[2021] TLQ 88

THE OBVIOUSNESS OF RISK: "TO BE ALIVE AT ALL INVOLVES SOME RISK"[1]

Andrew Warnock and Jack Harding

This is the second of two articles published in the Travel Law Quarterly on this important Court of Appeal case on hotel liability. The first can be found here.

On 5th July 2015, at approximately 2am, Christopher James returned to his bedroom at the White Lion Hotel in Worcester. He had attended a wedding with his friend. They had both been drinking but neither was drunk. Despite the late hour, it had been a hot day and the temperature in the room remained uncomfortably warm. The room contained a large sash window, which was close to one of the twin beds. The sash mechanism on the window was broken, with the result that the lower half would not stay open unless it was propped up. Once open, however, the gap was wide enough for a person to lean out. The bottom of the sill was just 46cm from the floor. At approximately 2:46am, having sat on the window sill and lent out in an attempt to cool down, and possibly to have a cigarette, Mr James fell to his death. After the accident the hotel was prosecuted and pleaded guilty to criminal offences under the Health and Safety at work act 1974. In particular, the hotel had not carried out any risk assessment of the window. After the accident, a window restrictor was installed at a cost of £7-8.

[1] Harold Macmillan

Mr James's widow brought a claim against the hotel (on behalf the estate and as a dependant) for a breach of the duty under section 2 of the Occupiers Liability Act 1957 for failing to take reasonable care to see that he was reasonably safe in using the premises for the purposes that he was invited to be there.

The judge at first instance found in favour of the Claimant, with a 60% reduction to reflect his contributory negligence. The principal question for the Court of Appeal (*The White Lion Hotel v James* [2021] EWCA Civ 31) was whether that decision was sustainable in circumstances where it was accepted that the risk of falling from the window, after sitting on the low sill and leaning out, was one which must have been obvious to Mr James.

The Defendant's argument was that, pursuant to a long line of authority, in particular the House of Lords decision in *Tomlinson v Congleton BC* (2004) 1 AC 46, an occupier owes no duty at all to a person of full age and capacity who chooses to run an obvious risk.

After analysing *Tomlinson* and subsequent authorities, the Court of Appeal (Nicola Davies LJ giving the lead judgment) concluded that the 'obviousness of the risk' was a matter which went only to the 'reasonableness' of the care to be exercised by the occupier under section 2(2) of the Act. It was, therefore, a factor which was relevant only to breach of duty. It did not go to the anterior question of duty itself, since the duty on the occupier was imposed by the statute and existed, pursuant to section 1, wherever there was a 'danger due to the state of the premises'.

Unlike *Tomlinson*, where the danger was inherent in Mr Tomlinson's activity (the decision to dive into the murky lake water without knowing its depth), Nicola Davies LJ regarded this as a clear case which the danger arose from the premises, namely the size and position of the low window, combined with the defective sash mechanism. It followed that the obviousness of the risk fell to be weighed against a range of other factors in determining whether there had been a breach of duty. Those factors, including the social utility of the activity, the cost of remedial measures and the likelihood and gravity of the injury if it materialised, led to the Court of Appeal to the conclusion that the judge had been right to find that the defendant owed a duty to protect Mr James against the obvious risk of falling, a risk which the defendant had accepted it should have guarded against through its guilty plea to the health and safety offence.

Some of the earlier cases, considered by the Court of Appeal, could be read as holding that the obviousness of a risk goes to the existence of a duty, as opposed to the question of breach. In *Tomlinson*, Lord Hoffman addressed the issue head-on and with characteristic robustness:

"I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ (at para 45) that it is 'only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability. A duty to protect against obvious risk or self-inflicted harm exists only in cases in which there is no genuine or informed choice, as in the risk of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger ... or the despair of prisoners which may lead them to inflict injury on themselves"

This was a statement of principle contained in a seminal judgment in this area of the law. It was a judgment which, at considerable length, sought to restrain the paternalistic approach of the court and to emphasise the importance of individual freedom and responsibility.

