

ENGLAND AND WALES / JUDGMENT

Geary v JD Wetherspoon Plc

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Neutral Citation Number: [2011] EWHC 1506 (QB) IN THE HIGH COURT OF JUSTICE NEWCASTLE UPON TYNE DISTRICT REGISTRY Claim No: 0MA04528 Newcastle Crown Court Quayside, Newcastle Upon Tyne, NE1 3LA Date: 14 th June 2011 Before : THE HONOURABLE MR JUSTICE COULSON

- ----- Between : Mrs Ruth Geary
- and - J D Wetherspoon PLC
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- ----- Claimant Defendant Mr Winston Hunter QC & Mr Marc Willems (instructed by Ralli Solicitors) for the Claimant Mr William Norris QC & Ms Camilla Church (instructed by Beachcroft LLP) for the Defendant Hearing dates: 11th & 12th May 2011
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Judgment

The Honourable Mr Justice Coulson: A. INTRODUCTION 1. Traditionally, the law has always distinguished between, on the one hand, the duties owed by occupiers to lawful visitors to their premises and, on the other, the much more limited obligations, if any, that might be owed to trespassers. Perhaps the most celebrated example of this difference was given by Scrutton LJ in *The Carlgarth*

[1927] P93, 110: “When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way in which it is used.” In the more recent decision of the Court of Appeal in *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39, Longmore LJ observed that that case, which involved an 11 year old boy suffering severe brain damage as a result of falling from a fire escape, was “the closest one will come in real life” to Scrutton LJ’s example. 2. Tragically, the present case is even closer to Scrutton LJ’s illustration. On the evening of 29 March 2007, the claimant, Mrs Ruth Geary, had been drinking with some work colleagues at The Union Rooms, a pub in Newcastle City Centre, close to the station, which is owned and operated by the defendant. The premises had formerly been a gentleman’s club. One of the original features of the building, which was deliberately left untouched by the refurbishment, was a grand open staircase in the centre of the building, with sweeping banisters on both sides, rising to a half- landing and then turning upwards on either side

to the first floor. On her way out with her colleagues, the claimant hoisted herself onto the left banister with the intention of sliding down it. Unfortunately she fell backwards and landed on the marble floor just less than 4 metres below. She sustained a fracture to her spine, resulting in tetraplegia. In March 2010, the claimant issued proceedings against the defendant, claiming damages for personal injury. The principal claim was put by way of negligence, that is to say as a breach of an alleged common law duty of care, although there was an alternative claim for breach of the Occupiers' Liability Acts 1957 and 1984. At the close of the evidence, Mr Hunter, on behalf of the claimant, indicated that the alternative claim under those Acts added nothing to the common law claim, although both leading counsel agreed that a number of the authorities which dealt expressly with the position under the Occupiers' Liability Acts were relevant to the issues of negligence. The trial on liability took place on Wednesday 11 and Thursday 12 May 2011 at Newcastle Combined Court Centre. Despite the volume of documents (the bundle consisted of two lever arch files and there were three volumes of authorities) and the number of witness statements (32 served on behalf of the claimant, although many repeated or endorsed earlier statements; 8 on behalf of the defendant), the issues between the parties were relatively straightforward. In essence, they concerned the existence or otherwise of the duty of care alleged by the claimant. They can perhaps be summarised as follows:

- a) Was there a voluntary assumption of an obvious and inherent risk by the claimant, in circumstances which would negate any liability on the part of the defendant?
 - b) Was there an assumption of responsibility by the defendant to the claimant? As a result of the efficiency of leading counsel, the trial, which was estimated to last three days, only took two. However, in deference to the arguments and the considerable volume of authorities that were cited, it was necessary for me to reserve judgment. This, then, is the Judgment on the issues of liability in this case.
3. 4. 5. B. THE REFURBISHMENT WORKS
6. 7. The premises were originally built in the late 19th century as The Union Club, a gentleman's club in an ornate, French style. They are typical of the numerous Georgian and Victorian stone-clad buildings which make the centre of Newcastle so special. Moreover, the splendour of the former Union Club is not limited to its exterior; inside it is a typically opulent Victorian clubhouse, centred round a stone staircase leading up to a half-landing and with two returns on either side going up to the first floor. The banisters on either side of the central staircase rising to the half landing are lower than normal. They are at a height of between 86 and 88 centimetres, measured from the step to the top of the banister. This means, for a man of average height, that his arm is fully extended when his hand is on the top of the banister. The distance from the half-landing to the marble floor beneath is about 3.45 metres. The full height of both sections of the staircase up to the first floor is just less than 7 metres.
8. 9. Despite the august nature of its early membership, The Union Club, in common with other such gentlemen's clubs in the larger provincial cities of England, fell on hard times. It was bought by the defendant to be refurbished into a large public house. To that end, on 10 July 1998, the defendant obtained Listed Building Consent for the refurbishment works from Newcastle City Council. It appears that the staircase and the banisters were the subject of

