Neutral Citation Number: [2022] EWCA Civ 18

Case No: B3/2021/0447

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
PLYMOUTH DISTRICT REGISTRY
His Honour Judge Allan Gore QC
Sitting as a Judge of The High Court
[2021] EWHC 469 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2022

Before:

LORD JUSTICE LEWISON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE WILLIAM DAVIS

Between:

(1) BENJAMIN MICHAEL BROWN **(2) DAVID THOMAS (by his father and litigation friend Benjamin Michael Brown)** **(3) JOHN SAMUEL BROWN (by his father and litigation friend Benjamin Michael Brown)**	**Appellants/ Claimants**
- and -	
(1) SOUTH WEST LAKES TRUST **(2) SOUTH WEST WATER LIMITED** **(3) CORNWALL COUNCIL**	**Respondents/ Defendants**

Robert Weir QC and James Marwick (instructed by **Chris Kallis Solicitors**) for the **Appellants**
Matthew White (instructed by **DAC Beachcroft**) for the **First Respondent**
Julian Horne (instructed by **BLM LLP**) for the **Second Respondent**
Tom Panton (instructed by **Weightmans LLP**) for the **Third Respondent**

Hearing dates: 8 & 9 December 2021

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Approved Judgment

Lord Justice Dingemans:

Introduction

1. This appeal raises issues about whether claims: (1) under the Occupiers' Liability Act 1984 ("the 1984 Act") against occupiers of land adjoining a highway; and (2) against the relevant highway authority; arising from a tragic road traffic accident which occurred on 16 May 2017, were reasonable causes of action or had a real prospect of success.

2. On 16 May 2017 Mrs Hazel Brown, then aged 29 years, was driving her Ford Fiesta motor car on the C164 highway near Redruth, Cornwall. The highway is subject to the national speed limit of 60 mph. The highway borders the Stithians Reservoir. Mrs Brown's car left her lane, crossed the other oncoming lane and a grass verge, went through a wire fence on the verge, and then went down a stone faced bank into the reservoir where the car was submerged. Mrs Brown was drowned.

3. A claim was brought by Mr Benjamin Brown, Mrs Brown's husband, and their children David Brown and John Brown, then aged four years and one year. The claim was for damages pursuant to the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934.

4. The claim was brought against South West Lakes Trust ("South West Lakes"); South West Water Limited ("South West Water"); and Cornwall Council ("the council"). It is common ground that South West Lakes has a licence to use the reservoir. South West Lakes is a charity formed in 2000 to look after forty inland waters in Cornwall, Devon, Somerset and Dorset. The licence to use the reservoir was from South West Water, the owner of the reservoir. The council is the highway authority for the C164.

5. This is the hearing of an appeal against the order of His Honour Judge Gore QC, sitting as a Judge of the High Court ("the judge"), dated 17 February 2021 striking out and granting reverse summary judgment in respect of the claims made by Mr Brown and his children against each of the defendants.

The statements of case

6. As this is an appeal against the striking out of a claim it is necessary to examine the Particulars of Claim. The Particulars of Claim were dated 23 June 2020. The location of the accident was pleaded in paragraphs 7 and 8 of the Particulars of Claim. So far as South West Lakes and South West Water were concerned it was pleaded in paragraph 9 that "on the offside of the deceased's direction of travel and immediately adjacent to the wire link fencing was the main body of the reservoir and its sloping stone-faced banks". It was also pleaded that "there was no safety barrier to protect against the risk of drivers losing control on the bend of the carriageway which crossed the reservoir and crashing into the reservoir".

7. The location of the accident was pleaded to be "on a section of the highway where there was a sweeping left-hand bend which ran across the southern end" of the reservoir. This part of the highway was pleaded to be "a causeway road which crosses the southern end of the reservoir … albeit in recent years the area of land south of the highway at the accident locus has been marshland". It was pleaded in the Particulars of Claim that

there was "a history of drivers losing control of their vehicles at or around the accident locus".

8. In paragraph 18 of the Particulars of Claim it was pleaded that "the Defendants (or each of them) were aware or ought to have been aware of the risk of vehicles leaving the carriageway at the accident locus at all material times; there had been accidents on the bend on inter alia 28th October and 21st November 2014". These other accidents were said to have been referred to at the inquest into Mrs Brown's death.