To the extent that Lord Hoffman's observations might be regarded as obiter (since *Tomlinson* was concerned primarily with the Occupiers Liability Act 1984) the decision in *Edwards v London borough of Sutton* (2017) PIQR P11 seemingly left little room for doubt. Mr Edwards was pushing his bicycle across an ornamental bridge when he lost his balance and fell over the low parapet walls. The case proceeded on the basis that the alleged danger arose from the state of the premises. McCombe LJ concluded that the answer to the claim:

"lies in ... two well recognised principles of law. First, there is the proper treatment in law of the concept of risk, secondly, occupiers of land are not under a duty to protect, or even warn against, obvious dangers"

How is the approach of Lord Hoffmann and McCombe LJ, to the effect that there is no duty to protect against obvious dangers, to be reconciled with the approach of Nicola Davies LJ that the obviousness of the risk goes only to the question of whether the common duty of care under section 2 of the Occupiers Liability Act 1957 was breached?

One answer, provided by Nicola Davies in the White Lion case, is that on a careful reading of the judgments in *Tomlinson* and *Edwards* the judges did in fact balance the obviousness of the risk against other factors of relevance to an assessment of whether the common duty of care was breached. In *Edwards*, for instance, McCombe LJ said that the addition of side barriers to the bridge would have altered its character to an extent out of all proportion to a remote risk which had never materialised in its known history. She also pointed out that the weight to be attached to the obviousness of the risk would vary having regard to the nature of the case. In some cases what the claimant knew or should reasonably have appreciated about the risk he was running may be decisive.

Another answer, it is suggested, lies in fact that whilst the existence of a duty of care simpliciter is imposed by the 1957 act, the scope of that duty (as distinct from its content) is not defined. It will, therefore, depend upon the circumstances of the case.

That was the approach taken by Jay J in *Risk v Rose Bruford College* (2013) EWHC 3869. The Claimant had dived headfirst into an inflatable pool at an activity day organised by a drama school. He sustained life-changing injuries.

In addressing the obviousness of the risk, Jay J stated as follows:

"85. I entirely agree with Mr Walker that the correct starting-point is to consider not whether the Defendant owed the Claimant a duty of care (the general duty under s.2(2) of the Occupiers' Liability Act 1957 is admitted) but whether the Defendant owed a particular duty to protect the Claimant from the risk he took. The Claimant characterises this particular duty as a 'protective duty' and I am content to adopt the Claimant's terminology.

86. So, the issue is not as to the existence of a duty but its particular scope. On this approach the debate is not about breach of duty, being a secondary question, but rather about the primary one of whether a duty of the relevant breadth or ambit applies to the circumstances of the Claimant's accident. If the duty does not travel far and wide enough (for the Claimant's purposes), the inevitable conclusion is that the claim fails at first base: viz. the absence of any relevant duty of care.

87. This approach is consistent with principle and the highest authority: see, for example, the citation from Lord Bridge in *Caparo* in paragraph 22 of the judgment of May LJ in *Darby v National Trust* [2001] EWCA Civ 189 . A similar approach underpins the analysis of Lord Hoffmann in *Tomlinson*. It is no more, and certainly no less, than the application of a general principle of the law that the existence of a duty of care, and its scope, can never be determined in abstract; regard must be had to all the circumstances of the case, including the salient features of the accident itself and the range of factors contemplated by s.2 of the 1957 Act"

For Jay J, therefore, the obviousness of the risk is matter which delimits the scope of the duty. As he observed, if the duty 'does not travel far and wide enough ... the inevitable conclusion is that the claim fails at the first base'.

This is not, however, the end of the analysis as far as the White Lion Hotel is concerned. The risk of sitting on the window sill was, it was conceded, entirely obvious to the Claimant. He did not fall through the window from his bed and he was not a child. He took the conscious decision to lean out. So why should the defendant have owed him a 'protective duty'?

