Neutral Citation Number: [2023] EWCA Civ 1507

Case No: CA-2022-002048

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON SECOND APPEAL FROM THE HIGH COURT
MRS JUSTICE ELLENBOGEN
Case No: QA-2020-000073
ON APPEAL FROM HER HONOUR JUDGE BACKHOUSE
Case No: E33YX086

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

MR KANWARJIT SINGH JUJ	**Appellant**
- and -	
JOHN LEWIS PARTNERSHIP PLC	**Respondent**

- -
- -

Catherine Foster and Nadia Whittaker (instructed by **Slater & Gordon Lawyers**) for the **Appellant**
Lisa Dobie (instructed by **Clyde & Co**) for the **Respondent**

Hearing date: 24 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lady Justice Nicola Davies :

1. This is a second appeal from the decision of Ellenbogen J ("the appeal judge") from the decision of HHJ Backhouse ("the trial judge") sitting at the Central London County Court in respect of a claim by the appellant/claimant for damages for personal injury arising from a fall in a car park adjacent to the Waitrose store in Ruislip on 17 May 2015. The claimant fell and hit his head and suffered a number of injuries with long term sequelae. It is the claimant's case that the defendant breached its duty of care under the Occupiers Liability Act 1957 ("the 1957 Act") when he tripped on a kerb next to a disabled parking bay in which his wife had parked their car. At the liability only trial, the defendant denied being an occupier of the car park for the purposes of the 1957 Act and further denied that the kerb posed a danger and had caused the claimant's fall. At trial, and on appeal, judgment was entered for the defendant. At the conclusion of the hearing before this court, Lewison LJ stated that the appeal would be dismissed with reasons to follow. These are my reasons for joining in that decision.

2. From the outset of the proceedings the claimant accepted that the owner of the car park is the London Borough of Hillingdon ("Hillingdon"). It receives the revenue from the pay and display ticket system. It empties the bins in the car park and carries out repairs from time to time. The defendant has no licence nor any other legal interest over the car park, its customers use it, as do those visiting a nearby GP surgery and the stores on the local high street. The defendant's branding is displayed in and around the perimeters of the car park and until 2017/2018, the defendant paid Hillington to advertise on the back of the parking tickets.

3. An initial letter of claim to Hillingdon dated 24 August 2015 was sent by solicitors instructed on behalf of the claimant. In their letter of response Hillingdon accepted that it is the occupier of the car park but denied liability on the ground that the kerb was not defective or dangerous. Notwithstanding the initial letter, the claimant has not instituted proceedings against the local authority.

The trial

4. At trial the judge heard evidence from the claimant, his wife and received a witness statement from their daughter. The sole witness for the defendant was Rebecca Wood, the branch manager at the Ruislip store between 2011 to 2018. Photographs, not contemporaneous with the accident, which show the parking bay and other areas of the car park were before the court.

5. The claimant, aged 83 at the date of the accident, was visiting the Waitrose supermarket on the morning of 17 May in order to purchase bread rolls for a lunch. His wife, who is disabled, drove their car into the disabled parking bay which is situated next to an entrance into the store. As Mrs Juj was not getting out of the car, she parked to the left of the bay in order to allow the claimant to step directly from the car onto the kerb which adjoined the parking bay. 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. A few minutes later he returned carrying shopping bags which he placed in the boot and then walked around the back of the car into the neighbouring bay. When he was level with the front passenger door, the claimant attempted to step on the kerb in order to reach the door handle, he caught his foot on the kerb and fell. He does not remember

hitting the ground. The claimant's fall was not seen by his wife but she heard a bang and help was swiftly obtained.

6. In his evidence to the trial judge, and because of some difficulties giving evidence, the claimant demonstrated what he had done with his foot using a copy of the White Book and a marker pen. The judge found at [12] that the demonstration showed that the claimant's foot caught towards the top part of the face i.e. the vertical part of the kerb, rather than slipping off the top. The judge records that the claimant was clear in his evidence that he knew the kerb was there, that he saw it and tried to step on it. The judge accepted that the claimant had a real memory of tripping and found at [19] that he did trip by catching his foot on the face of the kerb as he had demonstrated. No issue is taken with the findings of the trial judge as to how the accident occurred.

