus actus interveniens* could defeat a statutory breach of the Provision and Use of Work Equipment Regulations, 1992 (PUWER) (Construction Regulations), which are similar to the Health and Safety Welfare (Construction) Regulations in Ireland.

In this case, the claimant was a carpenter who had been working on a platform to remove a suspended ceiling. The platform had no stabilisers and insufficient guardrails (a breach of the PUWER). "*In a rage of temper*", one of the claimant's co-workers pushed the scaffold and it toppled over, causing serious injuries to the claimant.

The Court of Appeal found, in terms of the doctrine of *novus actus interveniens*, that "*an unforeseeable, unreasonable, deliberate, violent act is a paradigm example of a new intervenien caused*". Therefore, the act of the colleague was independent, unlawful, deliberate and not foreseeable. Even if there had been a finding of a breach of statutory duty, the actions of the colleague would have broken the chain of causation. However, some legal commentators feel that, had the claimant produced evidence to show that more stabilisers would have prevented the platform from toppling over when his co-worker pushed it, he may have succeeded with his claim.

The decision does represent a shift from the strict application of employers' safety at work legislation and it remains to be seen whether a similar approach will be adopted in this jurisdiction.