9. In the defence on behalf of South West Lakes it was pleaded "the deceased did not crash through the fence on the sweeping left-hand bend but beyond it". The incidents in 2014 were said to have been incidents in which drivers had only damaged the fence. It was stated in the defence on behalf of South West Water that "there had never before been an accident where a vehicle entered the water of the reservoir".

10. There was reference to "lease and/or licence agreements" between South West Water and South West Lakes. It was pleaded that South West Lakes and South West Water were responsible for the construction and maintenance of the wire fencing enclosing the reservoir.

11. So far as the highway authority is concerned it was pleaded in the Particulars of Claim that the council "was responsible for the construction and/or design of the physical road and its surrounds which forms the material section of the highway". It was also pleaded that it was the council who had installed the vehicle restraint barrier erected after the accident.

12. In the Particulars of Claim it was stated that in 2018 a vehicle restraint barrier on both sides of the highway was installed where the accident occurred. In the council's defence it was pleaded that a vehicle restraint barrier was installed in about May 2019, but that installation did not mean that there was a legal duty to instal it.

13. The particulars of negligence and breach of statutory duty pleaded against the council included: "(a) caused and/or permitted the highway and/or reservoir to be designed and/or constructed and/or adopted without any sufficient assessment of the risks posed to motorists negotiating the left hand bend of the highway …"; "(d) caused and/or permitted the highway to be designed and/or constructed with a radius on the bend which was significantly less than the absolute minimum prescribed by prevailing standards (including Memorandum No. 780 – Design of Roads in Rural Areas)"; and "(e) failed to heed, act upon and/or collate adequately all information and reports relating to previous accidents and incidents on the highway in the vicinity of the accident locus".

14. The council's defence pleaded that "no admissions are made as to the alleged or any involvement of the Third Defendant in the construction and/or design of the road and/or the reservoir and/or any other feature of the area in question. It is noted that no such allegations featured in the pre-action correspondence. Such matters date back to the 1960's and will require further detailed investigation if these claims proceed."

The applications and evidence

15. The applications to strike out the Particulars of Claim and for reverse summary judgment were supported by formal witness statements from legal representatives on behalf of each of the defendants. No witness evidence was adduced on behalf of the claimants. There were photographs of the accident site exhibited to a Skeleton Argument below, which the parties agreed that this court could consider, and these photographs showed that the car had travelled round the bend and had then gone through the fence part way along the road after the bend.

16. The formal witness statements in support of the application for reverse summary judgment did not contain any relevant evidence in the form of the police investigation report, notes from the inquest or even Memorandum No. 780 – Design of Roads in Rural Areas. This meant that although the application for reverse summary judgment was formally before the court below, that application did not in practice add anything to the application to strike out the Particulars of Claim, save where the parties had agreed certain factual matters asserted in the defences and recorded by the judge below.

The judgment below

17. The hearing took place before the judge on 18 January 2021 and the judge handed down a written judgment dated 17 February 2021.

18. The judge introduced the parties and set out the relevant tests for striking out a statement of case and for granting summary judgment in paragraphs 1 to 5 of the judgment. These tests were common ground before the judge and before this court. The judge summarised the pleaded case in paragraph 6 of the judgment and recorded "for the purpose of this hearing, it was accepted by all concerned that the responsibility of the highway authority was for the carriageway and the verge up to the fence, and the [First and Second] Defendants were the occupiers of the reservoir and the verge between it and the fence".

19. The judge recorded in paragraph 7 of the judgment that South West Lakes only came into existence in 2000, no one disputed South West Water's admission that it constructed the wire fence, and the reservoir was constructed in or around 1967 and at the same time the highway was re-aligned.

20. The judge stated that the claimants alleged that South West Lakes and South West Water were negligent at common law and in breach of duties under the Occupiers' Liability Acts of 1957 and 1984. The judge also recorded that the claimants alleged that the council were negligent at common law, acted in breach of statutory duty under the Highways Acts of 1959 and 1980 and in breach of duties under the Occupiers' Liability Acts of 1957 and 1984.