specific consideration at the time of the refurbishment. There was a tension between English Heritage, who did not want to see any changes to the staircase at all, and the Building Control Department of the City Council, who were concerned about the low height of the banisters. This tension is identified in paragraph 7 of the statement of Mr Alistair Broome, the defendant's then development manager, in these terms: "From these meetings I do recall there being discussions relating to the height of the balustrade and banisters on the staircase which was a significant feature of the building. The building held listed status and I was made aware at an early stage of the refurbishment that both the local authority planners and English Heritage were being very demanding regarding our treatment of all aspects of the refurbishment, the staircase and banisters being no exception to this. I recall being aware that the banisters were below the minimum height allowed under Building Regulations at the time. This was a concern to me and to our Health and Safety consultants, Perry Scott Nash, from a safety point of view. I do recall that we applied through the Architects on more than one occasion to raise the height of the banisters and balustrades to the minimum required under Building Regulations but those plans were rejected on each occasion and it was made clear by word of mouth to the Architects that both the planners and English Heritage required the banisters to remain at the original height and in the original state." 10. Although, during the trial, Mr Hunter complained about the absence of documents in the bundle confirming this history, I understand that the defendant made available to the claimant for inspection all of the documents relating to the proposed refurbishment in 1997, and that only a small proportion were included in the trial bundle. More importantly perhaps, it seems to me that those documents which were included support the gist of what Mr Broome told me, namely that the height of the banisters was a concern but that, in the end, the Council was prepared to waive the requirement that the banisters be at a greater height. 11. This can be seen in the following exchanges:

- a) On 27 July 1998, the defendant's architects, Lawrence Tring Architects, wrote to their Environmental Health consultants, Perry Scott Nash Associates ("PSNA"), in these terms: "We are advised by Building Regulations that it will no longer [be] necessary to change the existing balustrade, despite it not conforming to the correct height. The Planners obviously do not wish us to change it and so it is our proposal to leave it at 770 mm above goings and 900 mm above floor level at first floor landing. Could I please have your comments by return."
- b) On 31 July 1998, PSNA, who were and remain the defendant's professional advisors on all matters of Health and Safety, replied in detail. They said: "Further to your letter received on 28 July regarding the height of handrails to the existing balustrading at the above I would advise that provided the Building Control Officer is happy to accept a relaxation of the Building Regulations in respect of handrail and guardrail heights there is no specific legislation in Environmental Health terms which stipulates handrail heights per se. The Workplace (Health, Safety & Welfare) Regulations 1992 require all staircases to have a "suitable and sufficient" handrail or guard-rail. The associated ACOP advises that an open side to a staircase should be securely fenced, consisting of a guard-rail at an upper height of

900 mm and a lower rail. No guidance is given in the ACOP on handrail heights to be provided on at least one side of every staircase. Guidance is given that where a person can fall 2.0 metres or more secure fencing be provided consisting of a top rail of at least 1100 mm above the surface from which people can fall except where lower fencing has been approved by the LA under Building Regulations. The balustrading to the landing should be in-filled sufficiently to prevent persons or objects falling through. The minimum is an intermediate guard rail at approximately 450 mm from the surface. I would obtain in writing the relaxation from the Building Control Officer. I trust the above is helpful.” 12. 13. It is plain from this letter, and in particular the exhortation that the waiver be confirmed in writing, that PSNA were conscious that the height of the staircase was lower than would normally be permitted, and that written confirmation of the relaxation was necessary. On a comparison of the figures, the banisters were 860-880 millimetres high, which was below the 1100 millimetres recommendation referred to in the PSNA letter. It does not appear that the Building Control Department ever put the waiver in writing. However, on 10 November 1998, Lawrence Tring wrote to Mr Shepherdson in the Development Department to say: “We write to confirm that, as discussed with Mr W MacPhial and yourself that Newcastle City Council agree to waive any requirements for the alteration to the main existing Listed Staircase Handrail. We trust this meets with your approval but should you have any reservations please do not hesitate to contact the undersigned.” 14. There was apparently no response to that letter. Accordingly, I consider that all these documents are consistent, to the effect that the usual recommendation of 1100 millimetres was relaxed at the time of the refurbishment by the Building Control Department. C. PREVIOUS INCIDENTS 15. It seems clear that, from the time that the premises opened as The Union Rooms in about 1999, customers have, from time to time, been tempted to slide down the banisters, and some have injured themselves as a result. It seems that at least one reason for this behaviour is the unusually low height of the banisters. Indeed, the equation between the low banisters and an increased temptation to slide down them (which initially seemed to me to be rather curious) was foreseen by Mr Broome at the time of the refurbishment works. Accordingly, at paragraph 9 of his statement he said: “With these premises, I had noted the height and length of the banisters as they were such a feature of the premises. It did cross my mind that some customers may find the banister inviting and try to slide down it. I recall in general terms discussing the possibility of having studs fitted into the banister with Ian Lear. Having then had that discussion with the local planning officer and English Heritage, Ian made it clear that neither would entertain the idea...That, coupled with their rejection of our applications to have the height of the banisters adjusted made it very clear to me that we would simply not be allowed to make any alterations to the banisters.” 16. There were a number of particular incidents of sliding, in which a customer was hurt, and other, more general evidence about the frequency and seriousness of this conduct. Prior to the claimant’s accident on 29 March 2007, the following incidents occurred which caused injury to customers:

