

Case No: B3/2001/9001

Neutral Citation Number: [2001] EWCA Civ 878
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(H.H. JUDGE THOMPSON, Q.C.)

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 13th June 2001

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE MAY
and
LORD JUSTICE DYSON

KANE
- and -
NEW FOREST DISTRICT COUNCIL

Appellant

Respondent

(Transcript of the Handed Down Judgment of
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Mr. A.J.S. Coleman (instructed by Moore & Blatch of Southampton SO17 1XF) for the
Appellant
Mr. J.M. Snell (instructed by Beachcroft Wansbroughs of Winchester SO23 9WP) for the
Respondent

Judgment

LORD JUSTICE SIMON BROWN:

1. On 1 March 1995 the appellant suffered grievous injuries when struck by a motor car whilst out walking in the New Forest. He had emerged from a footpath and was crossing the road opposite. The motor car came from his right and, says the appellant, the driver had no chance to avoid him: the footpath ended on the inside of a bend in the road and the trees and vegetation growing alongside the road reduced the oncoming driver's visibility to no more than some 10-15 metres. The appellant rather puts his blame for the accident upon the respondent District Council, the authority responsible for the creation of this footpath and its emergence at a foreseeably dangerous point in the road.
2. Initially the appellant brought his claim also against the Hampshire County Council (the HCC), the highway authority responsible for the roadway. Following discovery, however, he accepts that the HCC had consistently warned the respondents about the danger of this footpath and he no longer attributes blame to them.
3. On 7 December 1999 the appellants' claim was dismissed by District Judge Cooper under CPR 24.2, the rule which allows summary judgment to be given against a claimant if the court considers that the "claimant has no real prospect of succeeding in the claim". The appellants' appeal against that order was dismissed by Judge Thompson QC on 3 April 2000. Both the district judge and Judge Thompson held the claim to be unsustainable in the light of existing authority, most particularly the House of Lords decision in Stovin v Wise [1996] 1AC 923 and the Court of Appeal decision in Lam v Brennan and Borough of Torbay [1997] PIQR P488.
4. Now before us is the appellant's second tier appeal brought by permission of Mantell LJ. The question it raises is whether the circumstances of this case give rise to a common law duty of care on the part of the respondent planning authority – or, more strictly, whether the appellant has "a 'realistic' as opposed to a 'fanciful' prospect of success" in establishing a breach of such a duty – see Swain v Hillman [2001] 1 All ER 91,92.
5. With that brief introduction let me turn next to flesh out the facts although I need do so only comparatively briefly. These, of course, must at this stage be assumed in the appellant's favour. That said, there is really very little dispute about them: the circumstances in which this footpath came to be constructed and opened appear reasonably clearly from the disclosed documents.
6. The story begins in 1984 when the respondents as the local planning authority were considering an application by Wilcon Homes Ltd (Wilcon) for planning permission for the construction of a substantial residential estate on land to the north of Main Road at Marchwood in Hampshire. It is unnecessary to describe the topography in any detail. Suffice it to say that the proposal included a footpath on the north side of Main Road running essentially in a north-south direction just to the west of a stream - a footpath intended, as the respondents wrote to the HCC on 2 March 1984, "to achieve a link across the road to a footpath [on the south side of Main Road] alongside the stream."
7. In their reply dated 29 March 1984 the HCC described this access on to Main Road as "totally unsuitable because of the lack of sightlines".
8. In June 1985 a s.52 agreement was entered into between Wilcon and the respondents providing amongst other things for Wilcon to construct the footpath, and in October 1985 planning permission for the erection of 129 dwellings and associated garages and works was duly granted to Wilcon.

9. To the west of the footpath at its southern end and bordering the north side of Main Road lay a property called The White Cottage and on 23 July 1987 a tripartite s.52 agreement was entered into between the respondents, the HCC and the owner of The White Cottage by which the latter agreed that upon the respondents' written direction, to be given within 10 years, he would dedicate free of charge to the HCC as highway authority a strip of land up to 3½ metres wide fronting Main Road specifically for the improvement of the relevant sightline to the footpath exit.
10. On 25 April 1990 a supplemental s.52 agreement was entered into between Wilcon and the respondents whereby Wilcon covenanted to construct the footpath before commencing their development works.
11. On 22 January 1993 the respondents sent a memorandum to the HCC under the heading "Proposed Line of Sight Improvement, Main Road, Marchwood", enclosing a copy of the tripartite s.52 agreement with the owner of The White Cottage, stating "Wilcon Homes will shortly be constructing the footpath ... You may therefore consider this brings a new urgency to the proposed line of sight improvements."
12. The HCC's area surveyor replied to that memorandum on 15 March 1993 stating:

