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"MIND THE GAP" …when jumping between balconies breaks the chain of causation

To the layman it might sound obvious that if you attempt to jump from one hotel balcony to another and fall in the process you will have difficulty in establishing that any blame rests with others. Yet these were the facts that presented His Honour Judge Seys Llewellyn QC and subsequently the Court of Appeal in the very recent decision of *Philip Clay v TUI UK* [1].

To lawyers however this case is an interesting example of when *novus actus interveniens (*by the Claimant*)* breaks the causative link between the original wrongdoing (by the Defendant) and the injuries/damages subsequently sustained.

The facts of *Clay*

Mr and Mrs Clay booked a package holiday with TUI staying in one of their hotels in Tenerife; staying in the next apartment were his parents. Each room was situated on the 2nd floor and each had a balcony accessed by a sliding door. Late one evening, Mr and Mrs Clay put their children to sleep and went next door to his parents for an evening drink on the balcony. The court stressed that there was no suggestion that they were under the influence of alcohol or that they were anything other than decent people. At some point Mr Clay returned to the balcony and closed the sliding door behind him, which, due to a defect, inadvertently locked. For about 30 minutes they tried to attract the attention of others but without success. Eventually Mr Clay decided that he would bridge the 2' 6" gap between the balconies by stepping on a decorative ledge. He did and it gave way causing him to fall 20 feet to the ground, fracturing his skull.

His claim was unsuccessful at first instance with the trial Judge concluding that the cause of the fall was the ledge giving way and the defective door lock was too remote. Furthermore he found that stepping onto the ledge created a risk of injury that was obvious and was so unexpected and foolhardy as to amount to a *novus actus interveniens*.

The decision of the Court of Appeal

[Kitchin LJ, Hamblen LJ, & Moylan LJ]

The main planks of the appeal were that the trial Judge:-

1. failed to properly consider that it was reasonably foreseeable that Mr Clay would seek to escape and that falling was a foreseeable consequence;
2. did not follow the approach adopted in *Sayers v Harlow UDC* [2];
3. didn't address whether the Claimant's conduct was sufficiently unreasonable so as to amount to a *novus actus interveniens*

The Court of Appeal accepted that the Judge did find the door locking mechanism to be defective [para 65] but rejected the suggestion that he didn't consider foreseeability; finding that he had fairly concluded that personal injury was not reasonably foreseeable in these circumstances.

In relation to ***novus actus*** the Court accepted that a judgment had to be made to distinguish whether the sole effective cause of the injury was the novus actus **or** the prior wrong. Reference was made to the following factors [3] that were commonly relevant:

1. the extent to which the conduct was reasonably foreseeable
2. the degree of unreasonableness of the conduct
3. the extent to which it was voluntary and independent conduct

The case of *Sayers* involved the unfortunate incident of the lady who was locked in a public lavatory and sought to climb over the door but slipped and injured herself in the process. In that case the Court rejected the suggestion that her actions were too remote or that they amounted to a novus actus. Lord Evershed MR identified the approach to be taken to a suggested *novus actus interveniens* as requiring the court *"….to weigh the degree of inconvenience …with the risk that she was taking in order to try and do something about it".* He found she was *"not engaged in a hazardous enterprise"* or doing something *"at all unreasonable".*

In distinguishing *Sayers*, Hamblen LJ (giving the lead judgement) pointed out that to Mrs Sayers the inconvenience was great but the danger of escape was slight (hence no *actus interveniens)*, whereas for Mr Clay the inconvenience was slight but the danger obvious and life threatening [35]. The Court concluded that Mr Clays' conduct:-

1. was not reasonable foreseeable;
2. was unreasonable to a high degree
3. was voluntary, considered and deliberate

Moylan LJ gave a dissenting judgement on the basis that it was foreseeable that injury might occur as a result of seeking to escape from the balcony and in that context, Mr Clay's conduct in doing so was not so highly unreasonable so as to break the chain of causation. He would have made a reduction of 45% for contributory negligence.

Comment

Although a highly unusual set of facts the case does demonstrate that those placed in an unfamiliar position, through the fault of another, will not establish liability if their conduct – viewed objectively – does not satisfy at least the 3 major criteria if it is to avoid being labelled a *novus actus interveniens*, ie it was conduct that;

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- was reasonably foreseeable
- was not highly unreasonable
- was in some way, not voluntary

[1] [2018] EWCA Civ 1177
[2] [1958] 1 WLR 623
[3] Set out by Aikens LJ in Spencer v Wincanton [2009] EWCA Civ 1404

By Christopher Taylor – August 2018