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Is It Obvious? The Duty to Warn in Package Cases

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Obvious risk: *Tomlinson v Congleton BC [2003] 3 WLR 705*

The facts:

- The claimant, a capacitous 18 year old, dived into a shallow lake on the Defendant's land;
- He struck his head on the bottom of the lake and was rendered tetraplegic;
- He sued the Council under the Occupiers' Liability Act 1984, which regulates the duty owed by occupiers to trespassers;
- The Council had placed warning notices around the lake.

Obvious risk: *Tomlinson v Congleton BC*

The decision of the House of Lords: the ratio decidendi:

- *Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk*;
- *It follows that there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises.*

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Obvious risk: *Tomlinson v Congleton BC*

The decision of the House of Lords: the obiter dicta:

- *the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the Council was under a duty to do what was necessary to prevent it. But this in my opinion is an oversimplification;*
- *I do not regard the financial cost as a significant item in the balancing exercise which the court has to undertake. There are two other related considerations which are far more important. The first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the Council should be entitled to allow people of full capacity to decide for themselves whether to take the risk.*

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Obvious risk: *Tomlinson v Congleton BC*

The decision of the House of Lords: the obiter dicta:

- *I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair;*
- *A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, or in the case of employees, or some lack of capacity, such as the inability of children to recognise danger.*

The Compensation Act 2006

Section 1 of the Act enshrines the *Tomlinson* principle:

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

Obvious risk: *Tomlinson v Congleton BC*

The aftermath:

- *Edwards v LB Sutton [2016] EWCA Civ 1005* – no duty to install guardrails on a bridge;
- *Cook v Swansea CC [2017] EWCA Civ 2142* – no duty to grit a car park in icy weather;
- *Geary v JD Wetherspoon [2011] EWHC 1506 (QB)* – no duty to prevent sliding down the bannisters in the manner of Mary Poppins – well, not *quite* like that (hence the claim).
- *Kolasa v Ealing Hospital [2015] EWHC 298 (QB)* – no duty to a drunk patient who discharged himself and fell after climbing onto a wall outside the hospital.

Obvious risk: *Evans v Kosmar Villa Holidays [2008] 1 WLR 297*

The facts:

- The claimant, a capacitous 17 year old, dived into a hotel swimming pool in Corfu;
- He struck his head on the bottom of the pool and was rendered tetraplegic;
- He sued the tour operator under the Package Travel, Package Holidays and Package Tours Regulations 1992;
- The hotel and the tour operator were aware that guests regularly dived into the pool without reprimand.

Obvious risk: *Evans v Kosmar Villa Holidays*

The decision of the Court of Appeal:

- *If there was a duty to exercise reasonable care to guard against what the claimant did in this case, then in my view the judge was entitled to find a breach of duty. It was open to him to accept the evidence of the claimant's expert as to the deficiencies of the signage, and to find non-compliance with the FTO guidance; and his conclusion that there was a failure to exercise reasonable care, in particular as to the prominence of the "no diving" signage around the pool, is not one with which there is any reason to interfere.*

Obvious risk: *Evans v Kosmar Villa Holidays*

The decision of the Court of Appeal:

- *But did the duty of care extend that far? That risk was obvious to an ordinary able-bodied adult such as the claimant. The evidence shows that he knew of the risk and was able to assess it for himself. He took a deliberate decision to dive in. Kosmar was under no duty to warn him against such a course or to take other measures to prevent it.*

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Obvious risk: *Evans v Kosmar Villa Holidays*

The decision of the Court of Appeal:

- *The core of the reasoning in Tomlinson was that people should accept responsibility for the risks they choose to run and that there should be no duty to protect them against obvious risks, subject to Lord Hoffmann's qualification as to cases where there is no genuine and informed choice or there is some lack of capacity. That reasoning was held to apply in relation not only to trespassers but also to lawful visitors. I do not see why the reasoning should not also apply to persons to whom there is owed a duty of care in similar terms under a contract of the kind that existed in this case.*

Obvious risk: *Evans v Kosmar Villa Holidays*

The aftermath:

- *Evans* has largely been used by claimants' representatives to found an argument that evidence of local standards is not necessarily required in cases of this nature (cf *Morgan v TUI [2020] EWHC 2944 (Ch),* an argument which is almost certainly wrong*;*
- It has, however, been followed, in *Wells v Full Moon Events [2020] PIQR P18* – no duty to warn of inherently obvious risks associated with offroad motorcycling.

Obvious risk: *Evans v Kosmar Villa Holidays*

The aftermath:

- In *McCarrick v Park Resorts Limited, Manchester District Registry, 26th October 2012,* the defendant occupier owed a duty to the claimant to post depth and No Diving signs around its swimming pool because the risk posed by diving into the pool was not an obvious one on the facts of the case.
- Damages were reduced by one third to reflect the claimant's contributory negligence.

Obvious risk: *The White Lion Hotel v James [2021] 2 WLR 911*

The facts:

- The claim was brought by the widow of a hotel guest who had fallen from a second floor window in circumstances which remained unclear at trial;
- He was probably sitting on the sill and holding the sash window open when he fell;
- The window was lower than modern building regulations require, the sash was faulty, and there was no opening regulator.

Obvious risk: *The White Lion Hotel v James [2021] 2 WLR 911*

The facts:

- The widow made a claim under the Occupiers' Liability Act 1957 (unlike in *Tomlinson*, he was a visitor);
- The hotel defended it on the basis that Mr James should not have been sitting on the window sill in the first place – in doing so he accepted the risk of falling.
- The hotel was Grade II listed and could not be altered to comply with modern building regulations.

