The extent of the duty

Magnus Hassett examines three recent high-profile court decisions and what they mean for landowners and their advisers

Magnus Hassett is a partner in the commercial property group at Forsters LLP

'In the three cases considered, the court concluded that the law did not allow them to compensate the claimants for their injuries, no matter how desirable that outcome might seem given the catastrophic and life-changing injuries suffered by the claimants.'

The tragic facts behind the three occupiers' liability cases discussed in this article led to plenty of media interest. However, for practitioners, the cases primarily serve as a useful reminder of some key principles, in particular that:

- claimants who are injured having voluntarily undertaken a risky activity on third-party land are likely to find their claim fails; and
- occupiers who have taken reasonable care to see that visitors are reasonably safe will have satisfied their duty of care to visitors who are injured on their land.

In the three cases considered, the court concluded that the law did not allow them to compensate the claimants for their injuries, no matter how desirable that outcome might seem given the catastrophic and life-changing injuries suffered by the claimants.

As well as adding to the weight of case law on visitors who voluntarily accept risks, the judgments provide further guidance for landowners as to what they are required to do to discharge their duty of care to visitors under the Occupiers' Liability Act 1957.

Occupiers' liability and visitors: the law

The duty owed to visitors

Under s2(2) of the Occupiers' Liability Act 1957, an occupier of premises owes a duty of care to visitors:

> ... 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 the visitor is invited or permitted by the occupier to be there.

It is widely acknowledged that the extent of this statutory duty is essentially the same duty as arises under the general common law of tort.

The exception

In relation to risky activities that are willingly undertaken by visitors, s2(5) of the Occupiers Liability Act 1957 goes on to provide that:

> 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).

Although this article looks primarily at the obligations that occupiers owe to visitors, it is worth mentioning that under the Occupiers Liability Act 1984, which is concerned with the lesser duties owed to trespassers, s1(6) is, in the same terms, stipulating that:

> ... no duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person.

Accordingly, under both statutes, there is no liability on the part of an occupier for risks willing accepted by the visitor or trespasser. The same position applies at common law, as summarised in the maxim *volenti non fit injuria*.

Claimants who voluntarily accept risks will find their claim fails

The House of Lords decision in *Tomlinson (FC) v Congleton Borough Council & ors* [2003] made it clear that it will be extremely rare for an occupier

of land to be put under a duty to prevent people from taking risks that are inherent in the activities they freely choose to undertake upon the land. Scrutton LJ, in the case of *The Carlgarth* [1927], put it a different way:

There is no liability on the part of an occupier for risks willing accepted by the visitor or trespasser.

> When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters...

Two recent cases before the courts looked at this principle again.

***Geary v JD Wetherspoon plc* [2011]**

The facts in the recent case of *Geary v JD Wetherspoon plc* [2011] are remarkably similar to the example given by Scrutton LJ. The case involved a claimant who was injured at a Wetherspoons pub in Newcastle. One of the original features of the pub, which was a converted Victorian building, was a grand open staircase in the centre of the building, with sweeping banisters on both sides. The banister was an original feature that, if installed now, would not be permitted by building regulations as it is set at a lower height than modern standards would require.

Mrs Geary was at the pub with her work colleagues. She had been drinking prior to the incident but the judge accepted that she was not drunk. The banisters apparently put Mrs Geary in mind of a scene from the film *Mary Poppins* and, on her way out of the pub, she and a colleague decided to slide down them. In doing so, she fell over the side of the staircase and onto a marble floor below, sustaining a fracture to her spine that has resulted in tetraplegia.

Mrs Geary sued Wetherspoon for not taking steps to prevent such an incident occurring. She said the accident was foreseeable. She pointed out that the pub had encountered problems previously with customers sliding down the banisters and hurting themselves. It was pointed out that, following the incident involving Mrs Geary, the simple solution of winding a thick rope around the banister had prevented any reoccurrence of sliding.

On the other hand, Mrs Geary acknowledged in court that she knew that what she was doing carried the obvious risk of falling off the banister, that such an activity would not have been allowed by the pub, and that she had chosen to take the risk. In the light of this frank concession, the court dismissed her claim because the law does not protect people who voluntarily accept an obvious risk. Mrs Geary was the author of her own misfortune.

The judge acknowledged that Mrs Geary would be bitterly disappointed with the outcome of the case but commended her for her 'candour, straightforwardness, and resilience'. He said that no-one who heard Mrs Geary's evidence in court could have had anything but the greatest possible sympathy for her as she bravely deals with the consequences of a moment's error of judgment.

***Grimes v Hawkins & anor* [2011]**

Another case that came to the media's attention, *Grimes v Hawkins & anor* [2011], concerned an 18-year old woman who, after an evening at the pub, was invited back to a house with a number of friends by the householder's daughter. At the house a number of people took the opportunity to swim in the householder's indoor pool. The claimant was provided with a swimming costume by the householder's daughter and the defendant accepted that Ms Grimes was to be treated as a visitor rather than a trespasser.

