Neutral Citation Number: [2021] EWCA Civ 31

Case No: B3/2020/0172

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
His Honour Judge Cotter QC
E90BS678

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2021

Before :

LADY JUSTICE KING DBE
LADY JUSTICE NICOLA DAVIES DBE
and
LADY JUSTICE ELISABETH LAING DBE

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Between :

THE WHITE LION HOTEL (A Partnership)	**Appellant**
- and -	
DEBORAH JAYNE JAMES (On her own behalf and in her capacity as personal representative of the estate of her late husband CHRISTOPHER JAMES)	**Respondent**

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Ronald Walker QC (instructed by **BLM Law**) for the **Appellant**
Robert Weir QC and Andrew Evans (instructed by **Enable Law**) for the **Respondent**

Hearing dates : 24 & 25 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 3pm on Friday 15 January 2021.

Lady Justice Nicola Davies:

1. This is an appeal from the judgment and order of HHJ Cotter QC dated 9 January 2020. Judgment was ordered for the claimant, the widow and personal representative of the estate of her late husband, Christopher James (the deceased), in respect of his death on 5 July 2015, when he fell from a second floor window while a visitor at the White Lion Hotel. A reduction of 60 per cent for the deceased's contributory negligence was made. The judge granted permission to appeal.

2. On 5 July 2015 the deceased, aged 41, was staying in a twin room on the second floor of The White Lion Hotel, Upton-upon-Severn, Worcester. The hotel is owned and operated by Jonathan Lear and his wife, Christine Lear, who trade as a partnership (the appellant). The deceased and his travelling companion, Ms Palfreyman, were attending a wedding. They returned to the hotel room following the wedding. Ms Palfreyman was asleep on the single bed next to the window, when, at around 2.46am, the deceased fell to his death from the sash window of the room. He landed on the pavement approximately nine metres from the window. His body was discovered at around 4am. The deceased was five foot seven inches tall and weighed 83 kilograms.

3. Following an investigation into the accident, the appellant was prosecuted for offences contrary to section 3 of the Health and Safety at Work Act 1974 ("the 1974 Act"). A guilty plea was entered upon an agreed basis.

4. The claim is brought pursuant to section 2 of the Occupiers' Liability Act 1957 ("the 1957 Act") alleging a failure to take reasonable care for the safety of the deceased. A contractual term governing the provision of the room was originally pleaded but has played no part in this appeal. The judge found that the appellant was in breach of the common duty of care pursuant to section 2 of the 1957 Act in failing to take reasonable care for the safety of the deceased in using the room but made a finding of 60 per cent contributory negligence.

5. There is no appeal as to the findings of fact made by the judge nor as to the finding of 60 per cent contributory negligence. The points raised in the appeal are issues of law. The essence of the appeal is contained in the first ground, namely that the judge, having found that the deceased had chosen to sit on the window sill, part out of the window, and had recognised and accepted the risk of falling from the window due to leaning too far out or losing his balance, erred in law in failing to apply the principle that a person of full age and capacity who chooses to run an obvious risk cannot found an action against a defendant on the basis that the latter has either permitted him to do so, or not prevented him from so doing. In so doing the judge failed to apply the ratio of *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, *Edwards v Sutton London Borough Council* [2016] EWCA Civ 1005 and *Geary v JD Weatherspoon* [2011] EWHC 1506 (QB).

6. Further grounds of appeal are pursued which raise the questions:

    i) does section 2(5) of the 1957 Act apply, such that the appellant had no obligation to the deceased in respect of the risk of falling from the window?

ii) did the judge err in holding that, as a matter of law, an occupier who is in breach of his statutory duty under section 3(1) of the 1974 Act was *ipso facto* in breach of his duty to a visitor under the 1957 Act?

The facts

7. The deceased was a long-standing friend (and no more) of Ms Palfreyman. On 4 July 2015 he accompanied her to a wedding, held near The White Lion Hotel. They were to share room 203, in which were two single beds. The day was hot and in the afternoon the deceased had complained of feeling very hot. As a result, Ms Palfreyman arranged a fan pointing directly at the bed on which the deceased had lain. The deceased told Ms Palfreyman that he was having trouble sleeping and complained to his wife that he was feeling the heat. In her evidence, his wife stated that the deceased had been struggling with the heat for the three to four weeks before the accident. On occasions he had been so uncomfortable that he had taken his shirt off, he had also used a fan at night. During the afternoon and evening of the wedding, Ms Palfreyman saw the deceased sweating profusely, he did not appear ill. Ms Palfreyman stated that "He'd had a few drinks but was not in any way drunk".

8. By the end of the wedding reception Ms Palfreyman described herself as being "pretty drunk". Having left the reception, the deceased and Ms Palfreyman walked back to the hotel and had a cigarette in the outside smoking area. Having returned to room 203 Ms Palfreyman said that she needed another cigarette. They decided to have another cigarette, in order to do so they positioned themselves at the window.

9. At [10] of his judgment the judge recorded the evidence given by Ms Palfreyman as to their respective positions:

> "I knelt on the floor to the right of the bedstead at the foot of my bed …. I do not remember clearly whether CJ was sitting or lying on the bed, but our bodies were both inside the room and we were holding our cigarettes as far out of the open lower sash window as we could and blowing the smoke out of the window.… We were not 'hanging' out of the window. I cannot remember exactly how the bottom sash windows held open at this time, but we were probably both propping or holding it open. The top sash window had been open when we first arrived in the room that afternoon. We had opened the bottom sash window earlier in the afternoon, because the room had been extremely hot and CJ had been complaining that he felt physically hot, but the sash mechanism of the window was broken so it wouldn't stay open on its own and had come crashing down. CJ had tried to wedge it open in the afternoon but hadn't succeeded. …"

10. When the deceased and Ms Palfreyman had finished their cigarettes, Ms Palfreyman lay on her bed fully clothed and fell asleep.

11. Evidence was given by the investigator for Worcester Regulatory Services. He confirmed the height of the sill in the room as being 460 millimetres. The modern standard is that this height should be no less than 800 millimetres. The maximum

opening of the lower sash was 650 millimetres, which increased to 670 millimetres with the top sash opened. In his evidence he stated that:

> "I thought the window in room 203 exposed any person to serious risk to their safety due to the height of the sill, the opening height and the width of the window, and the position of the bed close to the window. There was enough room for persons to fall through the window, including young children who could easily roll from the bed, through the window, and down to the street below. I noted that preventative measures (i.e. the installation of restrictors) had been taken in some rooms but no risk assessments had been made in respect of the windows in rooms 102, 202, 203 and 204. I consider that the serious hazard regarding falls from guest bedrooms should have been identified are minimised by installing window restrictors."

12. Restrictors costing £7 to £8 per window were subsequently installed following the service of a prohibition notice on 9 July 2015.

Criminal prosecution

13. The appellant was prosecuted by Malvern Hills District Council pursuant to section 3(1) of the 1974 Act. The particulars of the offence included the following:

> "… between the 1st January 2013 and the 10th July 2015, being an employer, failed to conduct your undertaking, namely the provision of hotel accommodation from The White Lion Hotel … in such a way as to ensure, so far as was reasonably practicable, that persons not in your employment who may affected thereby, were not exposed to risks to their health and safety."