21. The judge held that the claim against South West Lakes and South West Water could only be made under the 1984 Act as Mrs Brown was a trespasser over the bank and reservoir. There was nothing to show that the council was an occupier of the bank and reservoir.

22. The judge distinguished cases about man-made dangers adjoining the highway, recording that duties were now governed by the 1957 and 1984 Acts. The judge also

recorded that the reservoir was neither newly constructed nor invisible at night. In paragraph 12 of the judgment the judge said that the central question as regards South West Lakes and South West Water was whether occupiers of land adjoining the highway were under a duty to prevent cars from leaving the road and coming onto their premises. The judge held that there was no such duty.

23. The judge turned to consider the position of the council in paragraph 18 of the judgment. As far as the council was concerned it was not an occupier of the highway and so the only possible claims were under the Highways Act or at common law. The judge accepted that there was no failure to maintain the fabric of the highway.

24. As far as common law duties were concerned the judge considered a number of authorities. These included *Stovin v Wise* [1996] AC 923 (absence of a statutory duty on the highway authority would normally exclude the existence of a common law duty of care), *Goodes v East Sussex County Council* [2000] 1 WLR 1356 (a highway authority has a duty under the Highways Act 1980 Act to maintain the highway, but this relates to the fabric of the road), and *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 WLR 1057 at paragraph 10 (the highway authority is not an occupier of the highway). At paragraph 26(c) the judge held that as to any allegation that the council had created a danger "that founders because in this case neither is it alleged nor is it evidenced that what the highway authority created (the sharpness of the bend) either was dangerous in itself, or that it caused this accident". The claim was dismissed.

The appeal

25. There are nine grounds of appeal. Grounds one to six relate to the claim against South West Lakes and South West Water, as occupiers of the reservoir. Grounds seven to nine relate to the claim against the council, as highway authority. Many of the grounds of appeal overlap and I will address the respective cases below.

26. It was common ground that the relevant legal test to be applied by the judge below in respect of the claims against the occupiers and the claim against the highway authority was whether: the Particulars of Claim disclosed reasonable grounds for bringing the claims against the defendants; and the claimants had real prospects of succeeding on the claims. The test for this court is whether the judge was wrong in his findings that both the claims against the occupiers and the claim against the highway authority did not disclose reasonable grounds for bringing the claim and there was no real prospect of success in the claims.

The respective cases on appeal in relation to the claim against the occupiers of the reservoir

27. Mr Weir QC, on behalf of the Claimants, submitted that the judge misinterpreted the provisions of the 1984 Act and the decision of the House of Lords in *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] 1 AC 46. Mr Weir drew a distinction between voluntary acts, such as diving into the water as in *Tomlinson*, and this case where Mrs Brown was an unintentional or inadvertent trespasser because she had not deliberately driven into the reservoir, submitting that this made a critical difference to the explanation of the 1984 Act in *Tomlinson v Congleton*.

28. Mr Weir submitted that the water, and in particular the depth of the water, in the reservoir was a danger. This danger was of drowning, and the danger was to anyone who might drive a car into the reservoir having come off the highway, and this was a danger for the purposes of section 1(1)(a) of the 1984 Act. It was submitted that the judge should have found that it was arguable that the occupiers of the reservoir were "aware of the danger or has reasonable grounds to believe that it exists" as required under section 1(3)(a) of the 1984 Act. The Judge should have found that the claimants had an arguable case on the basis that the occupiers of the reservoir knew or had reasonable grounds to believe that users of the highway were in the vicinity of the danger from the water in the reservoir, within the meaning of section 1(3)(b) of the 1984 Act. The judge should have found that it was arguable that the risk of driving into the water was one against which, in all circumstances of the case, the occupiers of the reservoir might reasonably be expected to have offered protection from as required under section 1(3)(c) of the 1984 Act. This could have been done by erecting signs warning about the reservoir or creating a stronger fence than the wire fence through which Mrs Brown's car had travelled.

