Case Comment

English Heritage v Taylor

personal injury - occupiers' liability - risk
(CA (Civ Div), Lord Dyson MR, McFarlane LJ, Beatson LJ, 11 May 2016, [2016] EWCA Civ 448)

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Subject: Torts . **Other related subjects:** Arts and culture. Negligence. Personal injury.
Keywords: Breach of duty of care; Contributory negligence; Duty to warn; Heritage property; Occupiers' liability
Legislation:
Occupiers' Liability Act 1957 (c.31) s.2
Case:
English Heritage v Taylor [2016] EWCA Civ 448 (CA (Civ Div))

J.P.I.L. C130 On 13 April 2011, the claimant Mr Taylor was visiting Carisbrooke Castle on the Isle of Wight. A designated walk on the site ran around the tower fortifications. There was an elevated cannon-firing platform. Directly below the platform, at the base of a steep slope, was a grass pathway. There was also an informal path down the slope from the platform to the pathway. On the other side of the pathway, beyond a bastion wall, was a dry moat. Mr Taylor set off down the informal path, lost his footing and fell across the grass pathway and over the wall into the moat.

Mr Taylor was almost 60 years of age at the time. He was a professional man who was fit and well. He had no history of fits, dizzy spells, passing out, disorientation, or anything that might have contributed to or caused the accident. He had no memory of it.

A central issue in the case was whether anyone contemplating going down the steep slope to the pathway could have seen that there was a sheer drop into the moat, such that there was an obvious danger. Taylor***J.P.I.L. C131*** claimed that the accident was caused by English Heritage's negligence and/or its breach of s.2 of the Occupiers' Liability Act 1957 ("OLA"). During the trial Mr Recorder Blunt QC visited the site before finding that English Heritage had breached s.2 in failing to warn visitors, by means of a sign, of the danger which gave rise to the accident. He also found that Mr Taylor was 50 per cent to blame.

English Heritage appealed challenging the recorder's findings regarding the breach of s.2, causation and the apportionment of blame. It submitted that, if the decision was upheld, it and similar public organisations would be under pressure to adopt an unduly defensive approach to the guardianship of historic sites, leading to an unwelcome proliferation of unsightly warning signs that was contrary to the public interest.

The Court of Appeal rejected arguments advanced by English Heritage for reversing the decision regarding the breach of s.2. They held that the sheer drop was not an obvious danger and English Heritage should have taken reasonable steps to protect visitors against it. They concluded that the recorder was entitled to find that, on the balance of probabilities, causation was established. The risk that Mr Taylor took was that he would lose his balance and fall over on a steep grassy slope. That would have been most unlikely to cause him to suffer a serious head injury. The risk of falling 12 feet down a sheer drop was of a different magnitude, involving a real and obvious risk of serious injury. A sign warning of the sheer drop would have been likely to influence the behaviour of most sensible individuals.

When determining the issue of contributory negligence, the recorder had to balance the degree of fault and causation of injury. A 50:50 apportionment was held to be reasonable.[1] It was relevant that English Heritage's fault was of longstanding, whereas Taylor's was momentary.

Their overall conclusion was that the decision was a straightforward application of the principle that adult visitors did not require warnings of obvious risks except where they did not have a genuine and informed choice.[2] There was no basis for interfering with the recorder's finding that the sheer drop from the pathway into the moat was not an obvious danger.

The court recognised that the question of whether a danger was obvious might not always be easy to resolve, and might present an occupier of land with a difficulty. However, there were many areas of life in which difficult borderline judgments had to be made. That was well understood by the courts and was taken into account in deciding whether negligence or a breach of s.2 had been established. In that context, it was highly relevant that the common duty of care was to take such care "as in all the circumstances [was] reasonable" to see that the visitor was "reasonably" safe in using the premises for the purpose for which he was invited or permitted by the occupier to be there.
The court was, therefore, required to consider all the circumstances. Those would include how obvious the danger was and, in an appropriate case, aesthetic matters. If an occupier was in doubt as to whether a danger was obvious, it might be advised to take reasonable measures to reduce or eliminate the danger. The steps needed to be no more than reasonable steps, which was why the decision in this case should not be interpreted as requiring occupiers like English Heritage to place unsightly warning signs in prominent positions all over sensitive historic sites. The recorder found the existence of a breach of the common duty of care on a very specific basis, namely the failure to provide a sign warning of a sheer drop which was not obvious.
The appeal was dismissed.***J.P.I.L. C132***