14. The following agreed basis of plea was entered by The White Lion Hotel partnership:

> "1. The Partnership took their health and safety responsibilities seriously.
>
> 2. However, they accept that before the accident they did not carry out a suitable and sufficient risk assessment of the windows in their hotel bedrooms.
>
> 3. Before the accident they did not appreciate that those windows presented a risk. However, they accept that the sash windows did present a low risk that someone may injure themselves and that restrictors should have been put in place.
>
> 4. The processes in the hotel have improved and no risks remain."

15. On 9 February 2018 HHJ Cole imposed a fine of £34,000, credit having been given for the guilty pleas. An appeal was unsuccessful.

16. At the civil trial no attempt was made to go behind the guilty plea. At [48] the judge stated that:

> "Had the risk identified by the prosecution, which the criminal law required to be addressed, actually been addressed (the obvious course was that actually adopted; the use of window restrictors) then the Deceased would not have been able to fall as he did."

The law

17. The relevant provisions are sections 1(1) and 2(1) to (5) of the 1957 Act. They provide as follows:

> "**1. Preliminary**
>
> (1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.
>
> …
>
> **2. Extent of occupier's ordinary duty**
>
> (1) An occupier of premises owes the same duty, the 'common duty of care', to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
>
> > (a) an occupier must be prepared for children to be less careful than adults; and
> >
> > (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—
>
> > (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
> >
> > (b)where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
>
> (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (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)."

Relevant authorities

Tomlinson v Congleton Borough Council [2004] 1 AC 46

18. A lake, formed in a disused quarry, in a park owned and occupied by the first defendant, was known to attract many visitors in hot weather. Swimming in the lake was prohibited, prominent notices stated "Dangerous Water: No Swimming". On a hot day the plaintiff, aged 18, went into the lake and from a standing position in shallow water, dived and struck his head on the sandy bottom, breaking his neck. He claimed damages against the defendants, alleging that the accident had been caused by their breach of the duty of care which they owed him as a trespasser under section 1 of the Occupiers' Liability Act 1984 ("the 1984 Act"). The House of Lords, by a majority, held that any risk of the plaintiff suffering injury had arisen not from any danger due to the state of the defendant's premises or to things done or omitted to be done on them within section 1(1)(a) of the 1984 Act, but from the plaintiff's own misjudgement in attempting to dive into shallow water; there had not been a risk giving rise to any duty on the defendants, and even if there were such a risk, it was not one in respect of which the defendants might reasonably have been expected to afford the plaintiff any protection under section 1(1)(c) of the 1984 Act.

19. Lord Hoffman delivered a judgment with which Lord Nicholls agreed. He identified the first question as being "whether there was a risk within the scope of the statute; a danger 'due to the state of the premises or to things done or omitted to be done on them'". The trial judge had found that there was nothing which made the lake "any

more dangerous than any other ordinary stretch of open water in England". There were no hidden dangers. At [27] Lord Hoffman stated:

> "… Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. 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. In the present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises."

20. At [28] Lord Hoffman found that the water was perfectly safe for all normal activities and at [29] he stated that: "… there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises." Having so found he concluded that there was no risk of a kind which gave rise to a duty under the 1957 or the 1984 Acts.

21. Lord Hoffman went on to consider the matter on the assumption that there was such a risk. Section 1(3) of the 1984 Act states:

> "(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."

22. In addressing 1(3)(c), namely "Was the risk one against which the Council might reasonably be expected to offer the claimant some protection?", Lord Hoffman at [34] stated that:

> "Even in the case of the duty owed to a lawful visitor under section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of

> Mr Tomlinson, the question of what amounts to 'such care as in all the circumstances of the case is reasonable' depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other."

23. Lord Hoffman went on to contrast the position under the 1957 and 1984 Acts, observing at [38] that:

> "… Parliament has made it clear that in the case of a lawful visitor, one starts from the assumption that there is a duty whereas in the case of a trespasser one starts from the assumption that there is none."

24. In considering what he described as "the balance" under the 1957 Act, Lord Hoffman identified the financial cost of taking preventative measures as part of the balancing exercise which the court has to undertake, together with the social values of the activities which would have to be prohibited in order to reduce or eliminate an identified risk and whether an occupier of land should be entitled to allow people of full capacity to decide for themselves whether to take the risk. As to the latter, Lord Hoffman at [45] and [46] stated:

> "45. I think 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. Of course the landowner may for his own reasons wish to prohibit such activities. He may be thinking that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.
>
> 46. My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ, ante, p 62b-c, 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

> risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (*Herrington v British Railways Board* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves: *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360 ."

25. At [47] Lord Hoffman referred to "the balance between risk on the one hand and individual autonomy on the other" which, he said, "is not a matter of expert opinion. It is a judgment which the courts must make and which in England reflects the individualist values of the common law." At [48] he stated "this appeal gives your Lordships the opportunity to say clearly that local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers."

At [50] Lord Hoffman concluded:

> "My Lords, for these reasons I consider that even if swimming had not been prohibited and the Council had owed a duty under section 2(2) of the 1957, that duty would not have required them to take any steps to prevent Mr Tomlinson from diving or warning him against dangers which were perfectly obvious. If that is the case, then plainly there can have been no duty under the 1984 Act. The risk was not one against which he was entitled under section 1(3)(c) to protection."

Edwards v London Borough of Sutton [2016] EWCA Civ 1005

26. The claimant was pushing his bicycle over a footbridge with low parapets when, together with his bicycle, he fell over the left parapet onto a rock or rocks in the water below and sustained serious injury. The judge found that he had lost his balance for an unknown and undemonstrated reason. He held the defendants to be primarily liable for breach of the common duty of care under the 1957 Act and found the claimant to have been 40 per cent contributorily negligent. It was the claimant's case that the local authority had failed to take reasonable care to see that he, as a visitor to the park, was safe using the bridge for the purpose for which he had been permitted to use it. The parapets were dangerous, authority should have installed protective barriers or warned the claimant. The local authority had not carried out a risk assessment. In denying a breach of duty, the local authority contended that the bridge was not unsafe, it was visually pleasing, and no accidents had been reported. There was no duty to erect barriers or to warn users because the state of construction of the bridge was obvious.

27. The trial judge found that the local authority should have identified the risk of a fall and assessed it. The local authority was not required to fit side railings but if that was not done it was obliged to warn users about the dangerously low parapet and warn them to take particular care or to offer them a different safer route to the car park. This would not reduce the amenity of the bridge in the same way as railings would. The judge found that the claimant would have heeded such a warning. His

unexplained loss of balance must have been due to something "blameworthy and causally potent".

28. On appeal it was the authority's case that in applying section 1 of the 1957 Act there has to be a risk of a kind which gives rise to a duty, i.e. a danger due to the state of the premises and there was no relevant danger on the facts of the case. Further, there is no duty to warn of the obvious. In the judgment of the Court of Appeal sections 1(1), 2(1), (2) and (3) of the Act were identified. Notably, no mention was made of section 2(5).