An important consideration may lie in the fact that he was a hotel guest.

In *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646, a case in which a claimant fell from an indoor climbing wall, May LJ held that in addition to the categories of cases identified by Lord Hoffman in *Tomlinson* (those in which the claimant did not make a genuine or informed choice), the duty to protect against obvious risk will also be owed where there is a relevant assumption of responsibility.

In the recent decision in *Al-Najar v Cumberland Hotel* (2019) EWHC 1593 (upheld on appeal) Dingemans J considered the particular duty owed by Hotels to their guests in the context of a claim where three guests were violently attacked in their hotel rooms:

"187. In the light of all these authorities in my judgment, among other duties which are not material, the Cumberland hotel owed the claimants, as guests of the hotel, a duty of care "to take reasonable care to protect guests at the hotel against injury caused by the criminal acts of

third parties". In my judgment the duty of care arises in respect of the omission to take steps to prevent the attack (or the duty to make things better by preventing the attack) as a "responsibility" type case as identified in *Robinson* , para 35. This is because the hotel invited guests to come and stay at the hotel and thereby assumed a duty to take reasonable care to protect guests. There is a loose analogy with the situation in *Stansbie v Troman* [1948] 2 KB 48 and the imposition of the duty is consistent with the result of the decisions in *Chordas* 91 ALR 149 and *Everett v Comojo* [2012] 1 WLR 150 , the latter of which is binding on me. As is apparent, I have found the duty to exist by reason of the assumption of responsibility test set out in *Robinson* rather than by the use of the *Caparo* test, although I should record that in my judgment the imposition of such a duty of care accords with the reasonable expectations of both hotel proprietors and guests, as well as the subjective expectations of both the claimants and the defendant's witnesses such as Mr Stanbridge as given in evidence. It is clear that the common law relating to hotel proprietors has developed since"

In the White Lion case, the particular relationship between the defendant hotelier and Mr James, its guest, was addressed by Nicola Davies LJ in paragraph 86 of her judgment:

"In my judgment, there is a material difference between a visitor to a park, even a pub, and a guest in a hotel. During the time the guest is in the hotel room it is a "home from home". The guest in the room may be tired, off-guard, relaxing and may well have had more than a little to drink. Despite notices to the contrary he may be tempted to smoke out of the window and in hot weather the guest will want fresh air, particularly, as in this case, in a room with no air conditioning. As the judge observed, these are "facts of life" for any hotelier. These are normal activities"

The hotel could be viewed as having assumed a responsibility to its paying guest. Once Mr James was a guest at the hotel, the Defendant owed a duty to take reasonable care to protect him, whether from the criminal acts of third parties due to allegedly inadequate security (as in *Al-Najar*) or from the ordinarily foreseeable, and sometimes careless, conduct of the guest himself inside the four walls of a hotel room if, as here, it contained dangerously low, defective windows which, in a state of intoxication or inadvertence, he may be inclined to lean out of. With specific reference to the duty of an occupier, Nicola Davies LJ referred to the judgment of

Sedley LJ in *Lewis v Six Continents* [2005] EWCA Civ 1805, in which he noted that the common duty of care under the 1957 Act is not owed in the abstract, but by a particular occupier, here a medium sized hotel, to a particular visitor, here a young man with nothing to distinguish him from the hotel's other guests.

In the final analysis, there is nothing in the decision of the Court of Appeal in the White Lion case to undermine the principle that, save in a limited category of claims, where an adult of full age and capacity decides to engage in an activity which carries an inherent and obvious risk, the occupier will not owe a duty to protect them against the consequences of exercising their own free will. As Lord Hobhouse observed in *Tomlinson*:

"it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled"

As so often in tort law, much depends upon the facts of the particular case.

Andrew Warnock is a QC with 1 Chancery Lane.
He can be contacted at: awarnock@1chancerylane.com

Jack Harding is a Barrister with 1 Chancery Lane
He can be contacted at: JHarding@1chancerylane.com