7. The trial judge's description of the disabled parking bay included the following:

> "7. …. the disabled parking bay in question is nearest to the store entrance, under a canopy apparently belonging to the store. Facing towards the back wall of the store, on the right there is a kerb and an area where the defendant puts a display of plants for sale. To the left there is a narrow raised strip, ….. perhaps 40cm wide, although I have no actual measurements. This is bordered by grey kerb stones with tarmac in the middle. There is a photograph of the height of this strip which is 3.5 inches or 9cm. Two pillars, painted white, are situated along this strip, one towards the back wall, and one about two thirds of the way down…
>
> 8. If a customer drives their car in forwards, in order to access the store they must walk around the back of their car, where there is then a level entrance into the store. There is no room to walk along the back wall. There is a yellow hatched area painted at the back of the bay, i.e. at the boot end of the car. The bays are marked with the classic yellow disabled symbol, painted on the ground. …. there are other disabled parking bays ….. These have yellow hatched areas on both sides and at the back. This bay does not have such hatched areas at the sides, as it is not wide enough. I do not know the width, it has not been measured…... Ms Wood said that she had parked her car in there, and there was enough space on both sides to allow the doors to open and for a person to walk down the side of the car."

8. The trial judge considered the issue of whether the defendant was an occupier of the car park. Before the court was a template risk assessment dated 1 July 2013 prepared by Waitrose which included the following:

> "Slips and trips may be found all around the branch. They may be caused by rubbish, broken slabs, kerbs, uneven and unexpected floor level changes and other things. Waitrose have branch specific planned maintenance routines and in addition to this a system for checking around the branch where the public may have access and egress to identify where cleaning or repair

> is necessary to remove slip and trip hazards. Regular inspections are carried out by the Maintenance Operations Manager and visiting Maintenance Technicians to ensure that the maintenance is adequate at the branch. Branches are also expected to report defects for repair when noted.
>
> …
>
> In branches where we do not own the car park, we ensure that any views about safety issues are promptly reported to those responsible for it.
>
> ***Hazard***:
>
> …
>
> The potential for injury to customers mostly arises from slips (backwards) or trips (forwards). ...
>
> However, it is worth noting that for elderly customers fractured hips are not uncommon and according to NHS data a significant number may lead to fatality…
>
> In respect of existing control measures and other likelihood factors ticked are the boxes adjoining the questions is the surface of the pavement or car park in a satisfactory state of repair in all access and exit or pedestrian focal points…
>
> Are any changes in floor surface or height (e.g. kerb) clearly visible?"

9. The review or risk assessment is completed by a department manager and signed off by the branch manager. Miss Wood did so on 26 November 2013. It was also signed off on 10 July 2015 when it was reviewed by a department manager.

10. Evidence of steps taken by Waitrose in order to keep staff safe in the car park and to foster good customer relations included clearing up a broken wine bottle dropped by a customer, putting cones over potholes which developed in the surface of the car park and when the weather was icy, gritting the car park because it was the policy of Hillingdon not to do so. At [28] the trial judge noted that no permission was required for that activity and no objection was apparently taken.

11. Miss Woods reported previous accidents involving kerbs in the car park to Hillingdon in emails dated 11 February 2016 and 22 November 2017. At [29] to [31], the trial judge recorded the correspondence:

> "29. The 2016 email to her contact, Chris Barton, at LB Hillingdon reads:
>
>> "There have been a couple of accidents in the car park in recent months and I felt that you ought to be aware in case there was a need for repainting or maintenance. Two