- a) On 24 November 2005, Thomas Leggett, a student, was injured following an attempt to slide down the banisters. The defendant's Accident and Incident Form (a document which was seen by Mr Broome as the General Manager) reported as follows: "Thomas was sliding down the banister and he fell 10 steps from the main bar area, fell backwards and landed on his shoulder, hurting his shoulder and lower back. And upper chest pains. Thomas had drunk 1 bottle of wine and three pints of cider."
 - b) On 16 December 2006, Mr Dean Lamb slid down the banister and hit his head when he landed on the marble floor. It is unclear if he fell and, if so, from what height. The report prepared by PSNA indicated that he suffered a sore back and a bleeding head.
 - c) On 10 February 2007, Paul Whalley fell off the banister whilst sliding down it. On this occasion, although an ambulance was called, there was no apparent injury. 17. As noted above, the claimant's accident occurred on 29 March 2007, and is dealt with in greater detail in the next section of this Judgment. Six months later, on 13 October 2007, there was a further sliding incident when a customer called Robert Walker started to slide down the banister and then fell backwards off it. The Accident and Incident Form recorded that "he hit the back of his head which was bleeding badly." It appears that, as a result of the injury to Mr Walker, the defendant carried out some alterations to the banisters. This principally consisted of winding a long length of thick rope around the ornate supports of the staircase, and over the top of the banisters themselves, which meant that it became impossible to slide down them. It appears that, since those works were carried out, no further attempts have been made to slide down them. The works themselves cost less than £300. There were no contemporaneous records of any other sliding incidents. However, a number of the defendant's witnesses referred to them. Mr Stoker, who was the manager at the time, said at paragraph 10 of his statement: 18. 19. "During the period of being Manager of the Union Rooms from March 2006, I had occasionally seen people attempt to slide down the lower level of the banister. I think in the 18 months or so between becoming Manager up to when the rope was fitted, I may have seen 3 or 4 people attempt to slide down the banister in this way. It was not a regular occurrence and it was not something that I thought was a particular problem or one that I remember discussing or raising with other employees. As I recall, when I did see customers try to do this it would be the younger type of customer usually around student age and usually male. If I saw anyone doing this I would stop them." 20. There was similar evidence from Mr Dixon, the Duty Manager, who again referred to this happening on no more than a handful of occasions, and Mr McEvoy, a supervisor. He had also seen this happen three or four times and, on his evidence, it had "always been on the lower flight of stairs, near the bottom of the staircase." He recalled that on one occasion, he had to stop an elderly female customer who was trying to put her leg over the banister to slide down backwards.
21. Mr McEvoy also recalled two other incidents, one when a customer who was very tall had fallen over the banister close to the bottom of the stairs and landed on some chairs and, on another occasion, when a man jumped from the first floor down to the staircase below. He

said in evidence that he was sure that the man had jumped deliberately, because he simply got up and went out of the pub. 22. Because the risk of sliding down these banisters was both foreseeable and indeed foreseen, there was also some evidence as to what the defendant's employees endeavoured to do about it. Mr Dixon said in his oral evidence that he always spoke to any customer who either looked as if they wanted to slide or if they had slid down the banisters. In addition, Mr McEvoy said that they had discussed whether or not to put up a sign, warning customers not to act in this way. However he said that this proposal was rejected because the employees concluded "that it would attract more people to the possibility of sliding who hadn't otherwise thought of it". The reasonableness of that conclusion was not challenged during Mr McEvoy's cross-examination. D. THE EVENTS OF 29 MARCH 2007 23. There was a good deal of written and oral evidence about the events on 29 March 2007 when the claimant was so badly hurt. Much of it was irrelevant to any possible issue between the parties and very little of it was even remotely in dispute. I therefore 24. 25. 26. summarise what happened on that evening in fairly brief terms before going on to resolve the factual disputes, such as they are, between the parties. The claimant worked for Pfizer Limited and, on Thursday 29 March 2007, she attended a lunch, followed by a training session, at the Hilton Hotel in Gateshead. Towards the end of the afternoon there was a telephone conference and, whilst they were waiting for that to be connected, a round of drinks were served. The claimant had a vodka and tonic. Following the telephone conference a group of colleagues then went out for the evening. They went to the Tokyo Bar in Newcastle where the claimant had a second vodka and tonic. A group of them then walked across to The Union Rooms. They went upstairs to the bar on the first floor where they had something to eat and further drinks. The claimant believed that she had two further vodka and tonics in the upstairs bar. There can be no doubt that, during the evening upstairs at The Union Rooms, the claimant talked about the possibility of sliding down the banisters. It appears that her comment was first made in connection with the film "Mary Poppins" which she had seen with her children, and which of course features scenes in which Julie Andrews slides both down and up the banisters on a sweeping staircase. The evidence about this was as follows:

- a) Mr Garcia, one of the claimant's colleagues, said in his original statement: "19 I recall a conversation with my boss Mark McCabe when he said 'hey there look that would have been the type of banister I would have looked at sliding down when I was younger'. 20 I also recall that Karen [Wilson] and Ruth [the claimant] had a conversation about Mary Poppins. I think the DVD had been re-released around that time and Ruth's children had it and they were talking about it and that the banister looked like it was from the Mary Poppins film."
- b) Another colleague, Karen Wilson, confirmed this in her own statement, saying: "5 The staircase being an old fashioned, big sweeping staircase became the topic of conversation at one point during the night. Ruth mentioned it was like a Mary Poppins type staircase and she said that she loved the film. I myself do not like the film and it is something I had not thought about."

