[2021] TLQ 98

HOTELIERS AND ASSUMPTION OF RESPONSIBILITY: DO HOTELIERS OWE A HIGHER DUTY THAN OTHER SUPPLIERS OF SERVICES?

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This is the third of three articles published in the Travel Law Quarterly on this important Court of Appeal case on hotel liability. References to the other two can be found at the end of this article.

The recent decision of the Court of Appeal in *White Lion Hotel v James* [2021] 2 WLR 911 provides a reminder that a Claimant who chooses to run an obvious risk may sometimes be successful in his or her claim. It also raises intriguing questions around the nature and extent of the duty owed by hoteliers, both domestic and foreign.

The Facts

Christopher James died instantly after falling from a second floor window at the White Lion hotel in Upton upon Severn, in Worcestershire. It seems that he had been leaning out of the window, sitting on the sill and holding the sash window open, possibly so that he could smoke out of the window, when he fell. The window was at a much lower height from the floor than modern windows ought to be, the sash was faulty and had to be held open, and there was no opening restriction, for example in the form of an opening restrictor.

Mr James' widow brought a claim arising from his death. She alleged that the hotelier was in breach of s.2 of the Occupiers' Liability Act 1957 in that it had failed to take reasonable care for the safety of its guests. The sill was only 18″ off the floor, it could be fully opened, and it had to be held open. The hotel owners defended the claim on the basis that Mr James should not have been smoking out of the window; that in sitting on the window sill he had accepted the risk of falling out; and that the accident was his responsibility because he chose to sit on the sill. The hotel, which dated from the 16th century, was Grade II listed, and due to planning restrictions the window could not be altered or moved so as to increase its height from the bedroom floor.

At first instance the judge rejected the hotelier's arguments. He found that the hotel owners should have risk assessed the structure of the hotel, and if they had done so, they would have realised that the height of the sill created a danger that someone might fall out of it. The fact that the sash mechanism was faulty just increased that risk, because the window had to be held open by anyone wanting to keep it open. Mr James should not have been smoking, but the fact that he was did not mean that he accepted the risk of falling from the window and suffering a serious injury, or, as actually happened, of dying. Hoteliers must be aware that their guests will sometimes drink a little too much, or smoke in non-smoking rooms, or lean out of windows; and they should take account of this in making their rooms, and specifically their windows, safe. The judge made the point that installing an opening restrictor preventing the window from opening fully would have cost the hotel very little, and would have completely avoided the risk to guests of falling and suffering serious injuries. Tragically, if the hotel had spent only £7 or £8 on installing a restrictor, Mr James would not have died. However, the judge did accept that Mr James was partially to blame for the accident in choosing to sit on the low window sill, leaning out of the window whilst holding it open, and reduced damages by 60% accordingly.

The Appeal

The hotelier, relying on the decision of the House of Lords in *Tomlinson v Congleton BC* [2004] 1 AC 46 and the authorities that followed, appealed on the grounds that that the trial judge had erred in failing to apply what was widely believed to be the principle that someone who chooses to run an obvious risk cannot pursue an action on the basis that the Defendant had either permitted him to run that risk or had not prevented him from so doing.

The appeal was dismissed, the Court of Appeal holding that, on a careful analysis of the authorities, no such principle had been established as a first step to establishing the existence of a duty. Rather a conscious decision by a Claimant to run an obvious risk *was one of a number of factors* which might not outweigh other factors: the lack of social utility of the particular state of the premises from which the risk arose (namely, in this case, the ability to open the lower sash window); the low cost of remedial measures to eliminate the risk (£7 or £8 per window); and the real, even if relatively low, risk of an accident recognised by the hotelier's guilty plea in related criminal proceedings. That was, so the court held, a risk which was not only foreseeable, it was likely to materialise as part of the normal activities of guest.

Furthermore, the presence of a defect, the critical difference a risk assessment would have made, the foreseeable risk of injury, the negligible financial cost of the preventative measures which would not reduce the social value of the window and the fact that the deceased was a guest at the hotel acted as features distinguishing the claim from the *Tomlinson* line of authorities.

