Woodland v Swimming Teachers Association
[2013] UKSC 66

Summary

Annie Woodland went for a swimming lesson organised by her school. The swimming lesson was conducted in a local pool by a company known as Direct Swimming Services ('DSS'). For reasons which were not clear at the time this case was heard, Annie ended up hanging head down in the water during the lesson. She was hauled out of the water and resuscitated, but had suffered a severe brain injury due to lack of oxygen. The question the UK Supreme Court had to answer was whether Annie's school could be held liable for her injuries, on the basis that the school had owed Annie a non-delegable duty of care to see that she did not come to any physical harm while in the care of the school, and that the school had been put in breach of that duty as a result of the (alleged) carelessness of DSS in teaching Annie how to swim.

The UK Supreme Court held unanimously that a claim could be brought against Annie's school on the basis that it had owed her a non-delegable duty of care. Lord Sumption gave the leading speech. He argued that there are 'two broad categories of case' ([6]) in which a defendant (D) will owe a claimant (C) a non-delegable duty of care:

(1) where D is engaged in an ultrahazardous activity and owes C a duty of care in engaging in that activity to see that C is not harmed by that activity, and

(2) where (all quotes from [23]):

(i) C is a 'patient or child, or for some other reason is especially vulnerable or dependent on the protection of [D] against the risk of injury';

(ii) there is an antecedent relationship between C and D 'which places [C] in the actual custody, charge or care of [D]' and 'from which it is possible to impute to [D] the assumption of a positive duty to protect [C] from harm'; and

(iii) C 'has no control over how [D] chooses to perform' that positive duty, 'whether personally or through employees or through third parties'.

Lord Sumption held that while (1) did not apply here (on the basis that teaching people how to swim was clearly not an 'ultrahazardous activity' ([6]), (2) did apply to the relationship between Annie and her school: the school had owed her a duty to take care to see that she was reasonably safe in learning to swim and that duty of care was non-delegable in nature ([26]). So when the school gave DSS the job of seeing that Annie was reasonably safe in learning to swim, that meant that if DSS failed to take care to see that Annie was reasonably safe, then Annie's school would be put in breach of the non-delegable duty of care it owed Annie.

Comments

(1) *The big issue*. There is a big problem with children learning to swim in the UK: recent figures indicate that almost 40% of children in the UK have never been taught how to swim. Will this decision put schools off arranging swimming lessons for the children in their care? It would not be surprising if it did – the decision in *Woodland* has opened the doors to schools that do arrange swimming lessons for their pupils being sued whenever something

goes wrong in a swimming lesson and a pupil is injured – even if the school itself took all reasonable steps to see that people entrusted with conducting the swimming lesson were competent, and that the lesson was properly conducted.

However, Lord Sumption expressed himself confident that the decision in *Woodland* would not impose 'an unreasonable burden' on schools (at [25]). Of the six reasons he gave for thinking this, only two are worth noting: (4) that until recently it was the norm for schools to have a teacher teach the schoolchildren how to swim, with the result that the school might be held vicariously liable for the teacher's negligence in conducting the swimming lesson – so holding a school liable for the carelessness of an independent contractor in a case like *Woodland* leaves the school no worse off than it was when having teachers conduct swimming lessons was the norm; (5) the duties of fee-paying schools to the children in their care are already non-delegable because they are contractual in nature, and there is no good reason why duties of care owed by state schools should be delegable while duties of care owed by fee-paying schools are non-delegable.

(2) *The basis of non-delegable duties*. Students have long asked for some basis for determining whether a given duty of care is delegable or non-delegable, and they are likely to be keen to seize on Lord Sumption's 'two broad categories of case' as settling the issue. However, one note of caution should be sounded. Bailment (where D looks after C's property) does not fall neatly into either of Lord Sumption's two categories where a non-delegable duty will be owed – and this is a pretty big problem given how fundamental the non-delegable duty of a bailee of goods is.

(3) *Ultrahazardous activities*. It is disappointing that the UK Supreme Court did not take the chance – offered it by the decision of the Court of Appeal in *Biffa Waste Services* v *Maschinenfabrik Ernst Hese Gmbh* [2009] QB 725 – to kill off the idea that someone engaging in an 'ultrahazardous activity' will owe people who are foreseeably endangered by that activity a non-delegable duty of care to see that they are not harmed by that activity. All Lord Sumption had to say about this category of non-delegable duty was that many of the decisions dealing with this category 'are founded on arbitrary distinctions between ordinary and extraordinary hazards which may be ripe for re-examination' ([6]). When/who will put this area of law out of its misery?

(4) *Parents*. The decision in *Woodland* is consistent with the assertion on page 238 of McBride & Bagshaw that of all the people who look after the children, the courts are *most* reluctant to recognise that parents owe their children duties of care (though the courts will still recognise that parents owe their children duties of care in the limited circumstances set out on page 238 of McBride & Bagshaw). See, in particular, [25](6) where Lord Sumption observes that 'the common law has always been extremely cautious about recognising legally enforceable duties owed by parents on the same basis as those owed by institutional carers' and denies that there is anything in *Woodland* that indicates that parents can be sued in negligence when 'a swimming instructor to whom they had handed custody of a child' carelessly failed to look after the child's safety.

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