29. McCombe LJ, giving the judgment, with which Arden LJ (as she then was) and Lewison LJ agreed, stated that "it is necessary to identify what danger(s) there is/are before one can see to what (if anything) the occupier's duty in each case attaches". At [42] and [43], in addressing any possible dangers created by the bridge, McCombe LJ stated:

> "42. … Any structure of this type presents the risk that the user may fall from it. Unlike natural land features, such as steep slopes or difficult terrain or cliffs close to coastal paths, which Lord Hobhouse in *Tomlinson* said could hardly be described as part of the 'state of the premises', it seems to me that a bridge with no sides or only low ones may present a danger from the 'state of the premises' such as to give rise to the common duty of care. However, while I am prepared to assume that there was objectively a 'danger' arising from the state of the premises in this respect here, does this mean that, in order to discharge the common duty of care, arising from that objective possibility of danger, no such bridges must be left open to visitors or must not be left open to visitors without guard rails or express warnings? In my judgment, the answer to this question is a clear 'no'.
>
> 43. The reason for this answer lies, I think, 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 to warn, against obvious dangers. Both these propositions appear in the speeches in *Tomlinson's* case."

30. In relation to the first proposition, McCombe LJ cited [79] and [80] of the speech of Lord Hobhouse in *Tomlinson* and page 863 of the speech of Lord Oaksey in *Bolton v Stone* [1951] AC 850. In those passages, the point is made that there is no duty to guard against risks which may be foreseeable but which are very unlikely to materialise even if the consequences of the risk materialising would be very serious. McCombe LJ also cited [34] of the speech of Lord Hoffmann in *Tomlinson* saying that "Allied with the issue of foreseeability of likelihood risk is the balance of risk, gravity of injury, cost and social value". He stated that there were limits to social value in a case such as *Edwards* but the amenity value of the bridge could not be ignored entirely.

31. At [47] McCombe LJ stated that the second proposition is "a particularly forceful consideration in this case. That there was some risk of a fall and the potential for injury must have been obvious." He gave the factual reasons for such a finding.

32. At [57] McCombe LJ stated that a risk assessment would have produced only a statement of the obvious:

> "… namely that this was a bridge with low parapets over water; persons not exercising proper care might fall off. I do not see how such a statement would have led to steps being taken that would have prevented or lessened the possibility of Mr Edwards' accident occurring."

33. At [60] McCombe LJ carried out the balancing exercise identified by Lord Hoffman in *Tomlinson* when he concluded that there was no requirement to provide the bridge with the type of side barriers advocated by the claimant and stated that:

> "Such additions would have altered the character of the bridge significantly and to an extent out of proportion to a remote risk which had never materialised in its known history."

Cook v Swansea City Council [2017] EWCA Civ 2142

34. The claimant had slipped and fallen on ice in an unmanned car park that was owned and operated by Swansea City Council. In bad weather, the local authority did not grit unmanned car parks. It operated a reactive system of gritting them upon receiving a report from a member of the public about a dangerous area. Proceedings were brought by the claimant for breach of the common law duty of care or, alternatively, breach of the 1957 Act.

35. Hamblen LJ (as he then was) at [33] and [34] considered Lord Hoffman's judgment in *Tomlinson*, stating:

> "33. At [34]-[37], under the heading 'The balance of risk, gravity of injury, cost and social value', Lord Hoffmann identifies the balancing exercise which needs to be carried out when considering what amounts to 'such care as in all the circumstances of the case is reasonable' under section 2(2) of the 1957 Act. As he states this involves an assessment of:
>
> (1) The likelihood that someone may be injured;
>
> (2) The seriousness of the injury which may occur;
>
> (3) The social value of the activity which gives rise to the risk; and
>
> (4) The cost of preventative measures.
>
> 34. At [48] Lord Hoffmann emphasises that there is generally no duty to protect against obvious dangers."

36. At [35] under the heading "Likelihood that someone may be injured" Hamblen LJ stated:

> "The risk of ice in cold weather is an obvious danger. People out and about in cold weather can be reasonably expected to watch out for ice and to take care. The Car Park did not pose a particular risk compared to any other of the Defendant's car parks. There had been no previous reports of dangerous ice conditions at the Car Park, nor any previous accidents due to ice."

37. Balancing the obviousness of the danger with other factors – including that injury due to slipping on ice may be trivial or serious; if gritting of unmanned car parks was required whenever there is a report of icy conditions, this would be likely to lead to a prohibition on use of all unmanned car parks in periods of adverse weather, to the considerable inconvenience of local residents and visitors; and regular gritting would have been a disproportionate and costly reaction to the risk and would have diverted such resources from situations where attention was more urgently required – Hamblen LJ, with whom Henderson LJ and Longmore LJ agreed, concluded that there had been no breach of duty. To reach this conclusion, Lord Hoffmann's approach in *Tomlinson* was followed.

Geary v JD Weatherspoon [2011] EWHC 1506 (QB)

38. The claimant had been drinking with colleagues at a pub in Newcastle. One of the features of the building was an open staircase with sweeping bannisters on both sides. When leaving, the claimant hoisted herself onto the left bannister with the intention of sliding down it. She fell backwards and landed on the marble floor, sustaining a fracture to her spine. Proceedings were brought alleging breaches of the common law duty of care and alternative claims for breaches of the 1957 and 1984 Acts. The issues were summarised by the judge as being:

> "a) Was there a voluntary assumption of an obvious and inherent risk by the claimant, in circumstances which would negate any liability on the part of the defendant?
>
> b) Was there an assumption of responsibility by the defendant to the claimant?"

39. The evidence before the court was that from the outset customers had been tempted to slide down the bannisters and some had injured themselves. The risk of sliding down the bannisters was both foreseeable and foreseen. The defendant's employees had spoken to customers who looked as though they were attempting to slide down or had slid down. The defendant had considered placing a warning sign but concluded that it would attract more people to the possibility of sliding than otherwise; a conclusion which was not challenged by the claimant.

40. Coulson J (as he then was) considered section 2(5) of the 1957 Act and section 1(6) of the 1984 Act which states that "no duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person".

41. At [36] Coulson J stated that under both statutes "… there is no liability on the part of the occupier for risks willingly accepted by the visitor or trespasser. That is precisely the same as the position of common law, as summarised in the maxim *volenti non fit injuria*." The judge noted that the editors of *Clerk & Lindsell on Torts*, 20th Edition, make plain that the statutory defence is indistinguishable from the common law defence of *volenti*.

42. At [37] he stated that:

> "There are numerous authorities for the proposition that a claimant who voluntarily assumes an obvious risk, which subsequently eventuates, will, save in particular circumstances, be left without a remedy."

The authorities he cited included *Tomlinson*. Coulson J recorded that he asked if there was any authority in which, absent special or particular facts, a defendant had been found to owe a duty of care to protect a claimant for his or her voluntary assumption of an obvious and inherent risk. Counsel for the claimant said there was no such authority.

