

Blake Laphorn Tarlo Lyons' nursery and childcare news

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assessment of health and safety risk

One of the principle concerns for nursery operators is ensuring that the children in their care are safe. Section 3 of the Health and Safety at Work Act 1974 requires every employer to conduct its undertaking to ensure, so far as is reasonably practicable, that it does not expose people who are not in its employment, but who may be affected by it, to risks to their health and safety.

There has been a recent case that arose from the death of a boy aged three years nine months at a school. He was walking down a wide, shallow flight of brick stairs from one playground to another, when he decided to jump from the fourth-from-bottom step to the ground. He tripped, hit his head on the bottom step and passed away in hospital from a hospital-acquired infection.

The prosecution suggested that there ought to have been a gate preventing access to the top of the steps, that supervision should have been better and that the pupils should have been supervised specifically when moving up and down the steps.

The headmaster was prosecuted and convicted, and appealed.

The Court of Appeal said it was necessary to distinguish between real risks and those that were merely fanciful. The relevant factors would vary from case to case but might include:

- if a risk is part of the everyday incidents of life, is the exposure of someone to that risk a result of the conduct of the undertaking (which is forbidden by section 3) or a simple fact of life (which is not forbidden by section 3). The trivial risks of everyday life could not be described as "unacceptable" when carrying out a risk assessment.
- the absence of previous accidents in circumstances that occur day-after-day is highly relevant.

In this case:

- there was nothing wrong with the steps themselves

and no allegation that they could have been better constructed to avoid such an accident.

- the fact that a young child might slip, trip or choose to jump from one height to a lower level was part of the ordinary incident of everyday life.
- although children regularly moved up and down the stairs unsupervised, and jumped from one level to another, not one child had previously fallen or injured themselves.

Unless it could be said that the victim had been exposed to real risk by the conduct of the undertaking, no question of reasonable practicability of measures designed to avoid that risk arose. In this case there was little or no evidence of risk other than the fact of the accident.

points to note:

- This may not be the end of the story as the HSE has indicated that it intends to appeal the decision to the House of Lords
- This case does not reduce the need to carry out thorough and regular risk assessments
- It is inadvisable to rely, during the risk assessment process, upon the absence of previous accidents as an indication of the absence of risk, unless you can be very sure that the absence of previous accidents is not due to lucky chance.



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