29. Mr Weir submitted that in these circumstances the judge should have found that there was an arguable case that the occupiers of the reservoir owed a duty to users of the road pursuant to section 1(4) of the 1984 Act, and should have provided a secure barrier or warning so as to prevent a driver from inadvertently driving into the reservoir. The judge should not have struck out the claim before a trial, because disclosure might have shown more evidence about previous accidents, and because expert evidence might have assisted the court in assessing the risks of driving off the road into the reservoir.

30. Mr White, on behalf of South West Lakes, and Mr Horne, on behalf of South West Water, submitted that the judge was right to strike out the claims. The danger arose because Mrs Brown failed to drive with reasonable care and skill and drove into the reservoir. The claim was answered by the judgment in the House of Lords in *Tomlinson v Congleton* which reflected the approach of the Court of Appeal in *Donoghue v Folkestone Properties* [2003] EWCA Civ 231; [2003] QB 1008. Mr White and Mr Horne submitted that there was no risk of anyone suffering injury in the reservoir "by reason of any danger due to the state" of the reservoir for the purposes of section 1(1)(a) of the 1984 Act. The appellants were wrong to attempt to separate the need to show that the "danger" was "due to the state of the premises", and therefore the cases relied on by Mr Weir did not assist in answering the claim in this case.

31. Mr White and Mr Horne submitted that so far as a duty was concerned, this action had not been pleaded in public nuisance, and that it could not have been. In any event, there was no case which showed that occupiers next to a highway owed a duty to those who drove off the highway and there was no prospect of any court finding such a duty. The appeal should therefore be dismissed against the occupiers.

Relevant provisions of the 1984 Act

32. Section 1 of the 1984 Act sets out the duty of occupiers to persons "other than his visitors". So far as is material section 1 provides:

> "(1) The rules enacted by this section shall have effect, in place of the rules of the common law, to determine—

(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and

(b) if so, what that duty is.

…

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

…

(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6A) At any time when the right conferred by section 2(1) of the Countryside and Rights of Way Act 2000 is exercisable in relation to land which is access land for the purposes of Part I of that Act, an occupier of the land owes (subject to subsection (6C) below) no duty by virtue of this section to any person in respect of—

(a) a risk resulting from the existence of any natural feature of the landscape, or any river, stream, ditch or pond whether or not a natural feature, or

> (b) a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile.
>
> …"

No claim against the occupiers under the 1984 Act

33. On any summary determination of a claim, either by striking it out or by granting reverse summary judgment, a Court should always be conscious of what might emerge in the trial process, see *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 1 WLR 1294 at paragraphs 127-128. In my judgment, however, the claims against South West Lakes and South West Trust for breach of duties owed under the 1984 Act were bound to fail, and were rightly struck out by the judge. There was nothing that could emerge in the trial process which might affect this conclusion. This is because there was no sustainable basis for showing a duty under the 1984 Act owed to Mrs Brown by the occupiers of the reservoir for the reasons given below.

34. Duties on occupiers or landowners were originally restricted to a duty not to injure trespassers deliberately. These duties expanded to include duties owed to children who were trespassers, see generally paragraphs 61 to 68 of the judgment of Brooke LJ in *Donoghue v Folkestone Properties Limited* [2003] EWCA Civ 231; [2003] QB 1008. In *Tomlinson v Congleton* Lord Hoffmann explained the background to the enactment of 1984 Act, which was based on the 1976 Law Commission report "on liability for damage or injury to trespassers and related questions of occupiers' liability". The 1984 Act built upon the development of the common law duties owed by occupiers of land to trespassers.

35. *Tomlinson v Congleton* concerned a case of a claimant visitor to a park who had ignored signs not to swim in the lake, who had dived in the lake and who had hit his head on the bottom, and who suffered catastrophic injuries. In *Tomlinson v Congleton* the claimant had been a lawful visitor to the park, but he had been warned not to dive and was therefore a trespasser when he was diving. The House of Lords held that any duties owed to the claimant were therefore under the 1984 Act.