"I am presently drawing up a proposed programme of works for 1993/94 and I hope to include this scheme in that programme."
13. On 13 July 1993, following a site visit, the respondents wrote to Wilcon Homes stating:

"It was generally agreed that the junction of the footpath with Main Road was a safety problem due to inadequate sight lines. ... The District Council agreed to contact the Hampshire County Council to see if they were willing to cut back vegetation on highway land for the same reason [i.e. to improve sight lines]."
14. On 8 September 1993 the respondents wrote to the HCC's area surveyor:

"You may be aware that the construction of [the] footpath ... is nearing completion. Concern has been expressed locally that the footpath emerges at a point where it is dangerous to cross Main Road. I am aware that an agreement was reached in 1987 with the owners of The White Cottage to dedicate a strip of land to the highway authority in order to improve sight lines ... the sight line has not been improved and I wonder if any progress is likely to be made in the near future. ... In view of the current hazardous situation I would be grateful if you would give consideration to how matters may be improved, for instance by the improvement of sight lines or the erection of pedestrian/vehicle warning signs."
15. The area surveyor replied on 17 September 1993:

"We have a minor highway improvements scheme for this section of road scheduled for 1993/94."
16. He wrote again on 23 June 1994 stating:

“Negotiations have recently taken place with Mr Bray, the present owner of White Cottage, over the provision of the brick wall [also the subject of the s.52 agreement]. Subject to your approval and to that of Mr Bray to the brick-type, arrangements will be put in hand forthwith to take the land into the highway. I anticipate that this will take us about 5 or 6 weeks.”

17. Alas, the envisaged 5 or 6 week period was long exceeded and in the event it appears that nothing was done to improve the sight line until after the appellant’s accident on 1 March 1995. Meantime, in October 1994 the footpath had been opened to the public.
18. One of the appellant’s main pleaded particulars of negligence against the respondents is that they “caused or permitted the footpath to be created by Wilcon and/or used by the public before any or any adequate measures had been taken to improve visibility along [Main] Road to the west of point E [where the footpath joined Main Road]”.
19. Mr Coleman’s skeleton argument on this appeal puts “the claimant’s case in a nutshell” thus:

“By insisting on the construction and by permitting the opening of the footpath emerging on to Main Road at point E before the necessary road and/or sight line improvements had been carried out [the respondents] positively created a hazard on the highway which caused or materially contributed to the claimant’s accident.”

20. Mr Snell argues that the appellant’s case on analysis falls into two parts, each of which is blocked by binding authority. The first part of the appellant’s case, submits Mr Snell, depends upon the contention that it was negligent of the respondents to have required the construction of this footpath as a condition of planning permission (a requirement crystallised in Wilcon’s covenants under the two s.52 agreements). Yet, runs Mr Snell’s argument, no such contention is available against the respondents: local planning authorities enjoy blanket immunity in law in respect of anything done in the exercise of their planning functions. This is a wide submission indeed. In support of it, Mr Snell relies principally upon this Court’s judgment in Lam, a decision which itself had regard to the Privy Council’s judgment in Dunlop v Woollahara Municipal Council [1981] 1 All ER 1202 and this Court’s decision in Strable v Dartford Borough Council [1984] JPL 329. The court in Lam said this (at pp.502-503):

“In our view it is quite plain that the regime of the Town and Country Planning Acts is, in the words of Lord Browne Wilkinson in X [X Minors] v Bedfordshire County Council [1995] 2 AC 633] at p.731G

‘A regulatory system ... for the benefit of the public at large ... [involving] ... general administrative functions imposed on public bodies and involving the exercise of administrative discretion.’

Such a system is one in respect of which reported decisions reveal no example of a private right of action for breach of statutory duty ever having been recognised by the court.