> instances where customers parked in the disabled bays have tripped on the kerbs when getting in or out of the car. I am not sure whether the edge of the kerbs could be painted yellow to highlight them to customers".
>
> 30. …. The two accidents to which she refers appear to be the claimant's accident in May 2015 and another one in November 2015, ... On 22 November 2017 she wrote again to Mr Barton, "I just thought I should flag an incident in the car park last week. A lady fell in the car park and hit her head on the curbs (sic), by the disable parking bays". Then she goes on to say "There are still indentations in the surface of the car park. Some temporary tarmac fill was done on one run of bays but not the rest of the carpark… I would hate the indentations in the car park surface to be causing accidents to customers and you may not be aware of the potential risks. This is the response from Mr Barton the same day:
>
> > "Can you confirm if the area where the lady fell was under the canopy as I am aware this is the only location with kerbs. I have spoken to our Highways section about these indentations and they will arrange for them to be repaired. As you are aware we intend to carry out resurfacing of the car park in the future."
>
> 31. Then Ms Wood confirms that it was under the canopy. I have seen three emails from Ms Wood to Mr Barton. The last one must have been in August 2018 saying, "We have had a couple of incidents recently where customers have tripped on the kerb in the area below", and she forwards an email from another member of staff to her, showing the area where there is a trolley park and there is an area of raised kerb and then there is a lowered kerb and then a raised kerb again. Her colleague, a Ms Simpson says in her email to Ms Wood, "We keep getting a number of incidents where customers are falling over in the same place, mostly elderly. Could we suggest the Council that they paint a yellow line to highlight the kerb", and that is what Ms Wood does. It should be noted that it appears he does not respond to any of those three reports of trips on kerbs."

12. The trial judge concluded that the defendant was an occupier of the car park in conjunction with Hillingdon. Its duty was limited by the extent of its control, in this case it was limited to dealing with "immediate hazards" and reporting concerns and/or accidents/incidents to Hillingdon. The defendant had no control over the design, layout and/or construction of the parking bay and/or making any long term changes to the car park (whether by signage and/or painting kerbs). The trial judge's analysis is set out at [32] and [33]:

> "32. …. it appears to be the case that there is no formal legal agreement between the defendant and Hillingdon, but as Ms Wood says, partners are moving around the outside of the

> building all day, amongst other duties collecting trolleys from where customers had just left them rather than returning them to the trolley park. It seems to me that this arrangement with the car park was one of mutual commercial benefit to the defendant and Hillingdon. The defendant's customers had a car park to use and Hillingdon got the revenue from those customers. Hillingdon, at some point, decided to close the car park overnight because of vandalism, but set the hours to suit the store opening times and, indeed, it appears that the defendant had keys to the barrier to open and close it.
>
> 33. As I have said, the defendant had its branding around the car park and a notice up about the system of refunding parking charges to its customers. Ms Wood's evidence is that there was only one sit down meeting with Hillingdon, and this was to do with the adverts on the back of a parking tickets. However, there were a number of "walks round" the car park with council employees, the defendant had that dedicated contact in Mr Baron and there is some evidence in the correspondence of Hillingdon responding to issues raised by the defendant, including litter picking and the resurfacing of the car park and the potholes as I have just read out. In my judgment, the defendant was more than just a good neighbour to Hillingdon and given the risk assessment and the steps taken by Waitrose, I find that the defendant had sufficient control to be an occupier of the car park. However, that control was limited, in my judgment, to dealing with immediate hazards, and putting in place interim measures to deal with hazards, as Ms Wood told me, and to reporting matters to Hillingdon. Therefore, the defendant's duty of care has to be limited to the extent of its control. Specifically, in my judgment, the defendant was not entitled to, nor required to paint the kerbs, or to prevent the use of any particular bay, including the one in question, nor was it entitled or required to make any long term or structural changes."

13. The trial judge found that the juxtaposition of the kerb and disabled parking bay posed a danger to users of the disabled parking bay, owing to the narrow space to walk between a car and the kerb. Her reasoning was as follows:

> "38. …. this disabled parking bay is unique in this car park, being bordered both sides by a kerb. There is, as I have said, obviously less space between a car parked in that bay and the kerbs on both sides than in the other disabled bays in this car park where there is a kerb on one side, because there is no room for a hatched area. In my judgment, the issue in this case is the presence of the kerb itself. It has to be said that the kerb is clearly visible as a customer drives into the parking bay, or walks towards it; the kerb stones are a lighter colour. However, it seems to me that the danger comes from the space at the side of the car and the need for elderly and/or disabled customers, who

> are most likely to be using this bay, to manoeuvre between the side of the car and the kerb. It is apparent that the claimant's accident was by no means unique and bearing in mind the previous accidents, and the features of this bay as I have described them, I find on the balance of probabilities that the design of the bay, i.e. the presence of the kerb to the left, is an unreasonable danger for the class of visitors using that bay, namely the disabled."

