

Case summary of a recent Occupiers' Liability case: *Juj v John Lewis Partnership plc* [2023] EWCA Civ 1507

By [Charles Fulton](#)

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Introduction

This case was a second appeal by the Claimant in respect of a claim for damages for personal injury arising from a fall in a car park adjacent to a Waitrose store. The Claimant's case was that the Defendant breached its duty of care under the Occupiers' Liability Act 1957 ("OLA"). The Claimant accepted that the car park's owner was the London Borough of Hillingdon ("Hillingdon") but did not pursue proceedings against Hillingdon. At trial, the Defendant denied it was an occupier of the car park and denied that the kerb that the Claimant tripped on was dangerous. Judgment was entered for the Defendant at trial and on first appeal.

Facts and decisions of the lower courts

The Claimant's wife, who was disabled, drove the Claimant into a disabled parking bay in the car park adjacent to the Waitrose. She parked to the left of the bay to allow the Claimant, who was aged 83 at the time of the accident, to step directly from the car onto the adjoining kerb. The Claimant got out of the car onto the kerb, stepped down into the neighbouring bay, went round the back of the car and into the store. He then returned, placed shopping bags into the car's boot and then walked around the back of the car into the neighbouring bay. When he was level with the front passenger door, he attempted to step onto the kerb to reach the door handle but caught his foot on the kerb and fell. His foot had caught towards the top part of the kerb's vertical section. He knew the kerb was there, saw it and tried to step on it. The Defendant appeared to have reported this accident and other similar accidents afterwards.

The trial judge concluded that the Defendant was an occupier of the car park in conjunction with Hillingdon, but that its duty was limited by the extent of its control: it was limited to dealing with "immediate hazards" and reporting concerns and/or accidents/incidents to Hillingdon. It had no control over the design, layout or construction of the parking bay nor over making long-term changes to the car park. Moreover, the trial judge stated that the Defendant was not

entitled to, nor required to, paint the kerbs or make long-term changes, nor to prevent the use of a bay. The trial judge further found that the juxtaposition of the kerb and the disabled parking bay did pose a danger to users of that bay due to the narrow space to walk between a car and the kerb. However, the kerb itself was clearly visible and providing a notice warning of the kerbs would have gone beyond what the Defendant could have reasonably been expected to do.

As to causation, the trial judge concluded that the kerb was not defective. She found that the Defendant was in breach of its duty as an occupier in not reporting accidents sooner, but also that Hillingdon ignored the Defendant's requests to paint the kerbs and denied that the kerb was dangerous or defective, and that there was no evidence that it would have taken a different stance if the Defendant had reported the accidents before the Claimant's accident. Moreover, the Claimant's own evidence was that a painted line would have perhaps helped him to judge the height better, and as the step was not high, the failure to report sooner was not causative of his accident.

Finally, the trial judge stated that the more fundamental problem for the Claimant was that this was not a trip over an unexpected height difference. The Claimant knew the kerb was there and simply misjudged by not lifting his foot sufficiently. Thus it was simply a true accident and no act or omission of the Defendant caused it.

On first appeal, the findings and overall conclusion were upheld, except that the appeal judge found that the trial judge was wrong to conclude that the Defendant's control extended to the ability to put up warning signs and report concerns to Hillingdon. There was a departure from the trial judge's finding that the degree of risk was such as to trigger s1(1) of OLA.

The Court of Appeal decision

The judgment was elaborated by Davies LJ and was concurred with by Macur LJ and Lewison LJ.

Davies LJ set out that the claim against the Defendant proceeded on the basis that it has a level of control over the car park, and also set out that the nature and extent of that control is relevant to whether the Defendant is an occupier for the purposes of OLA and the nature and extent of its responsibility. It was unchallenged that the Defendant had no responsibility for the design, construction and layout of the parking bay. Accordingly, allegations that the Defendant should have altered any of these features fell away. Similarly, the unchallenged finding that the kerb was not defective countered allegations as to the repair or maintenance of the kerb. The Defendant had sufficient control to be an occupier, but that control was limited to dealing with immediate hazards, instituting interim measures and reporting matters to Hillingdon.

Davies LJ accepted that the kerbs were clearly visible and that there was no requirement to warn of obvious dangers. Placing a notice stating that the bay was not suitable for disabled customers would have gone beyond what the Defendant could reasonably have been expected to do as it would have effectively gainsaid Hillingdon's decision to use the bay for disabled customers. The Defendant, moreover, did not have sufficient control of the car park to close the bay, and painting the kerb would not have avoided the accident.

Davies LJ further set out that the hazard in this case was the lack of space between the kerb and a car – but that cannot be relevant here given that the Claimant's wife chose to drive the car to allow the Claimant to step directly onto the kerb and given that the Claimant was in the adjacent bay when he unsuccessfully attempted to step onto the kerb.

The Claimant's counsel stated the Defendant should have placed a cone in the bay to block it off or redesignated the bay or should have communicated with Hillingdon: but these were not a part of the Claimant's pleaded case. Moreover, the former two were not the Defendant's responsibility. As to the communication point, there was a sound evidential basis for the finding that Hillingdon would not have responded positively to earlier reporting.

Davies LJ stated that the "critical" issue for the Claimant was the finding for the trial judge that this was not a case where the Claimant tripped over an unexpected height difference, but was a case where he saw the kerb, tried to step on it and misjudged the manoeuvre. She deemed this to be a finding of fact properly made following careful evaluation of the evidence and was "fatal" to the claim.

The contention of the Claimant at the Court of Appeal which was successful was that the first appeal judge substituted her own view without the requisite legal threshold being met. This was in relation to the appeal judge's finding that the degree of risk was not such as to trigger s1(1) of OLA and that a proportionate and reasonable response to that did not require the Defendant to report the risk to Hillingdon nor to erect warning notices.

The Claimant's appeal was accordingly dismissed by the Court of Appeal.

Comment

One aspect which this case is useful in exemplifying is the nature and scope of the duty of care where there is more than one occupier: the nature and extent of control is relevant to the nature and extent of the duty of care.

This judgment, moreover, provides a helpful reminder for practitioners of occupiers' liability cases as to the importance of the issue of causation of accidents. Davies LJ regarded the point that the Claimant had seen the kerb and misjudged the manoeuvre rather than failing to see an unexpected difference in height as being the "critical" issue which was "fatal" to his

claim. It is very important that any (potential) claimant's evidence of the precise mechanism of the accident is clearly understood so that it can be evaluated against the issue of causation and whether that mechanism is likely to be deemed as occurring due to an alleged act or omission of any (potential) defendant.

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Charles Fulton

Barrister
3PB

020 7583 8055

Charles.fulton@3pb.co.uk

3pb.co.uk