43. Coulson J found that there was no difference in principle between *Tomlinson* and the facts of the *Geary* case. The claimant deliberately took the risk that she might fall. She did not intend to fall, but due to a momentary misjudgement she did. The defendant had taken some steps to deal with a problem and could not reasonably be expected to do more ([45]). In her evidence the claimant frankly accepted the obvious risk that she ran in sliding down the bannister. The judge found that she freely chose to do something which she knew to be dangerous. She knew that sliding down the bannister was not permitted but she chose to do it anyway. He found she was therefore the author of her own misfortune, and the defendant owed no duty to protect her from such an obvious and inherent risk. She made a genuine and informed choice and the risk that she chose to run materialised. In those circumstances, he found that the claim had to fail.

44. In addressing the issue of assumption of responsibility, at [59] Coulson J found that "… there was nothing unsafe about the premises, and no danger attributable to their structure. There could therefore be no liability under the 1957 or 1984 Acts, and thus no liability at common law." He stated that:

> "The danger was created by the decision to slide, not the banister itself: indeed, even if the banister had been at the normal height, the claimant could (and I find, probably would) have chosen to slide anyway."

Findings of fact

45. The judge's findings of fact included the following:

    i) The bottom of the windowsill was only 46 centimetres from the ground. The bed upon which Ms Palfreyman was lying covered around 61 centimetres of the window width of 92 centimetres. At the time of the incident the lower part

of the sash window would not remain in the open position but would fall under gravity;

ii) The sash window in the bedroom was low on the bedroom wall. The sill was 46 centimetres/18 inches above the floor and the lower sash could be opened to a height of 65 centimetres/25.6 inches. The top of the open window would be 109 centimetres/three feet seven inches above the floor. Access to the window was hampered by the position of the single bed which was occupied at the time of the fall by Ms Palfreyman, who was asleep. The bed extended across two-thirds of the width of the window.

iii) The deceased had been smoking that weekend and had also been struggling with the heat generally. 4 July 2015 had been a relatively hot day with temperatures in the twenties. He had positioned a fan to face his bed. Whilst he was only mildly to moderately intoxicated by alcohol, Ms Palfreyman was in a far worse condition;

iv) After putting Ms Palfreyman to bed, the deceased went to bed. His mobile telephone was under the pillow of his bed. The deceased was unable to sleep, got out of bed and picked up his packet of cigarettes and inhaler. The deceased had considered smoking when he left his bed but the judge could not safely say on the balance of probabilities whether the deceased went to the window with a sole or mixed purpose, i.e. to cool down and take this as an opportunity to smoke a cigarette, or whether he had actually smoked.

v) The judge found that the deceased had sat on the window sill. He was able to open the lower sash window and keep it open. It would have been a slightly, but not very, awkward position. The deceased probably lent out but with his weight distributed such that he did not fall out. For some reason, his balance altered and the deceased could not prevent himself from falling. The judge found that it may be the deceased sat there to cool down and closed his eyes. He must have been tired, it was late, he had not been sleeping well, and although not "drunk", he had consumed a significant amount of alcohol, and then lost balance. Or he lost balance as he began to move back into the room. The judge stated that he could not do more than speculate so was unable to make a finding as to the exact cause of the fall.

Section 2 of the 1957 Act

46. At [63] of his judgment the judge summarised the matters which he regarded as relevant to the section 2 duty of care as follows:

> "(a) The Defendants (through the guilty plea in the Crown Court) accepted that there was a reasonably foreseeable risk of harm ; a material risk to adults of falling from the sash window due to its low position. Although Mr Walker QC initially suggested that the conviction was irrelevant as it could have been based upon a risk to children, clarification proved this not to have been the case. Mr Walker QC then acknowledged that the conviction had been on the basis of a risk to a visitor such as the Deceased and did not try 'to go behind it'.

(b) Unlike the position in *Tomlinson-v-Congleton BC* [2004] 1 AC 46 (which I shall turn to in detail shortly) it is possible here to identify the state of the premises which carried the risk of the injury. 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. 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.

(c) The relevant circumstances under section 2 of the Act expressly include 'the want of care', which would ordinarily be expected of a hotel guest. Regard had to be paid to what occupants were likely to do. An obvious point is that sash windows are designed to be opened. As Mr Walker QC stated (in a different context) people like to open windows and look out. Ms Palfreyman stated 'everyone smokes out of hotel windows'. She overstated matters. However, a significant number of hotel occupants in no smoking rooms, faced with no easily accessible outside access (e.g. when on upper floors) will try to smoke out of a window. In addition a significant amount of hotel guests will consume alcohol (often supplied by the hotel) sometime in excess. These are 'facts of life' for any hotelier.

(d) There was no significant social value to the ability to fully open the lower part of the sash window to such an extent that a person could fall out of it (the top sash could be fully opened). There is no material impact upon personal autonomy. So nothing to weigh in the balance or consider as regards social utility and no 'important question of freedom at stake'.

(e) Given the guilty plea it was admitted that a risk assessment would have resulted in measures taken that would have addressed the risk and prevented the accident. An adequate risk assessment is the keystone to ensuring the safety of members of the public (and employees).

(f) So drawing matters together there was

i. a duty owed to a lawful visitor ;

ii. a foreseeable risk of serious injury due to the state of the premises ;

iii. injury, if it was to occur, which would inevitably be very serious, if not fatal ;

iv. no social value of/to the activity leading to the risk ;

v. a minimal cost of preventative measures."

47. The judge considered a number of authorities which included *Tomlinson*, *Edwards* and *Geary* above. He considered it "very important to note" that in *Edwards* the court had held that a formal risk assessment would not have produced anything other than a statement of the obvious and would have led to no steps being taken which would have prevented the accident or lessened the possibility of it occurring. The judge contrasted that with this case where he stated: "given the regulatory requirements of the criminal law, a risk assessment would have resulted in action that would have prevented the accident."

48. The judge recorded that neither counsel had referred to section 2(5) of the 1957 Act but stated that the section:

> "… does not achieve the aim of preventing liability attaching to an occupier in the same way as the common law defence did. The defence at common law only operates where the Claimant voluntarily accepts a risk negligently created by the Defendant's negligence. Section 2(5) concerns the breath or ambit of a duty i.e. if section 2(5) bites there is no obligation to act under section 2 and thus no negligence."

49. The judge recorded the submissions made on behalf of the defendant/appellant at [76] and [77] of his judgment:

> "76. Mr Walker QC submitted that a normal adult would recognise that there is an obvious risk that, if you lean too far out of a window, you may fall. It was difficult for Mr Evans to argue against this simple proposition. In my judgment the Deceased will have recognised that if you sit on a window sill, part out of the window, that there is a risk you may lean too far out or lose your balance slightly, and fall. The Deceased chose to sit on the window sill and accept that risk. There was no hidden feature or element (he knew that the sash window had to be held up).
>
> 77. Mr Walker QC submitted that the Claimant's case should fail 'in limine' as;
>
>> 'The deceased's fatal accident was, on any view of the facts, consequent upon his choosing (for whatever reason) to lean out of a second floor window which he had opened, and held open, to an extent sufficient to enable him to fall out of it. The risk of a fall, such as it was, was therefore one which he had created and was obvious. In those circumstances it is the Defendant's case that this claim cannot succeed; a person of full age and capacity who chooses to run an obvious risk cannot found an action against a defendant on the basis that the latter has either permitted him so to do, or not prevented him from so doing….'"