14. The trial judge was not satisfied that Ms Wood had a full awareness of the risks posed by the kerb in the bay, it being unclear what system if any she had to monitor the number of accidents taking place in the car park [39]. She concluded that Waitrose should have reported the accidents in 2012, 2014 and possibly that in 2013 to Hillingdon. No report was made until 2016. The trial judge doubted whether painting the kerb would be sufficient to address the issue and noted that: "…It was not within the defendant's power to insist on the kerbs being painted or that they should be altered or removed; that is all a matter for Hillingdon. " [40]

15. As to any notice warning customers about the kerbs in the disabled bay, the trial judge stated that the kerbs were:

> "….clearly there to be seen. There is no general requirement to warn of dangers which are obvious, and in my judgment, there is no requirement on the defendant in this case to put up a notice warning of the kerbs in this bay. It was suggested that perhaps Waitrose should have advised customers by notice that this bay was not suitable for disabled customers. The difficulty with that suggestion that is that any notice would have conflicted with the painted sign and would have effectively been gainsaying the decision by Hillingdon that this bay was to be for disabled customers. In my judgment, such a notice would have gone beyond what the defendant could have reasonably been expected to do." [40]

16. As to causation, the trial judge concluded that the kerb was not defective [41]. She had found that the defendant was in breach of its duty as an occupier in failing to report accidents sooner. As to that she stated:

> "41….However, the evidence shows that Hillingdon ignored the defendant's two subsequent requests to paint the kerbs and, in my judgment, it is unlikely that an earlier request would have produced a different result. I note that in response to the letter of claim, Hillingdon denied that the kerb was defective or dangerous and there is no evidence that it would have taken a difference stance if the defendant had reported the accidents in 2012 and 2014. Ms Wood also surmised that the Local Authority's view was influenced by budgetary constraints.
>
> 42. In any event, the claimant's own evidence as to what effect a painted line on the kerb would have had on this accident was only that it might have helped him judge the height better. This

> was not a high step by any measure. For those reasons, in my judgment the failure to report the previous accidents at the time cannot be said to be causative of the claimant's accident."

17. Finally, the trial judge addressed what she described as the more fundamental problem with the claimant's case namely this was not a trip over a difference in height that was unexpected, it was not a trap, it was not unseen. At [43] the trial judge noted the "claimant's clear evidence was that he knew of the presence of the kerb, he saw it and was trying to step onto it. That is an action which people when out and about do day in and day out. Very sadly, on this occasion he simply misjudged that manoeuvre by not lifting his foot sufficiently." She concluded that for the purpose of the claim it mattered not if the claimant slipped or tripped, this was simply a true accident and nothing that the defendant did or failed to do caused it.

18. On appeal, the trial judge's findings and overall conclusion were upheld save that the appeal judge found that the trial judge was wrong to conclude that the respondent's control extended to the ability to put up warning signage and to reiterating with reasonable frequency any concerns regarding issues which had not been attended to by Hillingdon within a reasonable period [50]. At [54] and [55], the appellate judge departed from the trial judge's finding that the degree of risk was such as to trigger section 1(1) of the 1957 Act. She found that the danger was obvious, a visitor was able to appreciate it, no warning was required, the respondent was under no duty to draw the danger to the attention of Hillingdon notwithstanding earlier accidents, a proportionate and reasonable response to the degree of risk and the seriousness of the outcome of that risk did not require the defendant to report the risk to Hillingdon nor was it required to erect warning notices for the benefit of those using the relevant bay. The visitor was reasonably safe in using the parking bay absent each such step. It followed there being no such duty there was no breach of duty.

The law

19. The duty which an occupier of premises owes to his visitors in respect of danger due to the state of the premises is set out in section 2 of the 1957 Act:

> "2.— Extent of occupier's ordinary duty
>
> (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, …"

20. In *Wheat v E Lacon & Co Ltd* [1966] AC 552 Lord Denning identified the duty of the occupier of land as a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on them. He identified the duty as being a particular instance of the general duty of care which each man owes to his "neighbour". In applying the general principle to application in respect of dangerous premises Lord Denning identified the principle as follows:

> "Wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor": and the "occupier" is under a duty to his "visitor" to use reasonable care. In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers" And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other...." (page 577H, 578A-F)

At 586D Lord Morris of Borth-y-Gest observed that:

> "It may, therefore, often be that the extent of the particular control which is exercised within the sphere of joint occupation will become a pointer as to the nature and extent of the duty which reasonably devolves upon a particular occupier."

