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Clarification of the effect of section 3 of the Health and Safety at Work Act

The Court of Appeal has passed a judgement which has resounding implications for our understanding of the effect of s.3 of the Health and Safety at Work Act 1974.

s. 3 Says that every employer must conduct its undertaking in such a way as to ensure, so far as is reasonably practicable, that the undertaking does not expose people who are not in its employment, but who may be affected by it, to risks to their health and safety

This case arose out of the death of a boy aged 3 years 9 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 died in hospital from a hospital acquired infection. The headmaster was prosecuted.

The prosecution's case, as disclosed variously by improvement notices, interviews under caution and the particulars of the charge, was vague, but 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 convicted and appealed.

The Court of Appeal allowed his appeal.

It held (unsurprisingly) that there was no obligation under the Act to take precautions against those risks which were merely fanciful.

It said that although there was no objective standard or test which would be applicable to every case, most cases would have some important feature or features which would indicate whether the risk was real or fanciful. None were determinative, but many were of importance:

- The fact that an accident was unavoidable went primarily to the reasonable practicability of control measures rather than to the issue of the assessment of risk. However, it also had some relevance to the assessment of risk.
- Risk that was part of the everyday incidents of life went to the issue of whether the exposure of someone to risk was as a result of the conduct of the undertaking (which is forbidden by section 3) or whether it was 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 which went on occurring day after day would be highly relevant.

In this case:

- there was nothing wrong in the constitution of the steps themselves and no allegation that they could have been better constructed to avoid such an accident

CONTACT

John Mitchell (FAREHAM)
john.mitchell@blaw.co.uk
T: 01489 555008

SOUTHAMPTON

T: 023 8063 1823
F: 023 8022 6294

WINCHESTER

T: 01962 844440
F: 01962 842300

OXFORD

T: 01865 248607
F: 01865 728445

FAREHAM

T: 01489 579990
F: 01489 579126

PORTSMOUTH

T: 023 9222 1122
F: 023 9222 1123

LONDON

T: 020 7405 2000
F: 020 7814 9421





- 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
- the factors which had led to the tragic accident had to have replicated themselves time and time again, yet not one child had fallen or injured themselves, despite the same allegedly inadequate level of supervision. Countless times, children had to have moved unsupervised up or down the steps or chosen to have jumped from one level to another without any previous accident

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.

Many health and safety experts would say that this case does no more than restate the obvious, i.e. that in assessing risk, risk which is in the remote or fanciful area of whatever matrix is used to assess it does not require measures to control it. The HSE itself in its more public pronouncements (as in "Myth of the Month") has been saying so loudly and publicly for over a year.

What is notable about the case, however, is that:

- the HSE even brought the case in the first place, given its public stance on such issues
- having brought it, it was soundly reproved by the Court of Appeal

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john.mitchell@bllaw.co.uk
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SOUTHAMPTON

T: 023 8063 1823
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