This point was said to "trump" arguments "such as that the risk was foreseeable (or even foreseen), the absence of risk assessments, or that the risk could have been avoided by the defendant without difficulty or undue expense."

50. The judge then addressed the issue:

> "… that section 2 of the 1957 Act does not impose an obligation on an occupier in respect of an (obvious) risk, so no duty to act arises to address such a risk is in direct conflict with the argument that the duty under section 2 must necessarily reflect a mandatory requirement of the criminal law to address a real and material risk (as accepted to have existed here), even though it is obvious. "

He noted that neither counsel had addressed it "head on" in their submissions.

51. The judge referred to section 3 of the 1974 Act, which states:

> "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

He observed that the primary obligations in sections 2 to 8 of the 1974 Act are unenforceable in civil law (section 47(1) of the 1974 Act).

52. The judge considered the authority of *Hampstead Heath Swimming Club v Corporation of London* [2005] EWHC 713 (Admin), in which Stanley Burnton J held, in the context of an issue as to whether the occupier of a pond would be criminally liable under section 3 of the 1974 Act if it allowed visitors to swim when not attended by lifeguards, that section 2 of the 1957 Act and section 3 of the 1974 Act are concerned with responsibility for fault. He stated that it was right to derive from the judgment in *Tomlinson* an approach to the interpretation and application of the 1974 Act. He cited [44] to [46] of the judgment as follows:

> "Furthermore, the functions of the civil law and the criminal law are different. The essential function of the civil law is, in the present context, to compensate those whose injuries are the responsibility or fault of another. The function of the criminal law is normative, to provide rules to be observed, the infringement of which leads to punishment (or to some other form of sentence). There is no simple relationship between the law of crime and the law of tort. Some statutory crimes give rise to a private cause of action for compensation on the part of anyone injured by its commission, others do not. Section 47 of the 1974 Act expressly provides that a contravention of s 3 does not of itself confer a right of action in civil proceedings. The criminal courts always have power to order a person convicted of a crime to pay compensation to someone injured

> by that crime, but that power is ancillary to the primary purpose of sentencing.
>
> [45] One can nonetheless say that one expects the scope of tort to be wider than that of crime. The relationship is summarised in *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 15th edn), at 14:
>
> > 'Crime and tort of course overlap. Many torts are also crimes, sometimes with the same names and with similar elements (for example, assault and battery) and sometimes a civil action in tort is deduced from the existence of a statute creating a criminal offence. The more serious, "traditional" criminal offences are likely to amount to torts provided there is a victim who has suffered damage but the scope of tort is broader: it is broadly true to say that causing physical damage by negligence is always tortuous, but it is criminal only in certain circumstances or conditions.'
>
> [46] I bear in mind the qualifications and reservations that must result from differences between tort and crime and between different enactments having different purposes. However, both s 2 of the Occupiers' Liability Act 1957 and s 3 of the 1974 Act are concerned with responsibility for fault. The former imposes liability on the basis of fault: a failure to take 'such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe'. An employer is absolved from liability under s 3 of the 1974 Act if he can show that he was without fault, in the sense that he did all that was reasonably practicable to do to remove or to minimise the relevant risk. I consider that it would be anomalous if Congleton Borough Council, so emphatically relieved by the House of Lords of liability in tort to Mr Tomlinson, were to be held to have infringed s 3 of the 1974 Act by failing to prevent his swimming in the lake. It would mean that the individual liberty that the House of Lords thought it was upholding was illusory: the criminal law would take away what the House of Lords thought it was establishing. And so I think it right to derive from the judgments in *Tomlinson* an approach to the interpretation and application of the 1974 Act in the present factual context."

At [87] the judge found that:

> "… the converse of Stanley Burton J's proposition also holds true. It would be equally anomalous if Congleton Borough Council was found to be (or accepted that it was) duty-bound to prevent access to a beach under the criminal law by virtue the existence of an obvious risk (e.g. a large rusted pipe with sharp edges) refused to do so, and a person then injured result

> of that risk could not recover under the Occupiers Liability Act on the basis that there was no need to prevent access as the risk was obvious (or need not be taken after applying considerations of personal autonomy). The reasonable person would surely consider this as wholly unacceptable as 'the law' would be inherently contradictory."

53. The judge considered it to be of significance that both the criminal and civil jurisdictions allow for orders for compensation. As to the appellant's guilty plea, the judge described it as "… in effect an admission of entitlement to compensation on the basis of a failure to act to remove a risk."

54. The judge addressed the issue of the process of the assessment of risk ([89]). He noted that the basis of the prosecution of the appellant was that it failed to carry out a suitable risk assessment of the premises and had it done so they would have identified the risk to adults associated with low-silled windows and installed devices to restrict the opening of the windows and reduce the risk of falling from the window. By their plea, this case was accepted. He observed at [90] that the criminal and civil jurisdictions recognise that an adequate risk assessment is a necessary step for any business such as the appellant.

55. At [92] the judge stated that:

> "In my experience unless the conviction is challenged on the facts (as permitted under section 11 Civil Evidence Act) civil liability does axiomatically follow."

56. Having so found, at [96] and [97] the judge stated:

> "96. It is my view Parliament cannot have intended that by the interaction of sections 2(2) and 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 such care as was, in all the circumstances of the case, reasonable. The risk may have been obvious but following a risk assessment the criminal law required steps to be taken. If such steps had been taken the accident would not have occurred. In my judgment section 2(5) cannot be used to negate a specific, mandatory health and safety requirement upon an occupier to Act.
>
> 97. In my judgment the answer to the issue thrown up in the present case in respect of the relationship between the criminal and civil law must be that the duty under the Occupiers Liability Act, of the exercise of ordinarily reasonable care, requires compliance with a specific safety requirement of the criminal law, a fortiori if a risk assessment would have resulted in the step being taken. In this case (unlike *Tomlinson*) there is nothing to weigh against compliance with that requirement. The civil law surely cannot regard as step required under the

criminal law as unduly paternalist. Rather the expectation should be that primary liability should follow a failure to take step required by the criminal law. The examples used by Lord Hoffman in paragraph 46 of his judgment as exception to his obvious dangers principle;

> A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, or in the case of employees, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2000] 1 AC 360);

were not intended cover circumstances where there was a mandatory requirement of the criminal law, so, in this respect alone, should not be treated as final and closed class. Alternatively, the reference to no genuine choice should be interpreted to include circumstances where there should not properly be an available choice given the requirements of the criminal law. In the present case, an adequate risk assessment, as required under both criminal and civil law would have required a step which in my judgment axiomatically not only informed, but dictated, the extent of the duty to take reasonable care under the 1957 Act"

57. It follows from the above that he did not accept the arguments in relation to the acceptance of risk by the claimant and found there was a breach of duty pursuant to section 2 of the 1957 Act.