36. In paragraph 26 of the judgment Lord Hoffmann addressed the issue of whether there was a "danger due to the state of the premises", within the meaning of section 1(1)(a) of the 1984 Act, and quoted with approval Lord Phillips MR's comment in *Donoghue v Folkestone Properties* at paragraph 53 to the effect that the injury suffered by Mr Tomlinson was because he dived into the lake "not because the premises were in a dangerous state". Lord Hoffmann referred to both diving and then mountaineering with a person stumbling or misjudging where to put weight stating "in neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity". The House of Lords drew a distinction for the purposes of the 1984 Act between premises which are dangerous because there is some defect in them which is not apparent to the trespasser, and the carrying out of a dangerous activity on the premises by the trespasser. It might be noted that in section 1(1)(a) of the 1984 Act there is at the end of the section express reference "to things done or omitted to be done on" the premises. This was explained to be a reference to activities carried out or licensed by the occupier which might be dangerous to trespassers, for example permitting power boating in a

lake where it was known that trespassers might swim. This part of section 1(1)(a) of the 1984 Act was not relied on by any of the parties in this case.

37. I accept that the "state of the premises", within the meaning of section 1 of the 1984 Act, might include references to natural features. This is for the reasons given by Lord Hutton in *Tomlinson v Congleton,* and because it is a conclusion which is supported by the provisions of section 1(6A) of the 1984 Act, which was inserted by amendment by the Countryside and Rights of Way Act 2000, which referred to "a risk resulting from the existence of any natural feature". However the fact that the "state of the premises" can include natural features, does not mean that the claim in this case might succeed. This is because it is necessary to show that there was a "risk of … suffering injury on the premises by reason of any danger due to the state of the premises" (emphasis added). In this case the danger arose because Mrs Brown's car came off the highway, travelled across the verge, went through the fence and down the bank, and into the reservoir. This danger was not due to the "state" of the reservoir.

38. It follows from this conclusion that I do not accept Mr Weir's attempt to distinguish *Tomlinson v Congleton* on the basis that the claimant in that case was carrying out some voluntary activity when he dived in the lake, whereas Mrs Brown's presence in the reservoir was inadvertent because she had not intended to drive off the road. It was accepted by South West Lakes and South West Water that Mrs Brown did not intend to drive off the road and into the reservoir, but that conclusion does not mean that the "danger was due to the state of" the reservoir rather than because of the driving. There was nothing in the "state" of the reservoir which posed a danger to Mrs Brown.

39. It also follows from this analysis that I do not accept Mr Weir's submission that *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39; [2006] 1 WLR 953 was wrongly decided. In that case an 11 year old child had climbed up the outside of a fire escape and fallen from it. The court confirmed that the risk of injury had to arise by reason of any danger due to the state of the premises, and that there was nothing dangerous about the fire escape in that case. The court in *Keown v Coventry Healthcare NHS Trust* expressly recorded that it was a question of fact and degree whether premises which were not dangerous for an adult might still be dangerous for a child.

40. This conclusion on section 1(1)(a) of the 1984 Act is sufficient to dispose of the appeal against South West Lakes and South West Water, and it is not necessary to consider all of the authorities which were relied on by the parties, because those authorities turned on their own particular facts. Even if, however, I had been persuaded that it was arguable that there had been a risk of suffering injury on the premises by reason of any danger due to the state of the premises, it was not, in my judgment, a risk in respect of which the occupiers might reasonably have been expected to afford the claimants some protection, under section 1(3)(c) of the 1984 Act. This is because there is nothing in the duties of those occupying properties bordering the highway which extends to preventing drivers on the highway from driving off the highway on to their land.

41. It is established law that owners of buildings and diseased trees adjoining highways may owe duties not to permit objects or branches to fall onto users of the highway, see generally Clerk & Lindsell on Torts, Twenty-Third Edition, at 19-189 and Charlesworth & Percy on Negligence, Fourteenth Edition, at 11-55, but that is very different from a duty to prevent drivers driving off the highway. It may also amount to a nuisance to users of the highway to create dangers for users of the highway, for

example by excavating an unfenced pit next to the highway or using spikes on a fence adjoining the highway which might injure users of the highway. In *Barnes v Ward* (1850) 9 CB 392 "a newly-made excavation adjoining an immemorial public way" into which a young mother fell and died, was held to amount to a public nuisance. This was because the danger next to the footpath "may reasonably deter prudent persons from using the way". Therefore to amount to a public nuisance which might be actionable, the danger to users of the highway must be sufficient that it would deter prudent persons from using the highway.