21. Grounds of Appeal

Ground 1: the Trial Judge erred by limiting the scope of the Defendant's duty under section 2(2) of the Act to addressing only what she described as "immediate hazards" within the car park and reporting any other issues to the owner.

A correct interpretation of the Act should have been that the Defendant's duty extended to taking such care as in all the circumstances of the case was reasonable to address any hazards that might affect the safety of visitors invited to use the car park.

Whilst the High Court Judge correctly extended the Trial Judge's definition of the scope of the Defendant's duty to include a requirement to put up warning signs as well as reporting its concerns to the owner, she erred by limiting the scope of the duty in other ways e.g. by stating that the duty did not extend to painting the kerb to delineate the hazard or to preventing the use of the parking bay (an issue of mixed law and fact).

Ground 2: the High Court Judge erred by interfering with a finding of fact properly made by the Trial Judge that the Defendant should have known that the disabled parking bay represented an unreasonable danger to its intended users. An Appeal Court should not interfere with the Trial Judge's conclusions on primary facts unless it is satisfied that such findings were plainly wrong. The High Court Judge simply substituted her own view without this threshold having been met (an issue of mixed law and fact).

Ground 3: having made a finding of fact that the Defendant should have known that the disabled parking bay represented an unreasonable danger to its intended users, the Trial Judge erred in law by concluding that the Defendant was not expected to take any steps to address the hazard other than to report the matter to the owner (an issue of law).

Whilst the High Court Judge properly extended the scope of the Defendant's duty to include a requirement to put up warning signs and to report its concerns to the owner, having erred on the basis set out in Ground 2 supra., she then compounded this error by concluding that no action was in fact required due to the obviousness of the hazard (an issue of mixed law and fact).

Ground 4: the Trial Judge concluded that the Defendant was in breach of its duty to report the presence of the relevant hazard to the owner in 2012, 2013 and 2014, but erred by finding that proper compliance with this duty would not have made any difference to the outcome (an issue of mixed law and fact).

Having erred on the basis set out in Ground 2 supra, the High Court Judge erred further by failing to address the Claimant's submissions on this issue (an issue of law).

Ground 5: both Judges erred in law by concluding that the Claimant's accident was "an accident in a true sense of the word" thereby disregarding any contribution of the Defendant's breach of duty to the occurrence of the accident. The test that the Court should have applied was whether the Defendant's breach of duty caused and/or contributed to the Claimant's accident. This required focus on the scope of the Defendant's duty and the state of affairs that proper compliance with that duty would have avoided (an issue of mixed law and fact)."

The appellant/claimant's submissions

22. The essence of the claimant's submissions are set out in the Grounds of Appeal. At the core of the claimant's case is the contention that the purpose of a disabled parking bay is to make allowances to accommodate those who will use it which include the elderly. Such allowances include a requirement for level access as it is known that those who are elderly or disabled may have difficulties navigating and negotiating obstacles including steps within the car park. This disabled parking bay was unique as it was narrower than other bays, it did not have the benefit of yellow hatched markings at either side of where a car would park and kerbs bordered each side.

23. The claimant contends that both judges erred by ignoring the primary finding of fact, namely the hazard identified at [38] of the trial judge's judgment which was the danger

resulting from the space at the side of the car and the need for elderly or disabled customers to manoeuvre between the side of the car and the kerb. The respondent, as occupier, had daily access and knowledge of the bay's usage and the problems created by the hazard of the kerb, it is the claimant's case that it was for the respondent to solve this problem. The judges also failed to have regard to section 2(3) of the 1957 Act and the particular difficulties that would be experienced by vulnerable individuals being required to execute such a complex manoeuvre.

24. The claimant relies upon the occurrence of previous similar accidents as demonstrating that the configuration of the bay created an unreasonable danger to the intended users of the parking bay. Waitrose should have reported the previous accidents to Hillingdon and, in the absence of a response from the local authority, a cone should have been placed in the parking bay to render it out of action or a notice placed to deregister the parking space.