- c) Another colleague, Mr Richard Moulding, who had an important part to play in the unfortunate events which unfolded, also referred at paragraph 16 of his original statement to the claimant saying that it was ‘like a scene from Mary Poppins’, when she was in the act of sliding down the first part of the banisters.
- d) Police Constable Mennie, who attended after the claimant had fallen, said that “someone told us that she had been sliding down the banister from the first floor, pretending that she was Mary Poppins...” 27. Accordingly, although the claimant said that she could not recall the conversation about the film, it seems to me that the other evidence demonstrated unequivocally that, at some point during the evening, when she was in the upstairs bar, she decided that she might very well slide down the banister on her way out of the pub. 28. It appears that, when the group left the first floor bar, Mr Moulding slid down the upper part of the banister which was affixed to the wall and ran down the left hand return staircase to the half-landing. It was his evidence that the claimant followed him, doing the same thing, and that it was as she approached the end of the slide, coming towards the half-landing, that she made her remark about Mary Poppins. Mr Moulding said that, once he had turned 180 degrees along the half-landing, he thought about sliding down the banister again to the ground floor. This time, of course, the banister was not fixed to the wall but ran down the right hand side of the staircase. He said that, as he started to slide down that banister, he saw the drop to the floor below, and he realised that it was dangerous. There was no wall, he said, simply a big drop on the other side of the banister. He said that, having slid two or three steps, he got off the banister immediately. 29. The claimant was not so fortunate. Although she could not remember the fall, other witnesses could. In many ways, the witness with the clearest recollection of what happened was Mr Mark Adams, another work colleague. He said at paragraph 35 of his statement: “Out of the corner of my eye I saw Ruth with her back to the banister. She hitched herself up on to the banister and went straight over backwards. The banister at which this happened was the banister rail for the flight of stairs leading from the first to the ground floor and Ruth was ahead of me. I had not been aware of her having left the bar and I was not aware that, as I subsequently learned, that she had slid down the banister of the flight of stairs leading from the second to the first floor. The sound of Ruth hitting the marble floor stays with me.” 30. 31. In his oral evidence Mr Adams clarified that what he was talking about when he referred to the flight leading from the first to the ground floor was the flight between the half-landing and the ground floor, and that he only discovered later that Ruth had already slid along the upper section of the staircase. There was some doubt as to whether the claimant had fallen from the section of staircase running down to the half-landing, or whether she had fallen from the top of the lower section of the staircase, just past the half-landing. She fell in such a way that, when she landed, her head was in the archway below the half-landing. That might be regarded as consistent with her falling from the bottom part of the top section of the banister. However, Mr Adams was emphatic that she had fallen from the top part of the lower section of the staircase; in other words, just past the half- landing. His recollection was the clearest of all the witnesses. Accordingly, for what it is worth, I have concluded that Mr Adam’s evidence

on this point is to be preferred. I therefore find as a fact that the claimant fell from the top of the lower part of the staircase, just below the half landing. It was immediately apparent that the claimant was seriously hurt. The police and ambulance were called. Although it seems that at least three police vans arrived, including an armed response unit, it was clear from the evidence of PC Taylor that there was no significance in that. The claimant was taken to hospital. She suffered a burst fracture of the fifth cervical vertebrae and spinal cord damage resulting in complete tetraplegia. She is now confined to a wheelchair. E. WAS THERE A VOLUNTARY ASSUMPTION OF AN OBVIOUS AND INHERENT RISK BY THE CLAIMANT?

- a) The Issue 32. It was submitted on behalf of the defendant that the claimant voluntarily assumed the obvious risk inherent in sliding down open banisters which, on the far side, had a long drop to the marble floor below. In consequence, the defendant maintains that it can have no liability in law to the claimant, whether as alleged or at all. The claimant maintains that her own conduct, whilst plainly relevant to issues of contributory negligence, could not amount to a defence in law.
- b) The Evidence 33. 34. The claimant was an admirably frank witness, never more so than in relation to this aspect of the dispute. She agreed that, when she was leaving The Union Rooms, she was not drunk and would not have appeared drunk. She said, and I accept, that she was acting rationally. It was put to her that sliding down a banister anywhere carried the obvious risk of falling off. She replied: "absolutely". It was then suggested to her that this was a risk which she had chosen to take. Again, she replied: "absolutely". She also expressly accepted that she had not thought for a moment that she was allowed to slide down the banisters. On the basis of this evidence, I find that the claimant voluntarily accepted the obvious risk inherent in sliding down these banisters with the unprotected drop to the marble floor below. On this analysis, the remaining issue is what effect, if any, that finding has as a matter of law.
- c) The Authorities 35. Section 2(5) of the Occupiers Liability Act 1957 provides 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)." Under the 1984 Act, which is concerned with the lesser duties owed to trespassers, section 1(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 the relevant statutes, there is no liability on the part of an occupier for risks willingly accepted by the visitor or trespasser. That is precisely the same as the position at common law, as summarised in the maxim *volenti non fit injuria*. The learned editors of Clerk and Lindsell on Torts, 20th Edition, at paragraphs 12-41 and 12-42, make plain that the statutory defence is indistinguishable from the common law defence of *volenti*. There are numerous authorities for the proposition that a claimant who voluntarily assumes an obvious risk, which subsequently eventuates, will, save in particular circumstances, be left without a remedy. For present purposes it is necessary to cite only

four. 36. 37. 38. In *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, the claimant broke his neck when diving into a lake that had formed in a disused quarry, in a country park owned and managed by the defendants. The claim under the Occupiers Liability Act 1984 had failed at first instance, Jack J finding that there was nothing about the lake that made it any more dangerous than any other ordinary stretch of open water, and that the danger and risk of injury from diving where it was shallow had been obvious. The Court of Appeal allowed the claimant's appeal, but the original judgment was reinstated by the House of Lords. They held that any risk of the claimant suffering injury had arisen, not from any danger due to the state of the defendants' premises, or to things done or omitted to be done on those premises, but from the claimant's own misjudgement in attempting to dive in water that was too shallow. They held that this had not been a risk that gave rise to any duty on the defendants' part and that, in any event, it had not been a risk in respect of which the defendants might reasonably have been expected to afford the claimant protection. 39. In a section of his speech entitled 'Free Will', Lord Hoffmann explained why the claimant's voluntary assumption of risk in that case provided a complete answer to his claim. He said: "45 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 hand-gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalistic view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so. 46 My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with an appropriate moderation my disagreement with the proposition of Sedley LJ that it is 'only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability'. A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (*Herrington v British Railways Board* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves: *Reeves v Commissioner of the Police of the Metropolis* [2000] 1 AC 360." 40. *Evans v Kosmar Villa Holidays PLC*