Obvious risk: *The White Lion Hotel v James*

The decision at first instance:

- The trial judge found that the hotelier ought to have risk-assessed the premises;
- Had it done so it would have identified the risk of guests falling from the window;
- It would then have taken steps to ameliorate the risk – installing an opening restrictor would have cost £7 to £8 and would have prevented the accident.
- Mr James had however contributed to the accident and damages were reduced by 60%.

Obvious risk: *The White Lion Hotel v James*

The appeal:

- The hotelier appealed, relying on the line of authorities following *Tomlinson* – there is no duty to warn of an obvious risk.

Obvious risk: *The White Lion Hotel v James*

The appeal:

- *The essence of the appeal is contained in the first ground, namely that the judge, having found that the deceased had chosen to sit on the window sill, part out of the window, and had recognised and accepted the risk of falling from the window due to leaning too far out or losing his balance, erred in law in failing 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 so doing.*

Obvious risk: *The White Lion Hotel v James*

The decision of the Court of Appeal:

- The fact that the injured party had chosen to run an obvious risk was one of a number of factors to consider when asking whether there was a duty to warn;
- There might, therefore, be circumstances in which there *is* a duty to warn of an obvious risk;
- Here there was no social utility in the configuration of the window and the problem was easily and cheaply solved.

Obvious risk: *The White Lion Hotel v James*

The decision of the Court of Appeal:

- The obviousness of a risk does not mean that there is no duty to warn of it – it goes to whether the duty has been breached and if so whether the breach is causative.

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Obvious risk: *The White Lion Hotel v James*

The decision of the Court of Appeal:

- *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 is 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.*
- That's to say: a point of difference with *Tomlinson* where there was no danger from the "state of the premises".

Obvious risk: *The White Lion Hotel v James*

The decision of the Court of Appeal:

- *In circumstances where the top part of the sash window could be fully opened, there was no significant social value to the ability to fully open the lower part of the sash window to such an extent that a person could fall out of it. It represented no material impact upon personal autonomy;*
- *Lord Hoffman appears to be placing the principle relating to a claimant's acceptance of the obviousness of a danger as one element in a balancing exercise going to the reasonableness assessment pursuant to s.2(2) of the 1957 Act. He is balancing the obviousness of the danger against the social and financial cost of precautions. I do not read it as representing an absolute defence, rather he is identifying or considering the circumstances under which it would be reasonable to hold an occupier liable in respect of obvious dangers or risks.*

Obvious risk: *The White Lion Hotel v James*

The aftermath:

- The court placed considerable emphasis on the fact that the occupier was a hotelier – do hoteliers owe a higher duty than other occupiers?
- *In my judgment, there is a material difference between a visitor to a park, even a pub, and a guest in a hotel. During the time the guest is in the hotel room it is a "home from home". The guest in the room may be tired, off-guard, relaxing and may well have had more than a little to drink. Despite notices to the contrary he may be tempted to smoke out of the window and in hot weather the guest will want fresh air, particularly, as in this case, in a room with no air conditioning. As the judge observed, these are "facts of life" for any hotelier. These are normal activities.*

Obvious risk: *The White Lion Hotel v James*

The aftermath: cases referring to *White Lion*:

- *Warner v Scarpa Flow Charters [2022] SLT 609* – no duty to warn a scuba diver of the risk inherent in walking in fins;
- *Ashton v City of Liverpool Young Men's Christian Association [2023] EWHC 707 (KB)* – duty under the 1957 Act to ensure that windows of a YMCA hostel were properly restricted, although the obvious risk point does not appear to have been argued.

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Can these authorities be reconciled?

The tension:

- *Tomlinson:*

A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, or in the case of employees, or some lack of capacity, such as the inability of children to recognise danger.

- *White Lion Hotel:*

There is no absolute principle that a visitor of full age and capacity who chooses to run an obvious risk cannot found an action against an occupier on the basis that the latter has either permitted him so to do, or not prevented him from so doing.

Can these authorities be reconciled?

The solution?

- In *Matthews v Broadway Travel, Cardiff CC, 18th September 2023* the court held that although there was no rule that no duty is owed in respect of an obvious risk, this consideration is part of the balance to be struck:

In White Lion the court balanced the considerations for and against imposing a duty and considered the obviousness of the danger in doing so. In Tomlinson the conclusion, having conducted this balancing exercise, was that there was no duty owed. So there is no absolute defence in respect of obvious risk. It is pertinent to note, however, that the court did not say that there could not be circumstances in which the obviousness of the risk could mean that a duty was not owed. It will depend on the circumstances of the case, and in White Lion the claimant was occupying a hotel room in an ordinary way, and the risk was likely to eventuate as part of normal activity.

Can these authorities be reconciled?

The solution?

- The court went on to find that *Evans* is binding authority for the proposition that there is no duty to warn in respect of diving into a standard hotel pool:
- *The claimant says that there is no hard and fast rule that there is no duty in respect of obvious risk, and this must be right. But the true ratio of Evans is that there is no duty to warn a capacitous individual diving into the shallow end of a hotel pool. The court in Evans undertook the Tomlinson balancing exercise, and that was the result. It remains good law and is binding unless distinguished.*

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Nagging doubts?

But is this right?

- Is the decision in *Evans* regarding the lack of duty owed to divers a decision of law, and therefore binding, or merely one of fact, and therefore to be redetermined in each individual case?
- After all, in *McCarrick* a duty was owed to a diving guest.
- But if the Court of Appeal found in *Evans* that no duty was owed, would a judge at first instance be likely to determine the factual balancing act differently? And if so, what factors might come into play?
- Tentative suggestion: key point is whether, on the evidence, the risk is obvious and whether C was in a position of informed choice.

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