

Cliff Edge

Taking the fall

A Court of Appeal ruling clarifying occupiers' liability has come as a relief to landowners worried about being held responsible for the consequences of visitors' risky activities, says Paul McClorey

MANY LANDOWNERS AND their insurers still fear that they will be held liable if visitors to their premises choose to engage in risky activities, despite the extremely robust views expressed by the House of Lords in *Tomlinson v Congleton Borough Council* [2003] UKHL 47. The judgment of the Court of Appeal on 29 July 2010 in *Harvey v Plymouth City Council* [2010] EWCA Civ 860 reinforces the message that such fears are misplaced (see solicitorsjournal.com, 3 August 2010).

This case concerned a young man who had sustained serious injuries in a late-night fall down a five-metre 'cliff' after an evening spent drinking with friends. In an attempt to avoid paying a taxi fare, the claimant (Mr Harvey) ran, in the darkness, across an unfenced grassed open space and through a gap in a line of bushes. He tripped over a low-hanging fence and fell down a manmade 'cliff' onto a supermarket car park. He accused the council that owned the land of breach of duty under the Occupiers' Liability Act 1957 for failing to maintain a proper fence along the cliff top. The Court of Appeal decided that the claimant was not a visitor to the land for the purposes of the Act and his claim for compensation failed.

Although the facts of the case were peculiar, in the sense that the council did not at the time realise – or had forgotten – that it owned the land, the case was decided on a separate issue and therefore is of general application.

Dangerous activities

The issue, as far as the Court of Appeal was concerned, was whether the council, which must be taken to have known that it owned the land – as it surely should have done – was to be deemed to have impliedly permitted the claimant's activity or similar activities. The

court could find no evidence to conclude that it had. The court did not consider the claimant's state of mind, in his intoxicated state, as to whether he was permitted to be on the land to be a useful guide. It took the view that when a council licences the public to use its land for recreational purposes it is consenting to what the court described as "normal recreational activities, carrying normal risks". Mr Harvey's actions did not constitute normal recreational activities.

The claimants in the leading decisions on occupiers' liability in relation to dangerous activities in recent years have for the most part been regarded as trespassers as their activities had been expressly and visibly prohibited by the occupier. Even in *Maloney v Torfaen County Borough Council* [2005] EWCA Civ 1762, where there was no express signage, the claimant had deliberately strayed from a formal pathway and climbed over a retaining wall.

Unrestricted access

Harvey goes one step further. There was nothing abnormal in a member of the public making use of an unfenced public open space and the council had not made any attempt to restrict or control access (and probably would not have done even if it had realised it owned the land).

The Court of Appeal's decision is an important and welcome one, especially for local authorities and other public sector bodies that own many similar informal open spaces throughout the country. Unrestricted free access to such land is undeniably in the public interest, especially in the urban environment; a consideration that was highlighted by Lord Hoffman in *Tomlinson*. No one wishes to see such areas fenced off. However, the uses to which such land is put

are many and varied and, in particular, the capacity of children and young people for mischief should not be underestimated.

No permission

Claimants are unlikely to be able to prove that occupiers have expressly permitted their activities and the test will, in most cases, be whether a licence can be implied. In some cases, those responsible for managing open spaces – local authority rangers and parks staff – will be completely unaware of some of the less obvious activities taking place. It may never have crossed their minds, for example, that the path worn down a seemingly impossibly steep slope has been caused by cyclists rather than walkers or that mountain bikers and fell runners may actually choose, for reasons of practicality and the extra buzz, to do what they do in darkness in the depths of winter. They are unlikely to be able to prevent young people from building 'dirt jumps' and BMX courses in the woods, even when they do recognise them.

Harvey makes clear that in determining whether a claimant had an implied licence, his belief as to his legal status is but one factor. The Court of Appeal clearly envisaged a level of risk beyond which, as a matter of policy, an occupier should not be treated as having impliedly permitted an activity.

The decision is entirely in keeping with the spirit of *Tomlinson*. It demonstrates, once again, that landowners should not fear that they will be liable for the consequences of risks that members of the public freely choose to take on their land.

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