[2007] EWCA Civ 1003 was another case about a man catastrophically injured by diving, this time into the shallow end of a swimming pool. The claim had been allowed at first instance, albeit with a finding of 50% contributory negligence. The defendant's appeal was allowed. Having set out various passages from *Tomlinson* in some detail, Richards LJ went on: "39...

but the core of the reasoning in *Tomlinson*, as in earlier cases such as *Ratcliffe v McConnell* [1999] 1 WLR 670 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 not only to trespassers but also to lawful visitors to whom there is owed the common duty of care under section 2(2) of the Occupiers Liability Act 1957...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... 41 Applying that approach here, Kosmar's duty of care did not extend, in my judgment, to a duty to guard the claimant against the risk of his diving into the pool and injuring himself. That was an obvious risk, of which he was well aware. Although just under 18 years of age, he was of full capacity and was able to make a genuine and informed choice. He was not even seriously affected by drink." 41. 42. In *Trustees of the Portsmouth Youth Activities Committee (a Charity) v Poppleton*

[2008] EWCA Civ 646, the claimant injured himself at an indoor climbing centre. He had climbed up the climbing wall when he saw another user leap to grab hold of a girder and then drop to the mat below. The claimant tried to do a similar leap from the back wall to grab hold of a buttress on the opposite wall. He lost his grip, and somersaulted in the air and fell to the matting below. His injuries were extensive and, by the time of the trial, he was tetraplegic. The claimant had succeeded at first instance, albeit with a reduction of 75% for contributory negligence. The defendant's appeal was allowed. May LJ said that "adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so that they are injured." He also referred to *Tomlinson* at some length, and added an additional possible exception to the principle set out by Lord Hoffmann, namely where a defendant had 'in some relevant way assumed responsibility for the claimant's safety'. He went on: "18 It is, therefore, in my view, necessary to consider whether the risk in the present case was inherent and obvious. The risk of falling from the wall was plainly obvious. The judge held in effect that the risk that the matting might not in every case protect a climber who fell from serious injury was not obvious. But I do not consider that this finding is sustainable, not least in the light of Mr Poppleton's own evidence. Evidence apart, it is to my mind quite obvious that no amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall and that the possibility of an awkward fall is an obvious and inherent risk of this kind of climbing. Mr Poppleton's evidence was that he did not think that it was that risky, indicating that he knew that there was a risk." 43. I should also, in this context, refer again to *Keown v Coventry Healthcare NHS Trust*, where the Court of Appeal held that the boy playing on the fire escape chose to run a risk that was nothing to do with the state of the premises. Even though the claimant was a child, the Court of Appeal found that it could not be said that he did not recognise the danger. The risk arose out of what he chose to do and there was no relevant duty.

- d) Conclusions 44. 45. 46. 47. 48. At the close of the claimant's oral submissions, I asked Mr Hunter if there was any authority in which, absent special or particular facts, a defendant had been found to owe a duty of care to protect a claimant from his or her own voluntary assumption of an obvious and inherent risk. He confirmed that there was no such authority. It seems to me that that concession was rightly made: indeed, the authorities, some of which I have noted above, are all the other way, with the courts having repeatedly held that, if the choice was freely made, there could be no such duty. In addition, in answer to another question from me, Mr Hunter candidly accepted that he "could not readily distinguish Tomlinson". At one point he suggested that the difference was that Tomlinson was concerned with the liability of an occupier, but so too of course is this case. Later, he said that Tomlinson was "a decision based on policy", a submission that appeared to me to be obviously wrong and which he subsequently withdrew. In my view, there is no difference in principle between Tomlinson and the present case. Similarly, I also conclude that this case is indistinguishable from Poppleton. Both Mr Poppleton and the claimant deliberately took the risk that they might fall. Neither intended to fall but, due to a momentary misjudgement, they both did. And in both cases the defendant had taken some steps to deal with the problem (in Poppleton they had provided safety mats, here they had warned would-be sliders away from the banisters), and could not reasonably be expected to do more. In the light of the claimant's candid evidence about the obvious risk that she ran, it seems to me that the principle of voluntary assumption of risk, set out in the cases noted above, is fatal to her claim. The claimant freely chose to do something which she knew to be dangerous. Because of the conversations about "Mary Poppins", there was even a degree of pre-planning. She knew that sliding down the banisters was not permitted, but she chose to do it anyway. She was therefore the author of her own misfortune. The defendant owed no duty to protect her from such an obvious and inherent risk. She made a genuine and informed choice and the risk that she chose to run materialised with tragic consequences. In those circumstances, I consider that, on the law, I am bound to find that this claim must fail. It would be contrary to binding authority to do otherwise. However, if I am wrong about that, and the claimant's voluntary assumption of risk is not the start and finish of her claim, it could only be because this was a situation, as May LJ postulated in Poppleton, where the defendant still owed her a duty of care, despite the obvious risk she chose to run, because it had in some relevant way assumed a responsibility for her safety. Accordingly, I go on to consider the issue of assumption of responsibility. F. DID THE DEFENDANT ASSUME A RESPONSIBILITY TO THE CLAIMANT?
- a) The Assumption of Responsibility 49. Although Mr Hunter relied on the defendant's alleged assumption of responsibility towards the claimant as a means of avoiding the application of the principle set out in Tomlinson and Poppleton, he also sought to argue that, in some way, the concept of the assumption of responsibility by a defendant to a claimant was irrelevant in this case. I cannot agree. There are numerous authorities, summarised below, in which the courts have approached the issue as to whether or not a defendant owed a claimant a duty of care at common law in a particular situation, by analysing whether or not the