25. The claimant contends that the conclusion that there was no breach of duty was wrong because on the assumption that the parking bay would create an unreasonable danger, the evidential burden would shift to the respondent to justify why the danger could not be addressed. The judges failed to articulate the basis upon which they considered that the appellant had been aware of and therefore consented to the risk.

26. It is the claimant's case that the defendant should have reported the danger with reference to a description of the problem, reporting previous accidents was insufficient. The claimant contends that the trial judge failed to engage with the correspondence between the respondent and Hillingdon in November 2017. That being so, the conclusion by the trial judge at [41] that the owner would not have done anything had the unreasonable danger been reported properly was not justified. (Ground 4)

27. The judges erred in law by concluding that the claimant's accident was "an accident in a true sense of the word" thereby disregarding the contribution of the defendant's breach of duty to the occurrence of the accident. (Ground 5)

The respondent/defendant's submissions

28. The defendant contends that the test for determining whether a defendant is an occupier for the purposes of the 1957 Act is control. The claimant's reliance on the defendant's knowledge of the risk as providing a basis for arguing that there was a duty to alter the state of the premises is misconceived. Both judges applied the correct test of control to the facts of the case. It was open to the trial judge to find limited occupation on the part of the defendant. The unappealed finding of the trial judge is that the defendant had no control over the existence, position, layout/design of the kerb and parking bay and/or any long term changes to it.

29. It is the defendant's case that not every foreseeable risk has to be guarded against, the duty is to see that visitors are "reasonably safe". Occupiers of land are not under a duty to protect or even warn against obvious dangers. Section 2(2) of the 1957 Act requires an assessment of the risk posed. *Tomlinson v Congleton BC* [2004] 1 AC 46, *Edwards v Sutton* [2016] EWCA Civ 1005. The assessment of risk under section 2(2) of the OLA 1957 will include the obviousness of the risk. *The White Lion Hotel v James* [2021] EWCA Civ 31.

30. The 'features' relied upon by the trial Judge (the potential restricted space between a car and the kerb) was not established on the evidence, no measurements or objective evidence were before the court to rebut this. Further, Mrs Juj parked on the left hand side of the disabled bay to enable the claimant to step out of the car and onto the kerb which was visible to her when she drove into the bay. Mrs Juj parked closer to the kerb, for the purpose of using it. Any risk posed by manoeuvring in a restricted area, was not relevant on the facts of this case.

31. The defendant's submissions upon Ground 3 are addressed at para 42 below.

32. It is the defendant's case that Ground 4 relates to the trial judge's factual findings. An appellate court will not interfere with findings of fact by a first instance judge merely because it takes a different view of the matter. This applies not only to findings of primary fact but also to evaluations of those facts and to inferences to be drawn from them. Further, there was insufficient evidence before the court that an earlier report (or more insistent reports) by the defendant to Hillingdon would have made any difference. The trial judge addressed the issue of reporting and provided for her conclusion reasons [29-31] and [40-42].

33. As to Ground 5, the defendant contends that the kerb was visible and seen by the claimant. No reminder of its presence would have made any difference, a reasonable factual finding made by the trial judge, based on the evidence at trial. Both the trial judge and the appeal judge were agreed that it was a "fundamental problem" with the claimant's case.

Discussion and conclusion

34. The Particulars of Claim plead negligence and breach of the defendant's duty as occupier of the Waitrose store and car park contrary to the 1957 Act. The relevant pleaded allegations are that the defendant caused or permitted the kerbed area to be present on the edge of the disabled parking bay when they knew or should have known that it constituted a danger in particular to vulnerable visitors authorised to use the disabled parking bay; they failed to provide a step free and/or level access from the disabled parking bay to the store; they failed to institute or enforce an adequate system of inspection and maintenance of the car park and the parking bay and failed to warn the claimant of the tripping danger presented by the kerb.

35. The duty of an occupier pursuant to section 2 of the 1957 Act is to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. This duty extends to taking reasonable steps to protect visitors from dangers which the occupier did not himself create and, where reasonable, to warn of any danger or hazard.