... given the discretionary nature of the power conferred to grant or refuse planning permission under s.29 of the 1971 Act, it seems to us

clear that the policy of the Act conferring that power is not such as to create a duty of care at common law which would make the public authority liable to pay compensation for foreseeable loss caused by the exercise or non-exercise of that power. As Collins J put it:

‘The local authority’s duty under the Planning Acts is to control and regulate development in the interests of the inhabitants of the area. It is of course inevitable, particularly where there are major developments, that some people are going to be adversely affected ... There may even be nuisances created in some situations. Of course the local authority has to consider the effect on the environment and the adverse effect, if any, upon neighbouring occupiers. Those are all proper planning considerations.

[However] ... It seems to me that it would be wholly detrimental to the proper process of considering planning applications if the local authority in addition had to have regard to the private law interests of any persons who might be affected by the grant of permission, and to ask itself in each case whether it had properly had regard to the individual rights of those concerned. If it were potentially liable to actions in negligence in those circumstances, it seems to me that the carrying out of its important functions in the public interest would be likely to be adversely affected.”

21. Lam, I may note, was a case where the plaintiffs’ complaint against the local planning authority was of the grant of a planning permission in the implementation of which the grantee had carried out injurious spraying processes which constituted a nuisance. The grantee was impecunious so there was no chance of recovering damages against him. Unsurprisingly to my mind the court declined to hold the local planning authority responsible in law for the nuisance: on no view was it a necessary consequence of the grant of planning permission. As the Court of Appeal observed at p.500:

“... the granting of a planning permission is not a licence or consent to the commission of a nuisance in the course of any activity upon premises coming within the scope of the planning permission granted.”

22. Dunlop v Woollara Municipal Council and Strable v Dartford Borough Council were very different cases and really are authority for no more than that local planning authorities are not liable in damages for financial loss resulting from their negligent dealing with planning applications.
23. It seems to me far from clear on these authorities that a local planning authority would be immune from liability if they permitted (still less if they required) the construction of a foreseeably dangerous footpath or (which is perhaps the better way of putting the present case) if they failed when granting the planning permission (or requiring the work) to impose a condition forbidding the opening of the footpath to the public until the sight lines had been cleared. How could the imposition of such a condition be contrary to anyone’s interest? How could it have been “wholly detrimental to the proper process of considering planning applications” (to use Collins J’s words approved by the Court of Appeal in Lam) for the respondents to have had regard to the “private law interests” of those who would use this

prospectively dangerous footpath? Why would the planning process be “adversely affected” by making the respondents potentially liable to an action in negligence for failing to take this elementary precaution?

24. All that said, it is to my mind unnecessary here to hold the respondents negligent for not having imposed such a condition back in 1990 when the construction of this footpath was stipulated. Rather I would regard what Mr Snell called the second part of the appellant’s case as essentially free-standing i.e. as independent of any finding of anterior negligence. This second part is the appellant’s fairly obvious contention that in mid-1994, instead of merely relying on the HCC’s letter of 23 June 1994 anticipating that it would take some 5 or 6 weeks to include The White Cottage frontage within the highway and thereby improve the sight lines, the respondents should have ensured that the footpath was not opened until that work had been completed. Whether or not they had any particular contractual right or statutory power to prohibit the footpath’s opening until it could safely be used seems to me frankly immaterial: there is no reason to doubt that Wilcon would have co-operated readily with any request to keep it closed..
25. It is at this stage of the argument that Mr Snell deploys his second main authority, the House of Lords decision in Stovin v Wise.
26. By the summer of 1994, Mr Snell submits, there was certainly no statutory duty upon the respondents to prevent the opening of the footpath until the sightlines were improved; at most there was a statutory power. The House of Lords in Stovin v Wise held by a 3:2 majority that the minimum pre-conditions for basing a duty of care on a statutory power were, first, that it would have been irrational not to have exercised power so that there was in effect a public duty to act, and secondly, that there were exceptional grounds for holding that the policy of the statute required compensation to be paid to persons who suffered loss because the power was not exercised. Here, he argues, it was not irrational of the respondents not to have required or requested Wilcon to keep the footpath closed until the sightlines were improved and nor are there exceptional grounds for holding the respondents liable for their failure to do so. Rather, he submits, the blame for this accident could as well be put upon the HCC for not having accelerated the improvement works and/or Wilcon for opening the footpath with a foreseeably dangerous exit point on to Main Road.
27. I would reject this argument. It is plain that Stovin v Wise proceeded upon the basis “that the complaint against the Council was not about anything which it had done to make the highway dangerous but about its omission to make it safer” (per Lord Hoffmann at p.943E in the leading speech for the majority) – or (as Lord Nicholls put it at p.929H in the leading speech for the minority):