defendant had assumed a particular responsibility to the claimant and/or whether or not the claimant had relied on the defendant. That is often a useful way of approaching the issue as to whether or not a common law duty of care is owed in any given circumstances. It is a practical application of the 'neighbour' principle. And, in cases where the claimant might otherwise be said to have been responsible for his or her own injuries, such a particular assumption of responsibility by the defendant may provide the only route to a successful claim.

- b) The Relevant Authorities 50. It is instructive to start this short analysis with the decision of the Court of Appeal in *Fowles v Bedfordshire County Council* [1995] PIQR P380. In that case, the claimant succeeded, both at first instance and in the Court of Appeal, in his claim for personal injuries against the owners and organisers of gym facilities. The claimant had received some instruction as to the use of gymnastic mats, but the instruction from the defendants was inadequate and had not made him aware of the dangers. Subsequently, when the claimant used the mats with a friend on a subsequent occasion, without supervision, he suffered a serious injury.
51. Millett LJ made plain that, by reference to the Occupier's Liability provisions, the defendant would not have been liable to the claimant simply because of the unrestricted access that it had allowed to the mats themselves. However, he upheld the original decision on another ground, namely the defendant's assumption of responsibility in respect of the inadequate teaching and advice given to the claimant. He said: "Having assumed the task of teaching Mr Fowles how to perform the forward somersault, the defendants voluntarily assumed a responsibility to teach him properly and to make him aware of the dangers. They failed to do either; and then compounded their failure by providing unrestricted access to the crash mat, thereby encouraging him to use it to practice what he had been taught, without warning him that he must on no account do so without supervision. This appears to me to be a sound basis for ascribing some degree of responsibility to the defendants. It is true that it is not how the case was primarily pleaded or presented, but it is supported by the evidence and it would cause no injustice to the defendants if liability was put on this basis." Accordingly, it seems to me clear that, in *Fowles*, the existence of the duty and the finding of the breach was based entirely on the defendant's specific and voluntary assumption of responsibility to provide the claimant with proper instructions – what May LJ in *Poppleton* called the assumption of a relevant responsibility – and for no other reason. 52. Similarly, in *Barrett v Ministry of Defence* [1995] 1 WLR 1217, the claimant's widow recovered at first instance and in the Court of Appeal, although in the latter tribunal the reduction for contributory negligence was increased. In that case the claimant serviceman had become drunk. He was inadequately looked after by a senior naval officer and was subsequently found dead, having asphyxiated on his own vomit. The Court of Appeal held that it was fair, just and reasonable to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink and that, until the deceased collapsed, he alone was responsible for his condition. However they found liability on the part of the defendant because, subsequently, the defendant had assumed responsibility for his care through the

intervention of the officer, and the measures that had been taken fell short of the standard reasonably to be expected. Again, therefore, Barrett was a case decided on the defendant's unambiguous assumption of a particular responsibility to the claimant, without which the claim would have failed because of the serviceman's own responsibility for his drunken condition. 53. Another way of putting a defendant's assumption of responsibility is to identify any reasonable reliance by the claimant on the defendant. The reliance cases include *Perrett v Collins and Others* [1998] 2 Lloyd's Law Rep 255 (negligence in issuing a fitness to fly certificate in relation to an aircraft, without which the doomed aircraft would not have been permitted to fly); *Watson v British Boxing Board of Control Limited* [2001] QB 1134 (in which Michael Watson, the boxer, was badly injured but where his injuries were exacerbated by the inadequate medical treatment at the ringside, with the Court of Appeal holding that boxers were entitled to rely upon the British Boxing Board of Control to exercise skill and care in ensuring their safety during a fight); and *Vowles v Evans* [2003] 1 WLR 1607 (a claim by an injured rugby player against the referee and the governing body for Welsh rugby because of inadequacies in the arrangements for replacement players).

