# Occupiers' Liability/Risk Assessments: Obvious Hazards or Serious Breach

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*Patrick West looks at the recent case of the White Lion Hotel (a partnership) v Deborah Jayne James (on her own behalf and in her capacity as personal representative of the estate of her late husband Christopher James) [2021] EWCA Civ 31*

This recent Court of Appeal is firstly remarkable as one of the recent cases made available on Youtube in order to improve public appreciation of how the Courts work which in the view of this writer is to be applauded and it can be viewed by clicking on this link:

https://www.judiciary.uk/publications/james-v-the-white-lion-hotel/

This was a tragic case involving a young man who fell to his death from an open sash window in his hotel room and is a highly instructive shot across the bows for the blanket application of the principle of "no duty in respect of obvious hazards" in occupiers' cases.

At first instance HHJ Cotter gave judgment for the Claimant. The Court of Appeal upheld that decision with consequences important for any situation in an occupiers' claim where there is a clear breach of the criminal law and allegations are raised about inadequate risk assessment.

In July 2015 the Deceased was staying at the White Lion Hotel. After he returned to his room at around 2.46 a.m. he fell to his death from the sash window of the room. It was suggested that he was either attempting to access fresh air or smoke a cigarette

The windowsill was 46cm above floor level. The modern standard minimum sill height is 80cm. The bottom sash was 92cm wide, though the bed restricted

access to 61cm of the width. It could be opened to 67cm height. As sometimes occurs with such windows, the sash was faulty and it had to be held open.

Following an investigation into the accident, the hotel owners were prosecuted under section 3 of the Health and Safety at Work Act 1974. Guilty pleas were entered on the basis that the window posed a risk to an adult occupying the room.

The Deceased's wife pursued a claim against the Defendants pursuant to s.2 of the Occupiers' Liability Act 1957 for a failure to take reasonable care for the Deceased's safety.

The Defendants, by their guilty pleas in the criminal trial, had accepted that there was a reasonably foreseeable material risk of harm to adults of falling from the sash window owing to its low position and that a risk assessment would have resulted in the installation of opening restrictors on the window.

The Judge held that the relevant circumstances under s.2 of the 1957 Act expressly included "the want of care", which would ordinarily be expected of a hotel guest. It was obvious that sash windows were designed to be opened and guests on upper floors might try to smoke out of a window and might also have consumed alcohol.

There was no significant social value to the opening of a lower sash that needed to be balanced against opening restrictors (to prevent the sash becoming a dangerously low opening).

There was, therefore, a duty owed to a lawful visitor; a foreseeable risk of serious injury owing to the state of the premises; the risk of serious or fatal injury; no social value of/to the activity leading to the risk; and a minimal cost of preventative measures. The Court considered *Lewis v Six Continents Plc (formerly Bass plc)* [2005] EWCA Civ 1805 but that case was distinguished on the basis that in *Lewis* the height from the floor to the sill was 75cms (only just short of the modern minimum), whereas in the instant case it was just 46cms. In the prior related Court of Appeal hearing *R. v Lear (Jonathan)* [2018] EWCA Crim 69, the

President had held that "material particular" to be crucial to the proper consideration of the case.

Further, the sash mechanism was defective so that guests had to struggle to keep the window open, further increasing the risks of accidents.

*Tomlinson v Congleton BC* [2003] UKHL 47 was distinguished on the basis that in the instant case it was possible to identify the state of the premises which carried the risk of the injury as the ability to fully open the lower sash of a window with a low sill, giving rise to the risk of a person falling out of it (paras 56-63). In *Tomlinson* the accident was caused by the claimant diving into water and onto an unseen obstruction below the surface. Lord Hoffman in *Tomlinson* referred to water as being perfectly safe for all normal activities (the actions of the Claimant in that case being abnormal). Here the window was not safe for all normal activities as if opened (which is the very purpose of the sash window) it presented the risk of a fall as it was so low relative the centre of gravity of many adults. One can easily appreciate the practical difference between obvious hazards in country parks like lakes and a sash window in a hotel.

