

A good sport

The ruling in *Uren* emphasises the courts' determination to protect the freedom to choose whether to participate in sports with an acceptable level of risk, say **Kris Lines** and **Jon Heshka**

"THE QUESTION for decision is not whether adequate risk assessments had been undertaken, but whether the defendants took reasonable measures to ensure that the game was safe" (*Uren v Corporate Leisure (UK) Ltd & Ministry of Defence and others* [2010] EWHC 46 (QB) (Field J)).

In delivering his judgment for the defendants, Mr Justice Field effectively dealt a knock-out blow for the legalistic interpretation of sports injuries. What was important to Field J was not that the defendants' risk assessments for the activity were inadequate or missing, but rather whether the activity itself was inherently dangerous.

The accident occurred during a relay race through an inflatable pool (organised as part of a corporate fun day). During the race, Robert Uren attempted to enter the pool by launching himself over the inflatable wall of the pool head first. Tragically though, in the process his legs were propelled upwards by the walls of the inflatable causing him to enter the pool at too sharp an angle, fracturing his mid-cervical spine and causing tetraplegia.

At issue was the nature and extent of the duty that both the operators of the inflatable and the event organisers owed towards him. While all parties accepted that a duty of care was owed both in common law and through statutory health and safety regulations (Provision & Use of Work Equipment Regulations 1998; Management of Health & Safety at Work Regulations 1999) where the parties disagreed was in what constituted reasonable care to ensure that Mr Uren was safe during the game.

What use is a risk assessment?

Unsurprisingly, the claimant placed considerable emphasis on the technical legal argument that both Corporate Leisure and the Ministry of Defence had failed to perform competent risk assessments. The High Court, however, disagreed with the importance placed on such documents and held that these omissions did not ultimately lead to the defendants breaching their duty of care.

At first glance, this conclusion seems peculiar. Indeed, Field J commented that

a non-delegable duty to perform an assessment existed and the documents prepared by both defendants were fatally flawed.



The challenge Mr Uren had is that while the duty to undertake a risk assessment is enshrined in statute (Management of Health & Safety at Work Regulations 1999) by itself, a failure to perform a risk assessment cannot give rise to a free standing duty of care (Poppleton). Instead, this failure is merely evidence that the defendants had not identified or controlled the potential risks of the activity. In this particular case though, the risks of a head-first dive were obvious, and 'common sense', rather than the defendants' paternalism, should have prevented Mr Uren from attempting such a manoeuvre.

This analysis also accords with two recent Court of Appeal judgments (*Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; *Parker v Tui Ltd* [2009] EWCA 1261) which reached very similar conclusions. In *Poppleton*, the claimant did not need to be told that jumping from a climbing wall was patently dangerous; while in *Parker*, tobogganists did not need to be warned of the risk of continuing down a slope on the toboggan and into the car park in

contravention of express instructions not to do so. In each of these cases, the defendants' failure to produce a risk assessment was not causative of the injury; rather it was the claimant's failure to self-censure their own behaviour.

Sports and inherent risk

Uren also raises interesting questions relating to the societal acceptability of risk. While the claimant tried to argue that the game was inherently unsafe and that head-first entry into the pool should have been prohibited, the High Court took a diametrically opposing view – effectively reasserting the need for personal autonomy. In particular, Field J stated that sport should not be seen as a sterile, sanitised environment, but rather played on a field of acceptable levels of risk. Indeed, this risk was often the main motivator for participation within the sport.

Ultimately, whether the risk would be sufficiently low would depend on:

- the age of the participants;
- their fitness;
- the fun to be had in the activity (including the wider benefits for society);
- the degree of challenge;
- their knowledge of the activity and apparatus being used; and
- the likelihood of the serious injury.

Given this analysis, once the parties had agreed that the risk of Mr Uren's neck injury was very low and could not have been mitigated or eliminated by further control measures without defeating the nature of the activity, then the defendants' failure to perform a risk assessment became irrelevant.

In an age of paternalistic oversight, petty restrictions and bureaucratic form filling, perhaps the real value in *Uren* is its reminder that the courts will still vigorously defend our freedom to engage in challenging pursuits, notwithstanding the tragic outcomes that are sometimes inherent in such an activity.

Kris Lines is a lecturer at Staffordshire University and Jon Heshka is an assistant professor at Thompson Rivers University. Contact: kris.lines@staffs.ac.uk and jheshka@tru.ca