54. More recently, the notion of the assumption of responsibility can be seen in *The Ministry of Defence v Radclyffe* [2009] EWCA Civ 635 where the Court of Appeal found the MOD liable for a soldier's injuries caused by jumping from a high bridge, because a senior officer had earlier "assumed responsibility to prevent [the junior soldiers] from taking undue risks of which he was or ought to have been aware". Sir Anthony May pointed out that the senior officer had been asked if the men might jump, concluding that "the very fact that they asked predicates reliance sufficient for a duty of care and their assumption that he had authority to order them not to jump." He distinguished *Tomlinson* on a number of grounds, including the fact that *Radclyffe* was not an occupiers' liability case, and where there was instead a military relationship akin to that of employer/employee which militated against informed choice. 55. Finally, in the House of Lords decision in *Mitchell v Glasgow City Council* [2009] UKHL 11, the deceased was attacked by his neighbour, and subsequently died of his injuries. They were both tenants of the defenders. The deceased family brought a claim in negligence, alleging that the defenders had failed to act on the repeated complaints against the neighbour and failed to warn the deceased that, shortly before the attack, the neighbour had been threatened with possession proceedings and was likely to be angry and violent. 56. At paragraph 15 of his speech, Lord Hope made the point that foreseeability of injury was not sufficient to establish a duty of care. Then, at paragraph 29, he said this about the scope of any claim against the defendants as landlords: "...the situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship. But it is not suggested in this case that this ever happened and Mr McEachran very properly accepted that he could not present his argument on this basis. I would conclude therefore that it would not be fair, just or reasonable to hold that the defenders

were under a duty to warn the deceased of the steps that they were taking, and that the common law case that is made against them is irrelevant.” 57. The authorities noted in the preceding paragraphs make clear that, not only is the question of whether or not the defendant assumed a responsibility towards the claimant an appropriate issue to consider when dealing with the existence or otherwise of a duty of care, but also that, in a situation in which the injuries were caused by an inherently risky act on the part of the claimant, it is only the existence of particular facts or specific reliance (Fowles, Barrett, Watson, Radclyffe) that will lead to a finding that the defendant assumed a responsibility to the claimant. Generally, the cases show that a defendant does not owe a duty to regulate the claimant’s activities for the claimant’s own benefit.

- c) Conclusions 58. 59. 60. In view of the claimant’s unqualified acceptance of the risk that she ran, the absence of anything on which responsibility or reliance could be based, and the trend of the authorities noted above, I am unable to conclude that there was any relevant assumption of responsibility on the part of the defendant. In particular, there were no specific facts which suggested a voluntary assumption of responsibility on the part of the defendant, and there was no evidence of reliance at all. In short, there was nothing which could allow the claimant to draw an analogy with those (few) cases in which an assumption of responsibility had been found on the part of the defendant, despite the obvious risk being run by the claimant. It must be remembered that this is a case about the potential liability of the occupier. But there was nothing unsafe about these premises, and no danger attributable to their structure. There could therefore be no liability under the 1957 or 1984 Acts, and thus no liability at common law. In his closing submissions, Mr Hunter argued that there was a danger caused by a defect in the structure, the defect being that the banister was lower than normal. But this submission, which was neither pleaded nor trailed in opening, was unsustainable on the facts. The danger was created by the decision to slide, not the banister itself: indeed, even if the banister had been at the normal height, the claimant could (and I find, probably would) have chosen to slide anyway. What attracted her was the style of the staircase, not the height. Moreover, the banister was not defective; there had simply been a waiver of a particular recommendation relating to the height of the banister, the kind of thing which happens on building projects in the UK every single day. In addition, this was not a case, such as *Uren v Corporate Leisure* [2011] EWCA Civ 86, in which the defendant was taking responsibility by, say, organising activities (in that case, competitive games) which ran a risk of causing injury. As Mr Norris rightly submitted, if the defendant had been organising banister-sliding competitions, there may well have been an assumption of responsibility. But in the circumstances of this case, there was no such assumption.
61. Mr Hunter unsurprisingly made much of the fact that the risk to the claimant was not only foreseeable but foreseen (see paragraphs 15-22 above). But it is trite law that the mere fact that there is a foreseeable (and indeed foreseen) risk of injury does not of itself create a duty of care (see paragraph 56 above, and Millett LJ in *Fowles*), particularly in circumstances where that duty is said to arise in order to protect the claimant from his own foolish conduct. It is foreseeable that a man walking towards a cliff will cause himself serious

injury, but there is no liability in law on the passer-by who does not point that out. 62. In these circumstances, therefore, even if the claimant's voluntary assumption of an obvious and inherent risk is not of itself a complete answer to this case, I am in no doubt that the absence of any obligation on the part of the defendant to protect or prevent the claimant from voluntarily assuming that risk does provide such an answer. G THE CLAIMANT'S APPROACH

- a) Introduction 63. 64. 65. It was noticeable that, not only could the claimant identify no authority in which, even by analogy, a person in her position had successfully established a duty of care, but that in addition, on her behalf, Mr Hunter was obliged to try and distinguish the cases to which I have so far referred, and instead to approach the law in an entirely different way. In this final section of my Judgment, I endeavour to address the way in which the claimant's case was put. Originally, in the claimant's written opening, reliance was placed on two cases, *Brannan v Airtours PLC* [1999] TLR 73 (CA) and *Jebson v MOD* [2000] 1 WLR 2055 (CA). In the former, a duty of care was admitted, and the argument turned on the standard of care; in the latter, the appeal was confined to contributory negligence matters. I therefore agree with Mr Norris, who submitted that neither case was of any assistance in dealing with the issues that arise in the present case. In closing, the claimant relied almost exclusively upon the decision of the House of Lords in *Caparo Industries PLC v Dickman and Others* [1990] 2 AC 605. In that case, three ingredients were identified for the imposition of a duty of care: foreseeability; proximity; and whether it was just, fair and reasonable in all the circumstances to impose such a duty. Mr Hunter argued that each of these three ingredients had been made out in the present case.
- b) Foreseeability 66. As noted above, there is no dispute between the parties that the claimant's accident was both foreseeable and indeed foreseen. That element of the *Caparo* test is therefore made out.
- c) Proximity 67. On behalf of the claimant, Mr Hunter argued that there was sufficient proximity between the claimant and the defendant for a duty of care to be owed. He maintained that this arose principally by reference to the defendant's obligations under the Occupiers Liability Acts and the defendant's responsibility for the management of the premises in question. He also relied on the recent decision of the Court of Appeal in *Everett v Comojo* [2011] EWCA Civ 13, where the Court of Appeal found that a nightclub owed a duty to the claimant guest to take reasonable steps to protect him from the violent conduct of a third party. 68. I do not consider that, if it were relevant, the necessary proximity has been made out in this case. There are three reasons for that. First, the notion of proximity is, in reality, no different to a defendant's assumption of responsibility towards a claimant or a claimant's reliance upon a defendant: see the passage in the judgment of Lord Hope in *Perrett* at page 262 and the passage from Lord Hope's speech in *Mitchell* already quoted in paragraph 56 above. For the reasons set out in Section F above, I have concluded that the defendant assumed no such responsibility towards the claimant, and there was no such reliance. In those circumstances, I do not consider that the necessary proximity has been

