Court of Appeal refuses to strike out novel foreign ship breaking yard fatal accident claim against English ship broker (Begum v Maran)

This analysis was first published on Lexis®PSL on 19 March 2021 and can be found here (subscription required)

Dispute Resolution analysis: This case considers whether an intermediary agent owes a duty of care for the actions of a third party. Rather than seeking to hold the employer-shipyard of the deceased employee or the owner of the vessel upon which he was working liable for his death during the course of his employment, breaking down the ship, the claimant instead sought to hold an intermediary agent liable. This was on the basis that it was domestically domiciled and had knowingly caused the vessel to be sent to Bangladesh, where it knew that ships breaking employment conditions were unsafe. Neither Mr Justice Jay at first instance nor Lord Justice Coulson on appeal considered that this claim was straightforward or easy to establish. Yet, both courts have refused to strike out or give reverse summary judgment, the Court of Appeal's judgment coming hot on the heels of the Supreme Court's judgment in Okpabi and others v RDS and another which seemingly is to like effect. The defendant might have a reprieve however, as the case has been remitted on only the narrowest of limitation grounds and may well be time barred. Written by Adam Heppinstall QC of Henderson Chambers.

Begum v Maran (UK) Ltd [2021] EWCA Civ 326

What are the practical implications of this case?

The general rule is that there is no liability for harm caused by a third party but there are exceptions and this a developing area of the law. The duty of care alleged in this case would be a further extension to the general rule. Neither Jay J nor Coulson LJ appeared in any way convinced by the merits of this claim, but both, following the lead seemingly set by the Supreme Court in other cases, have let it go to trial, albeit limitation may end the proceedings in any event, given the very narrow issue which has been remitted. It remains to be seen whether the pendulum in the Supreme Court might swing the other way, once the costs consequences of such decisions are taken into account.

Trials are expensive, both to the parties (especially where the law and evidence is largely sourced from abroad, as it would be in this case) and the court (in terms of resources deployed). This is why the courts have been astute, since the introduction of the Part 24 summary judgment test, to end early cases which, by reason of their merits, should not waste such vast resources at trial. The claimant is likely without the means to pay adverse costs in this qualified one-way costs shifting case, if she loses at trial. The defendant in this case may be concerned that it might therefore have to settle to avoid the costs of trial (win or lose).

What was the background?

Mohammed Mollah (decd.) worked at the Zuma Enterprise Yard (the Zuma Yard) in Chattogram, Bangladesh, breaking up an oil tanker, from which he fell to his death on 30 March 2018. The breaking up of the ship was arranged by an English Company (the defendant) which was the agent of the operator of the vessel, registered in Liberia, who was acting for the owner, also registered in Liberia. Mr Mollah's Bangladeshi employer was not before the court as a party. The defendant arranged the sale and breaking up of the ship with an intermediary company. The claimant contended that the price of the ship ($US 16m) necessarily meant that it would be broken up unsafely in Bangladesh rather than safely in China or Turkey. The claimant alleges that the defendant, through its control of the vessel and its knowledge of its unsafe destination owed the claimant's widower a duty of care, under the creation of danger exception to the general rule, which it had breached, such that it was responsible for his death.

What did the court decide?

Duty of care

There were two bases on which it was argued that the intermediary agent owed a duty of care:

1. Applying the principles in Donoghue and Stevenson [1932] AC 562

The basis would require the vessel to be a 'dangerous product', for it to have been foreseeable that it would cause harm and for there to be no break in the chain of causation.

The Court of Appeal did not consider that such a duty of care arose—the case did not 'sit comfortably' with the line of authority. Further, there was a question on the proximity between the intermediate agent and the deceased given there was no 'significant element of supervision and control' which is a prerequisite to finding a duty of care. Notwithstanding this it was held that the argument was not 'so fanciful' that it should not proceed to trial.

2. Creation of danger argument

This is an exception to the general rule set out by the House of Lords in Smith v Littlewoods Organisation Ltd [1987] AC 241, [1987] 1 All ER 710.

Jay J 'was plainly unimpressed with [this way] of putting the duty of care' but was not prepared to summarily dispose of the claim at this stage.

Coulson LJ hearing the appeal in the Court of Appeal also considered that it was 'an unusual basis of claim'. Coulson LJ decided that the strike out and summary judgment tests are in fact the same 'in a case of this kind'. The test is whether the claim is bound to fail, the court should not conduct a mini-trial, and may allow for further facts to emerge on disclosure or trial. Coulson LJ also found that it is not appropriate to strike out a claim on assumed facts in an area of developing jurisprudence, which he thought this was. He found that although the application of the 'creation of danger principle' was rare, the claim was arguable as 'an unusual extension of an existing category of cases where a duty [of care] has been found'.

Limitation issues

The court also dealt with limitation issues. Bangladeshi law applies and the claim is being brought outside of its non-extendable one-year limitation period.

Jay J had found, applying Article 7 of Regulation (EC) 864/2007, Rome II, that this was a case of environmental damage, resulting in the limitation period being replaced by the three-year limitation period applicable under English law. The Court of Appeal unanimously overturned this part of Jay J's judgment. holding that it was a case of personal injury.

The court did though remit back to the High Court for determination as to whether the one-year time limit should be disapplied under Article 26 of Regulation (EC) 864/2007, Rome II (manifestly incompatible with public policy) on the basis that applying the one year limitation period would cause undue hardship. This turns on a very narrow point as to when the claimant's solicitors became aware of the date of the accident and the commencement of the limitation period. Coulson LJ rejected any argument that public policy should have a role in displacing this limitation period, finding that this would only happen if the foreign limitation period was 'manifestly incompatible' with public policy.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Bean, Coulson and Males LJJ
- Date of judgment: 10 March 2021

Adam Heppinstall QC of Henderson Chambers is a member of LexisPSL's Case Analysis Expert Panel. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.

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