The Court addressed the issue of whether the Deceased had undertaken to run the risk from an obvious danger. The courts have held there is no duty for an occupier to act in such circumstances. Again, *Tomlinson* was distinguished as above, as was *Edwards v Sutton LBC* [2016] EWCA Civ 1005 (involving a claimant who fell over a 26-30cm parapet on an ornamental bridge in a park and onto rocks in the water below) on the grounds that in that case a formal risk assessment would only have produced a statement of the obvious, whereas in this case, given the regulatory requirements of the criminal law, a risk assessment would have resulted in preventative action.

Although neither Counsel referred to s.2(5) of the OLA 1957 (which incorporates the principle of volenti into the Act), the Court held that the defence of *volenti non fit injuria* at common law only operated where a claimant voluntarily accepted a risk negligently created by a defendant's negligence. To argue that if s.2(5) bit there was no obligation to act and thus no negligence, was in direct conflict with the argument that the duty under s.2 reflected a mandatory

requirement of the criminal law to address a material risk.

HHJ Cotter held that Parliament could not have intended that by the interaction of s.2(2) and s.2(5) of the 1957 Act, an occupier could fail to take a positive act required by the criminal law (here to reduce the risk created by the window to the lowest level reasonably practicable) and yet be found to have taken reasonable care. The duty under the 1957 Act to exercise reasonable care required compliance with a specific safety requirement of the criminal law.

He pointed out that, for example, it would also be anomalous if Congleton Borough Council were held duty bound to prevent access to a beach under the criminal law due to a rusty and sharp edged pipe but could escape civil liability on grounds of obvious hazard.

He cited with approval both *Allison v London Underground Ltd* [2008] ICR 719 (the "blueprint for action" case on employers' risk assessments) and *Kennedy v Cordia (Services)* [2016] UKSC 6 [2016] (in modern times risk assessments are to be expected of reasonably prudent employers):

*"I recognise that the Court in Kennedy v Cordia (Services) was concerned with duties to employees. However, I can see no material difference with the duty of a hotel business to its guests. A risk assessment is logically anterior to determining what precautions the Defendant would have to take in order to fulfil its safety duties under statue and at common law in either the criminal or civil law. In the present case it is conceded that such a risk assessment would have required steps to be taken. Such steps could not be avoided on the basis that the risk was obvious and a person would have to run it voluntarily before injury could occur."*

The Judge considered *novus actus interveniens*, inter alia whether his act was so unreasonable as to break the chain of causation. In addressing the three considerations set out by Aikens LJ in *Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404, it was clear that firstly, the deceased had acted voluntarily under no pressure or dilemma. Secondly, his conduct was reasonably foreseeable and the risk was accepted as material (it was the reason that window limiters were required). Thirdly, there was a high degree

of unreasonableness. The deceased made a clear misjudgement, but it was conduct that others might take. By a narrow margin, his action in sitting on the window sill did not break the chain of causation, so the accident was still the direct result of the partners' failure to apply window restrictors to the very low window, *Spencer* followed, *Clay v TUI UK Ltd* [2018] EWCA Civ 1177 and *Risk v Rose Bruford College [2013] EWHC 3869 (QB)* distinguished on the basis that they involved conscious individual risk taking.

In their Defence, the partners submitted that the Deceased became a trespasser and the duty of care under the 1957 Act ceased if the deceased was smoking in the room. A visitor would not have considered themselves as a trespasser, or without the protection of the Act if they smoked out of a window. The Court held that though there might be circumstances where smoking altered the status of a visitor, in the instant case it did not limit the duty.

Unsurprisingly, in light of the discussion of *novus actus*, contributory negligence was assessed by the Court at 60%.

On appeal, the partners relied on *Tomlinson* and *Geary v JD Wetherspoon Plc* [2011] EWHC 1506 (QB), arguing that the trial judge had erred in failing to apply the principle that someone who chose to run an obvious risk could not 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.

Lady Justice Nicola Davies held that in respect of the duty of care under s.2 of the 1957 Act the judge's conclusions as to the existence of the appellant's duty to the deceased, a lawful visitor; the foreseeable risk of serious injury due to the state of the premises; the absence of social value of the activity leading to the risk; and the minimal cost of preventative measures were unassailable and provided a sound factual basis for a determination that the appellant breached its s.2 duty.