demonstrated. 69. 70. Secondly, for the reasons already given, no claim has been made out under the Occupiers Liability Acts. The mere fact that the defendant was an occupier cannot therefore, without more, give rise to the necessary proximity. Thirdly, in my view, it is important to distinguish this case from the situation in *Everett v Comojo*. In that case the appellants, who were guests at the defendant's nightclub, were injured in a knife attack perpetrated by another guest. The appellant said that the nightclub had failed to take appropriate steps to protect its guests. At first instance the judge found that there was a duty of care but decided that there had been no breach. The Court of Appeal also found that there was a duty, but again held there to have been no breach. 71. The duty in question was the defendant's duty to its guests to take reasonable care in respect of the actions of third parties. At paragraph 31 of her judgment, Smith LJ said: "I consider that the relationship between the management of the nightclub and its guests is of sufficient proximity to justify the existence of a duty of care. The management is in control of the premises. It can regulate who enters, who is refused entry and who is to be removed after entry. The guest comes to the nightclub to relax and enjoy himself and for that prospect relies on the competence and prudence of its management. He expects and is entitled to expect that there will be no violence and that he will not be unsafe. Further the management of the nightclub is in business and wants the guest to come and spend his money; there is an economic relationship between the two. In my judgment those factors demonstrate sufficient proximity." 72. It seems to me, with respect, that this finding is obviously right. So, if in the present case the claimant had been injured when a drunken hooligan whom, on the facts, the defendant should have prevented from entering The Union Rooms, had pushed her over the banisters, a duty of care would have been owed and the outcome of this case would have been very different. But in the present situation, the duty alleged by the claimant has nothing to do with the actions of third parties, and is instead entirely concerned with the protecting the claimant from the consequences of her own actions. Accordingly, *Everett* is of no application, and provides a final reason why, in relation to the duty alleged here, I do not consider that the necessary proximity has been made out.

- d) Fair, Just and Reasonable 73. It is not, I think, necessary to extend still further an already overlong Judgment by setting out in detail all the reasons why, in the circumstances, I do not consider that it would be fair, just or reasonable to find that a duty existed in the present case. I consider that my reasoning in Sections E and F above provide sufficient justification for my conclusion that it would not be fair, just and reasonable, in the particular 74. 75. 76. circumstances of this case, to find that the defendant owed to the claimant the duty of care alleged. I should, however, note in passing that a number of the cases on which the claimant relied in this regard, such as *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082, can immediately be distinguished from the present case because important admissions were made in those cases which do not apply here. Thus, in *Jolley* itself, although the defendant Council conceded that they should have removed the abandoned boat, they argued (and the Court of Appeal had found) that there was no liability, because it was not foreseeable that the children would prop up the abandoned boat and be seriously injured by its falling off the

prop. The House of Lords reinstated the judge's original finding of liability, principally because of the defendant's concession. Lord Hoffmann made plain that, as a result of the concession, the defendant was liable for the materialisation of even relatively small risks of a kind different to that which might be foreseen, because of children's ingenuity in finding unexpected ways of doing mischief to themselves and others. This case, and other authorities with their attendant concessions, is far removed from the present case. Finally on the issue of what would be fair and just, I note the unchallenged evidence of Mr Dixon, who spoke to the claimant's colleagues after the claimant had been taken to hospital, asking them to remain in touch and passing on his best wishes to the claimant. He said: "I have a very clear recollection that a female amongst that group confirmed to me that it was all OK and that they knew it was not the pub's fault in any way as to what had happened." That initial and instinctive conclusion from those who might have easily taken a different view was, I think, the right one, and provides further support for why a contrary conclusion now would not be fair, just or reasonable. H. CONCLUSIONS 77. 78. For the reasons set out above, I consider that no relevant duty of care was owed by the defendant to the claimant. In those circumstances it is unnecessary for me to go on to consider questions of breach. I have also concluded that, even if both duty and breach had been made out, the probability must be that they were non-causative, and that the claimant would have slid anyway, even if the banister had been at normal height. Of course, I understand that the claimant will be bitterly disappointed with this conclusion, and that anything which I choose to add will be of no comfort to her. But it would be wrong for me not to conclude this Judgment without commending the claimant for her candour, straightforwardness, and resilience. No one who heard her 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.

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Prepared on 24 October 2026 · Esheria