“The starting point is that the Council did not create the source of danger. This is not a case of the highway authority carrying out roadworks carelessly and thereby creating a hazard. In the present case the Council cannot be liable unless it was under a duty requiring it to act. If the plaintiff is to succeed the Council must have owed him a duty to exercise its powers regarding a danger known to it but not created by it.”
28. Here, by contrast, the starting point must surely be that the respondent Council *did* create the source of danger. They it was who required this footpath to be constructed. I cannot accept that in these circumstances they were entitled to wash their hands of that danger and simply leave it to others to cure it by improving the sightlines. It is one thing to say that at the time

when the respondents required the construction of this footpath they had every reason to suppose that the improvements along The White Cottage frontage would ultimately allow it to be safely opened and used: quite another to say that they were later entitled to stand idly by whilst, as they must have known, the footpath lay open to the public in a recognisably dangerous state.

29. In short, the appellant seems to me to have not merely a “realistic” prospect of establishing a claim in negligence against the respondents here but a positively powerful case. Whether or not they in turn can look to contribution from the HCC and or/or Wilcon is for present purposes immaterial.
30. I add only this. Amongst various statutory powers drawn to our attention as having perhaps been available to eliminate the danger in this case is s.154(1) of the Highways Act 1980. This enables a competent authority (defined so as apparently to include the respondents in the present case) to serve a notice on the owner or occupier of land requiring him to lop or cut any “hedge, tree or shrub” which “obstructs or interferes with the view of drivers of vehicles”. As we indicated during the course of argument, however, it seemed to us altogether simpler and more realistic to put the appellant’s case on the straightforward basis that the respondents here could and plainly should have required the opening of this footpath to be delayed until after the sightlines had been improved.
31. I would allow this appeal.

LORD JUSTICE MAY:

32. I agree that this appeal should be allowed for the reasons given by Simon Brown L.J. whose account of the facts I gratefully adopt.
33. It is, to my mind, evident from the facts which Simon Brown LJ has related that the respondent District Council required, by the two section 52 agreements, the construction of what was to become a public footpath whose exit onto Main Road would, if nothing were done to improve matters, be dangerous. They thereby assumed a responsibility to those, including the claimant, who might wish to use the footpath to see that it was not open until the danger was removed. That is, in my view, an entirely orthodox application of common law principles of negligence. There is nothing in Stovin v. Wise [1996] 1 AC 923 which suggests a different conclusion. In Stovin v. Wise, the County Council had not created the hazard. In the present case the respondents had created the hazard. Nor on the facts of this case are the respondents immune from a claim in negligence because they were exercising a statutory function under planning legislation. It may be, depending on the facts, that the ordinary exercise of a statutory power to grant or refuse planning permission would not create a duty of care at common law carrying with it a liability to pay compensation to those affected by this – see Lam v. Brennan and Borough of Torbay [1997] PIQR 488. But I reject Mr Snell’s submission that a planning authority has blanket immunity from claims for negligence whatever the facts. That is simply not consonant with recent developments of the law both in this jurisdiction and in Strasbourg – see for example Barrett v. Enfield [1999] 3 WLR 79 and Osman v. United Kingdom [1999] 1 FLR 193.
34. There is no question but that the respondents were aware of the danger. Although preliminary steps were taken to enable the danger to be removed, the relevant works were not carried out when the footpath was opened. The respondents had the effective power to require Wilcon not

to open the footpath until it was safe to do so. It is, in my view, at best an unpersuasive quibble to suggest, as Mr Snell does, that the respondents were powerless to do this. I am sure that in the real world a suitable letter to Wilcon telling them to bar use of the footpath until its exit onto the road was safe would have achieved that result. Wilcon had no interest whatever other than to satisfy the respondents' request in relation to this footpath, which, after all, the respondents had required in the first place by means of the section 52 agreement. This seems to me to be a solid basis in law for the claimant's case that his accident was caused by the respondents' breach of the duty of care which, in my judgment, they assumed.

LORD JUSTICE DYSON:

35. I agree with both Judgments.

ORDER: Appeal allowed. The costs as between the Claimant and the first Defendant to be the Claimant's both on appeal and in regard to both hearings below.

(Order does not form part of approved Judgment)