36. The owner of the car park in which the claimant fell and sustained injury is the local authority namely Hillingdon. The claimant's claim against the defendant has proceeded upon the basis that it has a level of control over the car park. The nature and extent of that control is relevant to the issue of whether the respondent is an occupier of the car park for the purposes of the 1957 Act and the nature and extent of its responsibility. Unchallenged is the finding of the trial judge, upheld on appeal, that the defendant had no responsibility for the design, construction and layout of the parking bay. It follows

that allegations contained in the Particulars of Claim pertaining to the building regulations and any allegation that the defendant should have altered the design, construction or layout of the parking bay and/or kerb by for example removing it, fall away. Further the trial judge's unchallenged finding, upheld on appeal, that the kerb was not defective, counters any allegations relating to the repair or maintenance of the kerb.

37. In a careful and detailed judgment, the trial judge addressed the issue of whether the defendant is an occupier of the car park under the 1957 Act and the nature and extent of its duties. Having considered the evidence, in particular that of Miss Wood, the judge concluded at [33] that the defendant was more than just a good neighbour to Hillingdon and given the risk assessment and the steps taken by Waitrose, she correctly concluded that the defendant had sufficient control to be an occupier of the car park.

38. The trial judge then examined the evidence relevant to the nature and extent of the control, in particular she took account of the content of the risk assessment, the evidence of how the defendant dealt with immediate hazards such as broken wine bottles, potholes or icy weather and determined that the control exercised by the defendant was limited in its nature, confined to dealing with immediate hazards, instituting interim measures and thereafter reporting the matters to Hillingdon. I am satisfied that the trial judge's conclusion as to the limits of the defendant's control, and hence its duty of care, was not only reasonable, it realistically reflected the evidence before the court.

39. An appellate court will not interfere with findings of fact by a trial judge unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. (*Staechelin & others v ACLBDD Holdings Ltd* [2019] EWCA Civ 817 at [29], *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5). An appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the judge was plainly wrong: *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477.

40. Addressing the specific facts of the claimant's accident, it is undisputed that the design of the disabled parking bay was unique within the car park, it was narrower than other bays and kerbs bordered each side. At this appeal, considerable emphasis was placed on the need for the occupier of a car park in which there is a disabled parking bay to provide a bay with level access. At trial, no expert evidence was relied upon by the claimant to support this allegation. In any event, the fact that there was no level access within the parking bay was known to the claimant and his wife and is evidenced by the fact that the claimant's wife deliberately drove their car into the parking bay and close to the kerb on the left side in order to enable the claimant to step from the car directly onto the kerb, which he did.

41. Further, the unchallenged findings of the trial judge were that the kerb was clearly visible to anyone driving into the parking bay or walking towards it. The kerb stones are a lighter colour. The disabled parking bay had a clear delineation, set by the surrounding kerb. The visible kerb was the reason the claimant's wife parked close to it to enable the claimant to step onto the kerb.

42. I accept the defendant's submission that as the kerbs were clearly there to be seen, there was no general requirement to warn of obvious dangers. This was addressed by the trial judge at [40]. In my view the trial judge was correct to conclude that there was no

requirement on the defendant to place a warning of the kerbs in the bay. Further, the trial judge was right to find that 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 the decision by Hillingdon that the bay was to be for the use of disabled customers. The trial judge's finding of fact that the defendant did not have sufficient control of the car park to enable it to close the bay was properly founded upon the evidence. As to the claimant's contention that the kerb should have been painted, at [42] trial judge found that the painting of the kerb would not have avoided the accident. In my judgment all of the above findings of fact were reasonably open to the trial judge and do not warrant any interference by this court.

43. The relevant hazard identified by the trial judge at [38] of her judgment was that: "The danger comes from the space at the side of the car and the need for elderly and/or disabled customers who are most likely to be using this bay, to manoeuvre between the side of the car and the kerb". In my view, the difficulty which this finding poses for this claimant is twofold. Firstly, any risk created by a lack of space between the kerb and the car cannot be relevant on the facts of this claim because the claimant's wife chose to manoeuvre the car so as to allow the claimant to step directly on to the kerb. Secondly, immediately before he fell, the claimant was in the adjacent bay and from that position he attempted to step up onto the kerb, he did not lift his foot sufficiently high enough with the result that it caught on the kerb and he fell.

44. Further, if it is the claimant's case that he approached the car door from the adjacent bay because of the configuration of the parking bay, the unchallenged fact is that the defendant is not responsible for the design or the configuration of the parking bay.