Novus actus interveniens

58. The judge described the deceased's actions as representing a high, but not a very high, degree of unreasonableness. It was a clear misjudgement but was an act that others, particularly smokers, might take. He did not find that the deceased's act in sitting on the window sill broke the chain of causation. The judge found that the accident was the direct result of the appellant's failure to apply window restrictors to a very low window.

Contributory negligence

59. At [118] the judge stated:

> "This was not momentary inadvertence in that the Deceased consciously adopted a precarious position. He could foresee the danger of falling (if not the precise manner). Very considerable care was required if he was to sit on the sill. Any lapse of concentration and he might fall. It my judgment in choosing to act as he did he was guilty of a blameworthy failure to take reasonable care for his own safety."

Submissions

60. The appellant relies upon the finding by the judge at [76] that the deceased had chosen to sit on the windowsill, part out of the window, and had recognised and accepted the risk of falling from the window due to leaning too far out or losing his balance. Having so found, the judge erred in failing to apply the principle that a person of full age and capacity who chooses to run an obvious risk cannot found an action against a defendant on the basis that the latter has either permitted him to do so, or not prevented him from so doing even where the defendant is found to have negligently failed to take any precautions to protect the claimant against a risk of which he, the defendant, ought to have been aware or indeed was aware: *Edwards* above (in particular [43] and [47]).

61. The judge's approach, which was to justify his refusal to follow the authorities of *Tomlinson*, *Edwards* and *Geary* on the basis that in the present case the appellant had committed a criminal offence, does not provide a logical basis for failing to apply the principle. It is contended that in all of the above cases it is likely that the defendant had committed an offence under section 3 of the 1974 Act but this was nothing to the point. Reliance is placed on the observations of Stanley Burnton J in *Hampstead Heath Swimming Club* above.

62. The essence of the appellant's case is that there was no duty on it to protect or warn the deceased against obvious dangers. He was the author of his own misfortune. There are no cases in which a claimant has succeeded in such circumstances. The deceased had taken an obvious risk of which he was aware. That was the critical finding of fact made by the judge at [76] of his judgment. That should have been the end of the respondent's case but the judge reached an opposing conclusion embarking on a forensic route devised by himself, namely that the principle that there is no liability where a claimant takes an obvious risk of which he was aware is displaced where the defendant has been convicted of a criminal offence, relevant to the risk which the claimant accepted.

63. The effect of section 2(5) is that the appellant owed the deceased no duty at all in respect of the risk which he undertook. That being so, the appellant cannot be in breach of the duty. The appellant's conviction for a criminal offence cannot create liability because the criminal statute does not create a civil duty. It is a mandatory requirement of section 3 of the 1984 Act to assess risk. The criminal law provides sanctions which flow from a failure to do so. It does not provide for civil liability. Pursuant to section 11 of the Civil Evidence Act 1968 the fact of the conviction is admissible, no attempt was made at the trial to go behind the basis of plea which was entered. The basis of plea recognised the risk and the nature of it.

64. The breach of the regulations may be strong evidence of negligence but that is as far as it goes. Breach of the regulations *ipso facto* does not demonstrate negligence.

65. In summary, the respondent submits that:

    i) On the unchallenged findings of fact by the judge, the state of the premises presented a material risk of injury to the deceased, in particular by virtue of: (a) the window sill being so low; (b) the window being capable of being opened fully; and (c) the sash mechanism being defective. The window was

not safe for normal activities, such as that engaged in by the deceased, and the duty under section 2(2) of the 1957 Act was engaged. On this basis alone, *Tomlinson* can be distinguished.

ii) The judge was right to find that it was inconsistent with the guilty plea to the criminal charge for the appellant to contend that it nevertheless was not required to take any steps to avoid or limit the deceased's foreseeable exposure to the risk of falling from the window. Given the case and minimal costs with which the window could have been prevented from opening, the absence of any countervailing factors in favour of not limiting the opening of the window and how this would clearly have prevented the deceased from falling out, breach of duty and causation were made out. Again *Tomlinson* is readily distinguished.

iii) The judge properly took account of the deceased's own carelessness by way of a finding of contributory negligence.

iv) The judge's finding at [76] was not sufficient to act as a bar to liability even if the judge was wrong on the extent to which the criminal conviction determined the issue of liability.

v) If, contrary to the respondent's primary case, the judge did intend to find at [76] that the deceased should not (absent the criminal conviction) be entitled to recover damages, the judge was wrong so to do. In particular, such a finding is inconsistent with:

a) the judge's own findings of fact in the case;

b) the scheme of the 1957 Act by which the deceased's conduct could not act to bar recovery where it did not meet the threshold of triggering the defence of *volenti non fit injuria*.

Discussion and Conclusion

66. The claim is brought pursuant to the provisions of section 2 of the 1957 Act. The relevant provisions for the purpose of this appeal begin at section 1(1), which provides that section 2 replaces the common law rules and regulates the duty which an occupier of premises owes to visitors in respect of dangers due to the state of premises or to things done or omitted to be done to them. A simple but important point; this is a statutory scheme.

67. The first question for the court is whether the judge was correct to find that the deceased was owed a duty of care by the appellant pursuant to section 2 of the 1957 Act and, if so, whether that duty was breached. It is only after addressing sections 1, 2(1) and 2(3) of the Act, and determining the nature and extent of any breach under section 2, that the court can proceed to section 2(5), which represents a defence.

68. The assessment of whether there is liability under section 2 is essentially a factual assessment based upon the particular circumstances of each case. In this case it involved addressing a number of questions of fact and mixed questions of fact and law, namely:

i) Was there a danger due to the state of the premises;

ii) Was there a breach of duty in respect of that danger to the deceased;

iii) Was that breach of duty the cause of the deceased's fall;

iv) Should a finding have been made pursuant to section 2(5) that the deceased was not owed the duty by reason of his voluntary acceptance of the risk created by the danger?

69. The judge's findings at trial include the following relevant findings of fact. The deceased was a visitor to the appellant's hotel on a hot day, 4 July 2015. The sash window in his hotel room was low, some 46 centimetres from the floor. A bed was placed across some two-thirds of the width of the window. On the day of the accident the lower part of the sash window would not remain in the open position but would fall under gravity.

70. Prior to 4 July the deceased had been struggling with the heat, which was such that a fan had been positioned to face his bed. When the deceased and Ms Palfreyman returned to the room following the wedding, he was still struggling with the heat. He had consumed alcohol but was not drunk. The deceased later went to the window and positioned himself sitting on the sill in order to obtain fresh air, he may have also wished to smoke. He was able to open the lower sash of the window and kept it open by sitting on the sill in a slightly, but not very, awkward position. His balance altered and he fell.

71. At the time of the deceased's fall there was an identified risk which arose from the state of the premises, namely the ability to fully open the lower sash of a window with a low sill which gave rise to the risk of a person falling out of it. The window was not safe for all normal activities as, if opened, which is the very purpose of sash windows, it presented the risk of a fall as it was so low relative to the centre of gravity of many adults.

