Voluntary Acceptance of an Obvious Risk May Not Be Fatal to an Occupiers' Liability Claim

Posted On: 22/01/2021
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In *The White Lion Hotel v James* [2021] EWCA Civ 31 the Court of Appeal considered the ambit of the well-known authorities on 'obvious risks' in the context of occupiers' liability, and the proper approach to section 2(5) of the Occupiers' Liability Act 1957.

Background

HHJ Cotter QC at first instance gave judgment for the Claimant, the widow and personal representative of the deceased, in respect of an accident which was found to have been caused by the Defendant's breach of duty under section 2 of the Occupiers' Liability Act 1957. The brief circumstances of the accident were as follows. On 5 July 2015 the deceased was a guest at the Defendant's hotel. Whilst sitting on the windowsill in his room and leaning out of the sash window the deceased fell two stories to his death.

The Defendant had pleaded guilty to a breach of section 3(1) of the Health and Safety at Work etc. Act 1974 in respect of the window, which it was accepted had posed a foreseeable risk of harm. Judgment was entered subject to a finding of contributory negligence of 60%. Permission to appeal was granted to the Defendant.

Grounds of Appeal – Voluntary Acceptance of Risk Principle

The relevant ground of appeal for the purpose of this blog is whether the judge failed 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 doing so. Reliance was placed on the *ratio* of *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, *Edwards v Sutton London Borough Council* [2017] PIQR P2 and *Geary v JD Weatherspoon* [2011] EWHC 1506 (QB).

Outcome – No General Principle

In the leading judgment of Nicola Davies LJ, the Court of Appeal rejected the existence of a general principle that a person of full age and capacity who chooses to run an obvious risk cannot ground an action for damages on the basis of the Defendant's failures, noting that it was not borne out by the authorities relied upon. Rather, the Court found at [83] that:

> "*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.*"

Comment

This interpretation could give rise to a situation whereby an obvious risk is consciously accepted but is outweighed by other factors, such that the risk falls within the ambit of the duty of care. But if an obvious risk is found to be consciously, or voluntarily, accepted then arguably section 2(5) of the 1957 Act bites whatever competing interests arose during the 'ambit of the duty' balancing exercise. It is difficult to see in what circumstances a claimant who has consciously accepted an obvious risk can be said to lack full knowledge of the nature and extent of such risk so as to deny a section 2(5) defence.

Of course, it is a different question whether the deceased in fact voluntarily accepted the risk, to which the extent of his knowledge and the obviousness of risk are both relevant factors. Clearly a less obvious danger is more likely to give rise

to risks, the nature and extent of which may not be fully appreciated.

At the time of writing there is no further appeal contemplated, however, given the importance of the general principle denied by the Court of Appeal it may well be ripe for consideration by the Supreme Court.

To view the full judgment of the Court of Appeal, click here.