45. Miss Foster, counsel for the claimant, was asked by the court to identify the steps which the defendant should have taken in order to address the hazard identified by the judge at [38] of the judgment. Three steps were identified: (i) placing a cone in the parking bay to block it off; (ii) communicating with Hillingdon; (iii) redesignating the parking bay. These specific allegations were no part of the claimant's pleaded case. Taking the parking bay out of action either by putting a cone on it or redesignating it was not the responsibility of the defendant and flew in the face of the aim and designation of the bay by the owner of the site namely Hillingdon.

46. As to communicating with the local authority, that issue was addressed by the trial judge. The conclusion of the trial judge that the defendant should have reported the claimant's and other accidents at the time of occurrence is of limited effect. The trial judge's finding that the local authority would not have done anything was based on fact which was founded on the conduct of Hillingdon. There were two limbs to this finding namely: (i) when Miss Wood did write to Hillingdon notifying them of accidents there was no response; (ii) in response to the letter of claim from the claimant, Hillingdon denied that the kerb was defective or dangerous. It was the latter fact which was relied by the judge at [41] when she concluded there was no evidence that it would have taken a different stance had the defendant reported the accidents in 2012 and 2014. In my view, this provides a sound evidential basis for the judge's finding that Hillingdon would not have responded positively to earlier reporting of previous accidents.

47. Further, at [41] the judge recorded that the evidence showed that Hillingdon ignored the defendant's two subsequent requests to paint the kerb and concluded it was unlikely that an earlier request would have produced a different result. That was a finding of

fact made by the judge. It was an inference which she was entitled to draw from the evidence and a conclusion which she was entitled to reach.

48. I regard the claimant's contention, relying upon the authority of *Bolitho v City and Hackney Health Authority* [1998] AC 232, that the trial judge erred in finding that Hillingdon would have done nothing had the danger been properly reported to them to be misconceived. Lord Browne-Wilkinson at 239G of *Bolitho* stated that "..in cases where the breach of duty consists of an omission to do an act which ought to be done … that factual inquiry is, by definition, in the realms of hypothesis. The question is what would have happened if an event which by definition did not occur had occurred ….". In this case the omission is a failure by the defendant to earlier notify Hillingdon of previous accidents. The question for the court was what would have happened had those steps been taken. The answer to that is provided by Hillingdon's response to the detailed letter of claim sent on behalf of the claimant by his solicitors namely a denial that the kerb represented a danger for which Hillingdon were responsible. Thus, although the judge's attention was not drawn to the authority of *Bolitho*, her reasoning is consistent with the principle there enunciated and does not provide a reason to allow this ground of appeal.

49. In my judgment, the critical issue for this claimant is the finding of the trial judge at [43] namely that:

> "The more fundamental problem with the Claimant's case is that this is not a case of someone tripping over a difference in height where they would not expect one to be. This was not a trap. It was not unseen. The Claimant's clear evidence was that he knew of the presence of the kerb, he saw it and was trying to step onto it. That is an action which people when out and about do day in and day out. Very sadly, on this occasion he simply misjudged that manoeuvre by not lifting his foot sufficiently."

This was a finding of fact which was made following a careful evaluation of the claimant's evidence, it is clearly founded upon the evidence and was properly made. In my view, it is fatal to claim of the claimant.

50. I have difficulty with the finding of the appeal judge at [55] namely that the degree of risk as set out at [38] of the trial judge's judgment was not such as to trigger section 1(1) of the 1957 Act and her finding that a proportionate and reasonable response to the degree of risk and the seriousness of the outcome at risk did not require the defendant to report the risk to Hillingdon nor to erect warning notices for those using the relevant bay, there being no such duty there cannot have been any breach. As previously stated, in my judgment the findings made by the trial judge were not plainly wrong. I accept the contention of the claimant that what the appellate judge did was to substitute her own view without the requisite legal threshold having been met, accordingly Ground of Appeal 2 is allowed.

51. Given my findings as to the determinations of the trial judge set out above, and notwithstanding the fact that Ground of Appeal 2 succeeds for the reasons given, this appeal is dismissed.

Macur LJ:

52. I agree.

Lewison LJ:

53. I also agree.