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FOIL UPDATE 18 January 2021

Occupiers' liability and *volenti non fit injuria*

The White Lion Hotel v James (Deceased) (2021) EWCA Civ 31

This was an appeal from a judgment in favour of the claimant, the widow and personal representative of the estate of her late husband, (the deceased), in respect of his death, when he fell from a second-floor window while a visitor at the defendant's hotel. A reduction of 60% was made for the deceased's contributory negligence.

The deceased, aged 41, was staying in a twin room on the second-floor of the hotel. 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.

Following an investigation into the accident, the appellant was prosecuted for offences contrary to S3 Health and Safety at Work Act 1974 ("the 1974 Act"). A guilty plea was entered upon an agreed basis.

The claim was brought pursuant to S2 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 defendant/appellant was in breach of the common duty of care pursuant to S2 of the 1957 Act in failing to take reasonable care for the safety of the deceased in using the room, subject to the finding of contributory negligence.

IN BRIEF

The deceased fell to his death while sitting on the ledge of an open window.

He had been contributorily negligent but had not accepted the risk of falling .within the meaning of S2(5) Occupiers' Liability Act 1957.

The defendant's conviction of a related criminal offence, was not in itself proof of negligence.

On the defendant's appeal, the first question for the court was whether the judge was correct to find that the deceased was owed a duty of care pursuant to S2 of the 1957 Act and, if so, whether that duty was breached.

The assessment of whether there was liability under S2 was 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 S2(5) that the deceased was not owed the duty by reason of his voluntary acceptance of the risk created by the danger?

The trial judge's findings at trial included the following relevant findings of fact. The deceased was a visitor to the defendant's hotel on a hot day. 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. The deceased had consumed alcohol but was not drunk. He 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.

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 was 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.

Prior to the accident the defendant had not carried out a suitable and sufficient risk assessment of some of the windows in their hotel bedrooms. The cost of the restrictors on the window was £7 or £8. The defendant's guilty plea 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.

Given the findings of fact, the conclusions drawn by the judge as to the existence of the defendant's duty to the deceased, a lawful visitor, the foreseeable risk of serious injury due to the state of the premises, the absence of social value of the activity leading to the risk and the minimal cost of preventative measures were unassailable.

It followed from those findings that the issue thereafter to be addressed was whether a defence was available pursuant to S2(5) of the 1957 Act. The defendant's primary ground of appeal, namely that a person of full age and capacity who chose to run an obvious risk could not 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 was said to be the ratio of *Tomlinson*, *Edwards* and *Geary*.

Rejecting these submissions, the appellate court found that it did not read the case law as being authority for a principle which displaced the normal analysis required by S2 of the 1957 Act. There was no absolute principle that a visitor of full age and capacity who chose to run an obvious risk could not found an action against an occupier on the basis that the latter had either permitted him so to do, or not prevented him from so doing.

The defence of *volenti non fit injuria* was always a defence available to the occupier of the property and S2(5) expressly preserved it. If the defence was to succeed it must be shown that the deceased was fully aware of the relevant danger and consequent risk. 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% contributory negligence.

The deceased fell in the early hours of the morning. He had attended a wedding, drunk alcohol, when he returned to the room it was 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 could 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*.

It was pertinent to observe that the defendant, 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 was a considerable step to take. The judge's findings which provided a basis for the determination of contributory negligence, did not go sufficiently far to meet the requirements of S2(5).

The appellate court did not accept the conclusion of the judge that unless a conviction was challenged on its facts, civil liability axiomatically followed, as a matter of law. 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 would depend upon the facts of each case.

The full judgment may be found at: [The White Lion Hotel (A Partnership) v James [2021] EWCA Civ 31 (15 January 2021) (bailii.org)]