THE OCCUPIERS' LIABILITY ACT 1957 REVISITED

Edwards v London Borough of Sutton

Former Prime Minister Harold Macmillan once said "….*to be alive at all involves some risk*…." and in an important judgment handed down on 12 October 2016 that examined the treatment in law of the concept of risk to a visitor under the Occupiers' Liability Act 1957 ("the OLA"), the Court of Appeal wholeheartedly agreed.

The decision is helpful to "occupiers" of land and, in particular, to local authorities dealing with the ever present risk of injury to visitors to public parks, gardens and other types of open land under an authority's supervision.

Lord Justice McCombe's leading judgment in *Edwards v London Borough of Sutton [2016] EWCA Civ 1005* reversed the December 2014 High Court decision of HHJ Gore, in which Sutton were found to be primarily liable for breach of a common duty of care arising under the OLA, for a serious injury sustained by Mr Edwards when he fell from a small ornamental footbridge in one of its public parks.

The Facts

Mr Edwards was a 64 year old retiree who, with his wife, had decided to take up cycling as a form of exercise. The weather was dry, cold and crisp, and Mr and Mrs Edwards took a circular route round the park. The route included an arched ornamental bridge with low parapets each side.

As Mr Edwards was wheeling his bike across the bridge, he lost his balance for no apparent reason and fell over the parapet into the water below, landing on some rocks. The consequences were severe - he unfortunately suffered a spinal cord injury, rendering him paraplegic.

Mr Edwards put forward a claim for significant damages from Sutton, on the basis that Sutton had failed to take reasonable care to see that, as a visitor to the park, he was safe in using the bridge for a purpose for which he was permitted to use it. He said that the bridge ought to have had side protection barriers and that Sutton had failed to warn visitors of its dangers. What is more, Sutton had not carried out any satisfactory risk assessment on the danger posed by bridge, albeit that, as became clear at the trial, there was no history of accident, injury or complaint in relation to it.

At first instance, the Judge agreed with Mr. Edwards. He found that the risk of a fall from it ought to have been identified and assessed by Sutton, and whilst the bridge did not need to be reconstructed or rebuilt in

order to protect users, there was a foreseeable risk of catastrophic injury. The Judge decided that Sutton should, at the very least, have warned users of the dangerously low parapets.

In a decision that contrasted sharply with existing case law on the need to establish as a starting point that the premises were unsafe and that it was unnecessary to warn an adult of an obvious risk, Judge Gore decided that primary liability lay with Sutton. In doing so, he found that Sutton's duty under the OLA necessitated an enquiry into whether the visitor was *"safe in using"* the premises.

The Appeal

Reversing that decision, the Court of Appeal found that the Judge had misdirected himself.

The Court agreed with the appellant Sutton, that the Judge had paid *"insufficient regard"* to section 1 of the OLA. That section states:-

> *"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 …"*

and in section 2(2):-

> *"(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 visitor will be reasonably safe is using the premises for the purposes for which he is……permitted by the occupier to be there…"*

The Court of Appeal found that it was therefore necessary for the Judge to have identified what danger there was before seeing to what (if anything) the occupier's duty attached. In doing so, the Appeal Judges echoed the approach of Lord Hobhouse in *Tomlinson v Congleton BC [2004] 1 AC 46.* So, whilst recognising that a bridge with low parapets presented more danger of a fall than one with high guard rails, and that it could objectively present a "danger" arising from the state of the premises, the Appeal Judges refused to accept that this meant that in order for an occupier to discharge its common duty of care, no such bridges (which were accepted to be a common feature in public parks), should be left open to visitors.

The reason for this rested in what were said to be two well-recognised principles of law:-

1. The treatment in law of the concept of risk – in other words, the degree of risk is central to the assessment of what reasonably should be expected of the occupier and what would be a reasonable response to that degree of risk. Whilst suffering a spinal cord injury like Mr. Edwards, could hardly be more serious, it did not mean that there was therefore a serious risk of that injury. Precautions could not be taken against every foreseeable risk – simply because there was a foreseeable risk of serious injury, it did not mean that Sutton was under a duty to do what was necessary to prevent it. There had to be a balance of risk, the gravity of injury, the cost of preventative measures and social value.

2. Occupiers are not under a duty to protect or even to warn against obvious dangers – the Court thought this a particularly forceful consideration in this case; the approach to the bridge was clear and unobstructed, and its width and the height of the parapets were obvious to the eye. As such, a warning would not have told Mr Edwards anything that he did not know from his own observation. In addition, the lack of a formal risk assessment was not decisive – the Appeal Judges queried what would a formal assessment have produced *"… beyond a statement of the obvious, namely that this was a bridge with low parapets over water"* and that *"persons not exercising proper care might fall off".*

The significance…

There must have been, to put it mildly, a sigh of relief by local authority occupiers and their insurers alike, when the decision was handed down and the Court of Appeal's approach made known. Had HHJ Gore's decision, which set a high standard, not been reversed, its practical impact would have been potentially significant. Obligations to undertake expensive risk assessments that were disproportionate to the actual risk being run would have been established, as would the need to put up warning signs for even obvious risks, to adapt certain structures or more likely to restrict access to them, and so to erode further the social benefit offered by our public parks.

Put simply by Lord Justice McCombe, "...*an occupier is not an insurer against injuries sustained on his premises"* and, most importantly *"…not every accident is the fault of another...".* Life is, as Macmillan says, a risk .

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