72. Prior to the accident the appellant had not carried out a suitable and sufficient risk assessment of some of the windows in their hotel bedrooms, this included room 203. The appellant did not appreciate that those windows presented a risk. They now accept that the sash window did present a risk that someone may injure themselves and that restrictors should have been put in place. The cost of the restrictors on the window was £7 or £8. The guilty plea of the appellant in the criminal proceedings represented an admission that a risk assessment would have resulted in measures being taken which would have addressed the risk and thus prevented the accident.

73. In circumstances where the top part of the sash window could be fully opened, there was no significant social value to the ability to fully open the lower part of the sash window to such an extent that a person could fall out of it. It represented no material impact upon personal autonomy.

74. Given the above findings of fact, the conclusions drawn by the judge at [42] 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 are

unassailable. In my judgment they are findings which provide a sound factual basis for a determination that the appellant breached its section 2 common duty of care to the deceased.

75. It follows from those findings that the issue thereafter to be addressed is whether a defence is available pursuant to section 2(5) of the 1957 Act. Before addressing that issue, it is necessary to consider the appellant's primary ground of appeal and the authorities relied upon, as the appellant contends that no section 2 duty arises out of the facts of this case.

76. The appellant's primary ground of appeal, namely that a person of full age and capacity who chooses to run an obvious risk cannot found an action against a defendant on the basis that the latter has either permitted him to do so, or not prevented him from so doing, is derived from what is said to be the ratio of *Tomlinson*, *Edwards* and *Geary*.

77. In my judgment, consideration of these authorities does not provide unequivocal support for the proposition contended for by the appellant.

Tomlinson

78. The claim in *Tomlinson* was brought pursuant to section 1 of the Occupiers' Liability Act 1984 as the claimant was a trespasser. A duty arises pursuant to section 1(3) of the 1984 Act in respect of a risk 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 …; 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."

It is only if those three conditions are met that the duty arises. As was stated at [38] by Lord Hoffmann: in the case of a lawful visitor one starts with the assumption that there is a duty whereas in the case of a trespasser one starts with the assumption that there is none. On the facts in *Tomlinson* the claimant did not meet the requirements of section 1(3)(c), thus there was no assumption of duty.

79. Lord Hoffmann then went on to consider what the position would have been if there had been a duty under either the 1984 or the 1957 Act. However, given the finding on the facts that there was no duty, Lord Hoffmann's consideration of the 1957 Act cannot properly be described as the ratio of the case. Further, in assessing the duty under section 2(2) Lord Hoffman made no reference to section 2(5). The focus was upon the council's hypothetical duty under section 2(2) of the 1957 Act. As I read [45] to [49], Lord Hoffman appears to be placing the principle relating to a claimant's acceptance of the obviousness of a danger as one element in a balancing exercise going to the reasonableness assessment pursuant to section 2(2) of the 1957 Act. He

is balancing the obviousness of the danger against the social and financial cost of precautions. I do not read it as representing an absolute defence, rather he is identifying or considering the circumstances under which it would be reasonable to hold an occupier liable in respect of obvious dangers or risks. Lord Hoffman regarded Mr Tomlinson's exercise of free will in voluntarily choosing to run an obvious risk as an important consideration, but identified other considerations of which account should be taken, including the social value which would be lost by the preventative measures under consideration, namely destroying beaches.

80. It is of note that in *Cook*, in the passages cited at [35] and [36] above, Hamblen LJ treated the obviousness of the danger as going to the issue of reasonableness for the purposes of section 2(2). Lord Hoffman's *dicta* in *Tomlinson* was cited as authority for that approach.

81. In *Edwards* at [47] McCombe LJ identified the potential for injury which must have been obvious such that any user of the bridge would appreciate the need to take care and any user limiting the width of the bridge's track, by pushing a bicycle to his side, would see the need to take extra care, as being a "particularly forceful consideration" militating against a duty to take protective steps. At [60] he attached weight to the fact that the addition of side barriers would have altered the character of the bridge significantly, to an extent out of proportion to a remote risk which had never materialised in its known history. Notwithstanding the somewhat broad assertion of what is described as "principle" at [43], at [47] McCombe LJ noted the obviousness of the danger and at [60] conducted the proportionality assessment relevant to section 2(2). In McCombe LJ's reasoning, the obviousness of the danger did not operate as an absolute defence, but as one element of a balancing exercise.

82. In *Lewis v Six Continents* [2005] EWCA Civ 1805, the facts of which are similar to the present, the question identified for the court was whether the window was unsafe for anyone. Ward LJ and Sedley LJ found that the window did not present an obvious danger to an adult. On that basis the claim failed. The court explored the particular facts relating to the window and reached its conclusion upon them. At [15] Ward LJ identified the fact that if the risk assessment had recommended the fixing of limiters or guardrails (around the window) and the risk had been ignored, then "of course the claimant would be well on the way to success". In my view, this is another authority in which the relationship between the obviousness of the danger or risk and the content of the duty of care under section 2(2) of the 1957 Act was factually explored. Notably, on the particular facts of *Lewis*, if the danger had been obvious this would have supported a finding of a breach of duty.

83. For the reasons given, I do not read *Tomlinson* or *Edwards* as being authority for a principle which displaces the normal analysis required by section 2 of the 1957 Act: the analysis undertaken by the judge at [63] of his judgment. What a claimant knew, and should reasonably have appreciated, about any risk he was running is relevant to that analysis and, in cases such as *Edwards* and *Tomlinson*, may be decisive. In other cases, a conscious decision by a claimant to run an obvious risk may, nevertheless, not outweigh other factors: the lack of social utility of the particular state of the premises from which the risk arises (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. This was

a risk which was not only foreseeable, it was likely to materialise as part of the normal activity of a visitor staying in the bedroom.

84. Separate from the considerations above, there are a number of factual features which distinguish this case from those of *Edwards*, *Tomlinson* and *Geary*:

    i) The lower sash window was defective. No defect was present in the ornamental bridge in *Edwards*, the body of water in *Tomlinson*, nor the bannister in *Geary*;

    ii) In this case the judge found that a risk assessment would have made a critical difference. In *Edwards* McCombe LJ found that a risk assessment would have done no more than state the obvious;

    iii) The risk of injury was foreseeable. In *Edwards* the risk was remote and had never previously materialised;

    iv) The social value lost by taking preventative measures was low given that the top sash window could still be opened. In *Edwards* side barriers would have significantly altered the character of the ornamental bridge, in *Tomlinson* destroying the beaches would have been at huge social cost;

    v) The financial costs of fitting the window restrictors was negligible (£7 or £8 per window). The same cannot be said of the preventative measures in *Edwards* or *Tomlinson*;

85. A further and material distinction as between this case and the authorities relied upon by the appellant is the fact that the deceased was a guest at the appellant's hotel. In *Lewis* the claimant returned to his hotel room at around 10pm having consumed alcohol. He later fell from the window. Sedley LJ noted that the common duty of care is owed not in the abstract but by a particular occupier here, a medium sized hotel, to a particular visitor, a young man with nothing to distinguish him from the hotel's other adult guests. This observation reflects the provisions of section 2(3) of the 1957 Act and the references to "want of care" of a visitor. The formulation of the duty encompasses the recognition that visitors are not always careful.