Ms Grimes, who was an accomplished swimmer, was left paralysed after sustaining a neck injury when diving into the swimming pool and hitting the bottom.

In her judgment, Mrs Justice Thirlwall DBE concluded that the owner of the house was not in breach of his duty to the claimant under the Occupier's Liability Act 1957 because the claimant had voluntarily undertaken a risky activity:

> [The claimant] did something which carried an obvious risk. She chose, voluntarily, to dive when, how and where she did, knowing the risks involved, as she acknowledged on the first day of the trial.
>
> She knew how much water she needed to dive in. In my judgment either she misjudged the dive, or she misjudged the depth of the water, or she did both.

The judge went on to consider whether, even if the claimant voluntarily accepted the risk, the occupier was still obliged to take steps to keep the visitors safe:

> The pool was not unsafe for diving. I have no doubt that some mature adults faced with a group of young adults in high spirits, some of whom had had too much to drink, would send them all home rather than allow any of them into a swimming pool. But that is not to say that the duty owed to the claimant under the Occupier's Liability Act 1957 required the defendant to put the pool out of bounds that night. The defendant was not required to adopt a paternalistic approach to his visitors, all of whom were adults, all of whom were making choices about their behaviour, exercising their free will.
>
> I do not accept that it is incumbent on a householder with a private swimming pool to prohibit adults from diving into an ordinary pool whose dimensions and contours can clearly be seen. It may well be different where there is some hidden or unexpected hazard but there was none here.

Occupiers who have taken reasonable care to see that visitors are reasonably safe will have satisfied their duty of care

The case of *Bowen & ors v The National Trust* [2011] was not a case that involved risky behaviour undertaken by the claimants. Instead, it involved a freak and tragic accident at a National Trust property at Felbrigg Hall in Suffolk. The surrounding estate includes the Great Wood in which there are close to 250,000 mature trees. The wood is used by the public, including by schoolchildren for outdoor educational activities. In June 2007, one such group of schoolchildren was using the Great Wood. The children were following a trail, supervised by a teacher, when it began to rain and they sheltered briefly under the canopy of a mature beech tree. Entirely without warning, a large branch from the tree fractured and fell on the group. One of the children was killed and three other children suffered fractures and serious injuries.

The claimants argued that the National Trust was in breach of its duty of care under the Occupiers Liability Act 1957 to take such care as in all the circumstances was reasonable to see that the visiting children were safe.

In looking at whether the National Trust had taken adequate care, the court examined the steps that the National Trust had taken to maintain a regime of tree inspections at the property.

In looking at whether the National Trust had taken adequate care, the court examined the steps that the National Trust had taken to maintain a regime of tree inspections at the property. In Mackay J's words:

> I have to decide whether the judgment [which the National Trust's tree inspectors] formed, acting together as they did, was one which no reasonable tree inspector in those circumstances could have formed... risk assessment in any context is by its very nature liable to be proved wrong by events, especially when as here the process of judging the integrity of a tree is an art not a science, as all agree. I accept these inspectors used all the care to be expected of reasonably competent persons doing their job, and the defendant had given them adequate training and instruction in how to approach their task. To require more would serve the desirable end of compensating these claimants for their grievous loss and injuries. But it would also be requiring the defendant to do more than was reasonable to see that the children enjoying the use of this wood were reasonably safe to do so. I regretfully conclude that I cannot find that the defendant was negligent or in breach of its duty in respect of this tragedy.

The court found that the National Trust had done what was reasonable in the circumstances to see that the visitors were reasonably safe.

Summary

The cases are a helpful reminder to both landowners and potential claimants of the tests the court will apply when examining occupiers' liability claims.

From a landowner's point of view, the outcome of these cases:

- Provides some reassurance, in that it remains clear that claimants who have voluntarily accepted risks are unlikely to find sympathy in the courts and landowners who have taken adequate steps to keep visitors reasonably safe will not be held liable simply to compensate claimants for tragic and unforeseeable accidents.
- Reinforces the need for landowners to have adequate public liability insurance and to ensure that they are actively complying with their obligations under the Act, to take reasonable care to ensure that visitors are reasonably safe. In order to be able to demonstrate that they are discharging their obligations, it is essential that a proper paper trail of risk assessments should be maintained. ■

Bowen & ors v The National Trust [2011] EWHC 1992 (QB)
Carlgarth [1927] P 93
Geary v JD Wetherspoon Plc [2011] EWHC 1506 (QB)
Grimes v Hawkins & anor [2011] EWHC *2004 (QB)*
Tomlinson (FC) v Congleton Borough Council & ors [2003] UKHL 47