In summary, the obviousness of the risk run by Mr James did not go to the *existence* of a duty to guard him against the risk, but to whether or not that duty had been breached. In this case, it had.

Commentary

In coming to this conclusion the Court of Appeal placed some considerable emphasis on the fact that the Claimant was a hotel guest rather than a mere visitor to a natural feature such as a lake or bridge (as in the earlier authorities). It therefore appears that a hotelier assumes a greater responsibility to a guest than it would otherwise owe as an occupier; and there is some support for this proposition in the caselaw that preceded the decision.

In *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] 6 WLUK 277 the Claimant fell from an indoor climbing wall. The Court of Appeal held that where an occupier has assumed responsibility for a class of persons it will owe a duty to protect members of that class against even obvious risks. More recently, and perhaps more pertinently for the cross border

specialist, in *Al-Najar v Cumberland Hotel (London) Limited* [2020] 12 WLUK 314, the Claimants were attacked in their hotel room by an intruder. The claims failed at first instance and on appeal, but it is noteworthy that the Court of Appeal endorsed the approach taken by Dingemans J at first instance to the existence and nature of the duty owed by the hotelier:

"… 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 … 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 …

… it followed from the duty that [the judge] had found to exist that the fact that the attack by [the intruder] was a criminal act did not amount to a new intervening act breaking the chain of causation…

… it was reasonably foreseeable to the Cumberland Hotel that a third party might gain entry to the hotel and might injure the guests by a criminal assault, whether as part of an armed robbery, sexual assault or physical assault, with consequences which might be very serious…However, it is also right to record that the evidence showed that the likelihood of such an attack occurring was extremely low, which is relevant to what steps ought reasonably to be taken by the hotel to prevent such an attack …"

In the event, however, Dingemans J, with whom the Court of Appeal agreed, concluded that there was no causative breach of the hotelier's duty.

The Court of Appeal in *White Lion Hotel* seems to have endorsed the 'assumption of responsibility' argument in respect of hoteliers in particular, holding:

"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 …

Contrast these facts with the 'activities' contemplated in Tomlinson*. Lord Hoffman at [45] observed that 'it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair.' These activities go far beyond those involved in the ordinary occupation of a hotel room …*

There is no absolute principle that a visitor of full age and capacity who chooses to run an obvious risk cannot found an action against an occupier on the basis that the latter has either permitted him so to do, or not prevented him from so doing …"

Essentially, then, where a visitor is injured as a result of running an obvious risk, he or she may bring a claim against the occupier of the premises, and whether or not the occupier is liable for the injury will depend on a number of factors, including but not limited to the obviousness of the risk. Moreover, hoteliers are a particular class of Defendant, owing a greater duty to guests as a result of having assumed responsibility for them.

Conclusion

What does this mean for cross border practitioners? The duty owed in *White Lion Hotel* and in *Cumberland Hotel* was founded on the Occupiers' Liability Act 1957 ('OLA'), which obviously does not have extraterritorial effect. On the face of it, then, the extended duty applies only in respect of hotels located within England and Wales. However, a good argument can be made that a similar duty should be owed, for similar reasons, in respect of hotels located outside the jurisdiction, where English law applies, especially given that the OLA effectively enshrined the occupier's common law duty in statute. Thus in claims brought pursuant to Regulation 15 of the

Package Travel and Linked Travel Arrangements Regulations the extended duty, arguably, applies by extension of the assumption of responsibility doctrine. It will be interesting to see whether, when *X v Kuoni* returns to the English courts for determination following the decision in the Claimant's favour in the Court of Justice of the European Union, these arguments will be deployed; and, if they are, what the outcome will be.

However, at the very least, these are arguments that all travel litigation practitioners should be ready to marshall in their future package travel cases.

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Other articles in the *Travel Law Quarterly* on this case:

The Obviousness of Risk: "To Be Alive At All Involves Some Risk"
Hotel Found Liable for Fatal Fall. Court of Appeal Upholds Decision