86. 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.

87. 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.

88. For the reasons given, I do not accept the appellant's primary contention. 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. Subject to the opinions of King LJ and Elisabeth Laing LJ, I would dismiss this ground of appeal.

Section 2(5)

89. The defence of *volenti non fit injuria* was always a defence available to the occupier of the property and section 2(5) expressly preserves it. The editors of *Clerk & Lindsell on Torts*, 23rd Edition, 11-43 recognise this. At [36] of *Geary*, Coulson J accepted that the statutory offence has been confirmed to be indistinguishable from the common law defence of *volenti*.

90. In *Nettleship v Weston* [1971] 2 QB 691 at 701 Lord Denning expressed the doctrine thus:

> "Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of *volenti non fit injuria* has been closely considered, and, in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The [claimant] must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant …."

91. The maxim presupposes a tortious act by the defendant. The test is a high one.

92. If the defence is to succeed it must be shown that the deceased was fully aware of the relevant danger and consequent risk. In *Morris v Murray* [1991] 2 QB 6 Stocker LJ said that he would not go so far as to say that the test was objective. The issue in that case was whether there was evidence that the claimant was so intoxicated that he was incapable of appreciating the nature of the risk and thus did not consent to it.

93. The appellant identifies the finding by the judge at [76] ([49] above) as representing a determination by the judge that the deceased possessed full knowledge of the nature and extent of the risks sufficient to provide a defence to the appellant pursuant to section 2(5).

94. At [18], in making a finding of contributory negligence, the judge found that the deceased consciously adopted a precarious position, he could foresee the danger of falling, if not the precise manner, and very considerable care was required if he was to sit on the sill. Any lapse of concentration and he might fall. He concluded that "in choosing to act as he did he was guilty of a blameworthy failure to take reasonable care for his own safety." Upon that basis the judge made the unappealed finding of 60 per cent contributory negligence.

95. The deceased fell in the early hours of the morning. He had attended a wedding, drunk alcohol, when he returned to the room it is likely that he was hot and tired. He

was unable to sleep and felt the need for, at least, fresh air. In assessing his actions and the knowledge of any risk and its consequences, account can properly be taken of the condition of the deceased and his ability to fully appreciate what he was doing and the consequences of it, such as to meet the stringent requirements of the test of *volenti*.

96. It is pertinent to observe that the appellant, who owned and managed the hotel, did not appreciate the risk prior to the accident. In the circumstances, to make a finding that the deceased, a visitor, should possess greater knowledge than the occupier of the premises is a considerable step to take.

97. The findings of the judge, in particular at [76], represent knowledge of the general risk which the deceased faced. There is no finding that the deceased was aware of, and expressly or impliedly accepted, that the risk had been created by the appellant's breach of duty and by his actions he was deliberately absolving or forgiving the appellant for creating the risk. There is no finding that in sitting as he did the deceased was waiving his legal right to sue. In my judgment these are findings which provide a basis for the determination of contributory negligence. They do not go sufficiently far to meet the requirements of section 2(5).

98. The judge heard the evidence and assessed the witnesses. There is no challenge to his findings of fact. Notwithstanding the fact that neither party had raised section 2(5), it was open to the judge to make a finding pursuant to that section if he thought it was made out on the facts. He clearly did not. His finding was one of contributory negligence. In my judgment this was a paradigm exercise for the trial judge, who made a finding with which this court would not easily interfere. In my judgment there are no grounds to interfere with the judge's finding that the deceased was contributorily negligent in appreciating some risk but insufficient to provide the appellant with a complete defence to this action.

99. Accordingly, for the reasons given, and subject to the views of King LJ and Elisabeth Laing LJ, I do not accede to the appellant's appeal in respect of section 2(5) of the 1957 Act.

The criminal conviction

100. Section 47(1)(a) of the 1974 Act states that:

> "(1) Nothing in this Part shall be construed—
>
> (a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; …"

101. Given the clear wording of this section, I am unable to accept the conclusion of the judge at [92] that unless the conviction is challenged on its facts civil liability does axiomatically follow, as a matter of law. I accept the need for coherence and consistency as between the civil and criminal law which apply to the same set of facts, but those facts have to be explored in order to decide whether, and if so, how, a criminal conviction relates to civil liability.

102. I accept the following contentions made by the respondent:

i) The risks identified in section 3(1) of the 1974 Act include risks arising out of the condition of the work premises (section 1(3)) and *Hampstead Heath Swimming Club* above at [51] and [52]). The word "risk" in section 3(1) is "directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against": *R v Chargot Ltd* [2009] 1 WLR 1 at [27]. Foreseeability of risk or danger is relevant to the question whether such a material risk to safety exists: *R v Tangerine Confectionery Ltd* [2011] EWCA Crim 2015 at [36].

ii) The key constituent of the criminal offence, namely the existence of a reasonably foreseeable material risk, which any reasonable person would appreciate and take steps to guard against, reflects the obligation under section 2 of the 1957 Act. In *Hampstead Heath Swimming Club* at [46] Stanley Burnton J held that both section 2 of the 1957 Act and section 3 of the 1974 Act are concerned with responsibility for fault and that it was correct to derive from the judgments in *Tomlinson* an approach to the interpretation and application of the 1974 Act in this context. At [63] he held that the requirement under section 3 of the 1974 Act was subject to the same considerations as those referred to in *Tomlinson*.

iii) In her pleading the respondent had relied upon the criminal conviction pursuant to section 11(1) of the Civil Evidence Act 1968. The appellant was entitled to challenge the inference that it would have been taken to have committed the offence (section 11(2)(a)) but did not do so. At trial the appellant accepted that through its guilty plea there was recognition of a reasonably foreseeable risk of adults falling from the window due to its low position, which risk should have been addressed.

103. In this case the risk, the existence of which the appellant accepted in its basis of plea in the criminal proceedings, was that it was reasonably foreseeable that an adult could fall from a window such as this due to its position. The appellant also accepted that that risk should have been addressed. The risk was at the core of the appellant's plea of guilty. It was a material risk which was causative of the fall of the deceased. The respondent describes the deceased's accident as a paradigm example of the risk which the appellant was under a duty to guard against. I agree.

104. 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.

105. It follows, and subject to the opinions of King LJ and Elisabeth Laing LJ, I accept the appellant's contention that the judge erred in holding that, as a matter of law, an occupier who was in breach of his statutory duty under section 3(1) of the 1974 Act was *ipso facto* in breach of his duty to a visitor under the 1957 Act.

106. Given my findings as to:

i) the nature of the balancing exercise to be carried out pursuant to section 2(2) of the 1957 Act;

ii) the breach of that duty on the unchallenged facts of this case; and

iii) the fact that a defence is not made out pursuant to section 2(5);

the determination made by the judge that there should be judgment for the respondent subject to a reduction of 60% contributory negligence is upheld.

Lady Justice Elisabeth Laing:

107. I agree.

Lady Justice King:

108. I also agree.