*Tomlinson*, *Edwards* and *Geary* were not authority for a principle which displaced the normal analysis required by s.2. What a claimant knew and should reasonably have appreciated about any risk he was running was relevant to that analysis and, in cases such as *Edwards* and *Tomlinson*, might be decisive. In other

cases, such as the instant case, a conscious decision by a claimant to run an obvious risk might not outweigh other factors: the lack of social utility of the particular state of the premises from which the risk arose (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 guilty plea. That was a risk which was not only foreseeable, it was likely to materialise as part of the normal activities of guest. Moreover, there were factual features that distinguished *Tomlinson*, *Edwards* and *Geary* from the instant case: 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.

Davies LJ stated:

*"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."* [86]

The judge determined that the deceased had chosen to sit on the windowsill and had accepted the risk that, if he leant too far, he might fall. The appellant contended that that finding was sufficient to provide a *volenti non fit injuria* defence pursuant to s.2(5) of the 1957 Act. However, the judge's findings represented knowledge of the general risk. There was no finding that the deceased knew and accepted that the risk had been created by the appellant's breach of duty and was deliberately absolving the appellant by his actions or waiving his right to sue. The findings provided a basis for the determination of contributory negligence but did not go far enough to meet the requirements of s.2(5) and there were no grounds to interfere with them.

Did civil liability axiomatically follow a criminal conviction? Here the Court of Appeal departed from the original judgment.

Davies LJ stated:

*"At the civil trial there was no attempt to go behind the criminal conviction nor the basis of plea. In my judgment, account could and should be taken of the fact of the conviction and the basis upon which the plea of guilty was entered. As to the weight to be attached to the conviction and any basis of plea, that will depend upon the facts of each case. In this case the risk was directly relevant to the tragic events which materialised. It does not follow that in every case such a chain of causation will be made out. I accept that the assessment pursuant to section 3 of the 1984 Act and section 2 of the 1957 Act was in key respects the same. It is important that the civil and criminal law should be internally consistent. That said, each assessment will be fact-specific and it does not follow, and I do not find, that civil liability axiomatically follows an unchallenged criminal conviction in civil proceedings."*

The judge erred in holding that an occupier who was in breach of his statutory duty under s.3(1) of the 1974 Act was *ipso facto* in breach of his duty to a visitor under the 1957 Act. The wording of s.47(1)(a) of the 1974 Act was clear: failure to comply with any duty imposed by s.3 did not confer a right of action in civil proceedings.

The Court upheld judgment for the respondent subject to a reduction of 60% contributory negligence.

In the light of the above, key considerations when dealing with obvious hazards in an occupiers' context should be:

- Does the obvious hazard arise from a defect in the premises?
- Would a risk assessment have been a blue print for action or would it have resulted in no preventative steps?
- Was there a reasonably foreseeable risk of injury (the normal/abnormal activity argument)?
- Was the risk of injury foreseeable?

- Would any social value be lost by taking preventative measures and if so how heavily would that weigh in the balance?
- What would the cost of preventative steps be? If relatively low it is hard to see a Court finding such steps should not be taken.
- The criminal law does not automatically trump the civil law; each case is fact dependent but it will be hard to argue if there is a relevant criminal breach that it is not good evidence of a breach of the common law.
- Risk assessments can reasonably be expected in hotel cases but may not be required in other environments unless it is a "home from home" scenario (e.g. a caravan park but probably not in the public bar area of the hotel in this instance).

*Lewis v Six Continents Plc (formerly Bass plc)* [2005] EWCA Civ 1805

*R. v Lear (Jonathan*) [2018] EWCA Crim 69

*Tomlinson v Congleton BC* [2003] UKHL 47

*Edwards v Sutton LBC* [2016] EWCA Civ 1005

*Allison v London Underground Ltd* [2008] ICR 719

*Kennedy v Cordia (Services)* [2016] UKSC 6 [2016]

*Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404

*Clay v TUI UK Ltd* [2018] EWCA Civ 1177

*Risk v Rose Bruford College [2013] EWHC 3869 (QB)*

*Geary v JD Wetherspoon Plc* [2011] EWHC 1506 (QB)

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