Comment

Whilst this case attracted a fair bit of media attention,[3] it establishes no new principle regarding the law applicable to occupiers. It clearly centred on the obviousness or otherwise of the fall from height the claimant was at risk of. No duty of care is generally owed to a visitor who is fully appraised of the risk in question as long as he is free to do what is necessary for his own safety. Hence there is generally no duty to fence the edge of a cliff unless there is a hidden drop or an unusual feature of the landscape.[4] But if the only route across the land is along an unfenced cliff edge, the occupier may owe a duty to reduce the risk of falling. In such circumstances a simple warning may not suffice.[5]
In the present case the trial judge had made a finding of fact that the sheer drop from the grass pathway into the moat would not have been obvious to the claimant. The appellant (English Heritage) contended that the judge was wrong to reach this conclusion, and that as the Court of Appeal was in the same position as the trial judge to interpret the photographs of the locus it should reverse his finding. In this regard the appellant relied upon a judgment of the Court of Appeal in *Manning v Stylianou* [6] to the same effect. The problem for the appellant was that the trial judge had not just based his finding on a view of photographic evidence, he had also received the benefit of a site visit. Thus the Court of Appeal found itself to be in an inferior position to the trial judge and it considered the appellant's attack on the judge's conclusion to be "hopeless".
The trial judge's decision regarding what would have been obvious or not to a claimant ought, in any event, to be a difficult issue to successfully challenge. We are all familiar with the dictum of Brooke LJ in *Tanfern v Cameron MacDonald* that:
"the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or could have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible." [7]
But there is also important guidance from Robert Walker LJ in *REEF Trade Mark* viz:
"where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation." [8]
Quite properly therefore the Court of Appeal in the present case was not prepared to overturn the trial judge's assessment of whether the drop was obvious. In the not so distant past it was almost impossible to obtain permission to appeal such findings of fact. Perhaps this is a signal that the Court of Appeal will again be reluctant to entertain such appeals.
Further arguments made in the appeal were in the nature of policy, referred to by the Master of the Rolls as the "in terrorem" arguments. The appellant argued that if its appeal was dismissed, organisations like English Heritage would be under pressure to adopt a defensive approach to the guardianship of their historic sites which will lead to a proliferation of unsightly warning signs. This, it said, would be contrary to the public interest, and it would fuel the popular conception that this country is in the grip of a "compensation culture".
Fortunately, the Court of Appeal were not minded to base their decision on the basis of an

un-evidenced "popular conception" of there being a "compensation culture". Whether or not one considers the "compensation culture" to be a misconception, it is not the function of the appellate***J.P.I.L. C133*** courts to satisfy popular demand nor to absolve English Heritage from the obligations of a reasonable occupier, though some may disagree. The trial judge's findings were unassailable.

The Court of Appeal acknowledged that questions of whether a danger is "obvious" may not be always be easy to resolve, but such situations are common, and the test of reasonableness within s.2 of the OLA, which requires "all the circumstances of the case" to be taken into account, enables the court to weigh in the balance such matters as aesthetics in appropriate cases. This aspect of the judgment is potentially useful for occupiers. The Master of the Rolls also said:

"If an occupier is in doubt as to whether a danger is obvious, it may be well advised to take reasonable measures to reduce or eliminate the danger." [9]

Finally, as for the challenge to the judge's assessment of contributory negligence, the Master of the Rolls went so far as to say:

"It is well established that an appellate court will not interfere with a lower court's apportionment of contributory negligence: see *Clare v Perry [2005] EWCA Civ 39* per Pill LJ at para 44 and *Jackson v Murray [2015] UKSC 5, [2015] EWCA 2 All ER 805* per Lord Reed at para 31." [10]

This may have been over-stating the position somewhat, but it possibly emphasises the court's intention to send a message that appeals on matters of *degree* rather than *principle* should not be readily entertained.

Practice points

- If it is likely to have a beneficial effect on the judge's decision and is reasonable, consider arranging a site visit. It will make it harder for the judge's decision to be appealed—though this may of course be a double-edged sword.
- Where the challenge is to the trial judge's assessment of issues which involve no legal principle but are simply a matter of degree, successful appeals ought to be rare, and permission granted sparingly.
- Aesthetic matters can be brought into the consideration of "all the circumstances of the case" for the purposes of s.2(2) OLA in appropriate situations. To some extent this feeds into s.1 of the Compensation Act 2006, and the "social value of the activity" addressed by Lord Hoffman in *Tomlinson*.[11]

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1. *Clare v Perry (t/a Widemouth Manor Hotel) [2005] EWCA Civ 39; (2005) 149 S.J.L.B. 114* and *Jackson v Murray [2015] UKSC 5; [2015] 2 All E.R. 805* considered.
2. *Tomlinson v Congleton BC [2003] UKHL 47; [2004] 1 A.C. 46* followed.
3. See for example *"Historic sites could be littered with 'irritating' warning signs after pensioner fell in moat", The Telegraph, 12 May 2016*.
4. See *Donoghue v Folkestone Properties Ltd [2003] EWCA Civ 231; [2003] Q.B. 1008* at [35].
5. See for example the dicta of Lord Reid in *AC Billings & Sons v Riden [1958] A.C. 240 HL* at 250 et seq.
6. *Manning v Stylianou [2007] EWCA Civ 1655*.
7. *Tanfern v Cameron-MacDonald [2000] 1 W.L.R. 1311 CA (Civ Div)* at [32].
8. *Re REEF Trade Mark [2002] EWCA Civ 763; [2003] R.P.C. 5* at [20].
9. *English Heritage v Taylor [2016] EWCA Civ 448* at [30].
10. *English Heritage v Taylor [2016] EWCA Civ 448* at [26].
11. *Tomlinson v Congleton BC [2003] UKHL 47; [2004] 1 A.C. 46* at [34].