42. In this case it was not pleaded that the presence of the reservoir amounted to a public nuisance, but I would not have upheld the striking out of the action on that basis alone because if there was such a common law duty on the occupier of property adjoining the highway this might be relevant to the existence of a duty pursuant to section 1(3)(c) of the 1984 Act. The important point is that there was nothing in the pleaded facts which showed that prudent persons would be deterred from using the highway because of the presence of the reservoir. Therefore it is not possible to identify any basis on which the occupiers of the reservoir might have been expected to offer protection to Mrs Brown. For all these reasons, I would dismiss the appeal against the order of the judge striking out the claims against the occupiers of the reservoir and granting the occupiers reverse summary judgment.

A reasonable cause of action against the council which should not have been summarily dismissed

43. The issue on the appeal against the council was whether the claim against the council for the negligent design and construction of the highway, in that part of the Particulars of Claim set out in paragraph 13 above, was properly struck out. The judge's decision to strike out the claim against the council appears, from paragraph 26(c) of his judgment, to have been on the basis that it had not been pleaded nor evidenced that the sharpness of the bend "was dangerous in itself, or that it caused this accident".

44. Mr Weir submitted that the judge's conclusion on the pleading was not a fair analysis of the Particulars of Claim. Mr Panton accepted that causation itself had been sufficiently pleaded, but supported the judge's conclusion that this claim against the council should be struck out. This was because there was no sufficient pleading of the detail of the claim against the council. Mr Panton pointed out that there was no identification of which part of Memorandum No. 780 had been breached by the design and construction of the highway.

45. I agree with Mr Weir and Mr Panton that causation had been sufficiently pleaded in this case. The Particulars of Claim pleaded that the location of the accident was on the section of the highway with the bend. The accident was pleaded to have been caused by, among other causes of action, the negligence of the council. This included the plea that the council "caused and/or permitted the highway to be designed and/or constructed with a radius on the bend which was significantly less than the absolute minimum prescribed by prevailing standards (including Memorandum No.780 …)". It will be for evidence at a trial to establish whether the bend had anything to do with the way in which Mrs Brown's car left the highway.

46. It was accepted in the course of argument on behalf of the claimants that the Particulars of Claim were not as focussed as they might have been and that the Particulars of Claim

included claims against the council: as an occupier of the highway; for failing to maintain the highway; and for failing to exercise powers to erect a crash barrier; which it was common ground on appeal were bound to fail and had been rightly struck out by the judge. Quite apart from potential costs consequences, an approach to pleading where unsustainable claims are pleaded with viable claims, increases the risk that a good claim might get struck out with the bad causes of action.

47. I also agree with Mr Panton that the pleading in this case did not contain some of the detail that might be expected in a claim for misfeasance on the part of a highway authority, for example by specifying the angle of the bend, and by specifying the angle recommended by prevailing standards. That, however, is a different thing from saying that the claim did not disclose a reasonable cause of action and that the claim did not have a real prospect of success. If the council (or its predecessor in title to whose liabilities it had succeeded) constructed a highway with a bend which was more acute than that recommended by prevailing standards for reasonable, prudent and competent builders of highways, and the acuteness of the bend was a cause of Mrs Brown's loss of control and accident, then the claim made by Mr Brown and his children might have a real prospect of success, even if there would be an inevitable and substantial reduction for contributory negligence on the part of Mrs Brown. This is because such a claim against the council as the highway authority would be for misfeasance in negligently creating a danger, rather than an impermissible claim against a highway authority for nonfeasance. In these circumstances in my judgment the judge was wrong to strike out the Particulars of Claim against the council and to give reverse summary judgment for the council.

Conclusion

48. For the detailed reasons given above I would: (1) dismiss the appeals against South West Lakes and South West Water as occupiers of the reservoir; and (2) allow the appeal against the council to the extent of permitting the claim for negligently designing and constructing the highway with too sharp a bend to progress. The claims against the council: as an occupier of the highway; for failing to maintain the highway; and for failing to exercise powers to erect a crash barrier; remain struck out and dismissed.

Lord Justice William Davis

49. I agree.

Lord Justice Lewison

50. I also agree.