

Child's play

The Court of Appeal has refined the test of the meaning of risk, say **Patrick Harrington QC** and **Gerard Forlin**

IN BRIEF

- The *Porter* judgment has arguably extended the law to adopt the realities of day-to-day life.
- In future, real (not theatrical or fanciful) risk will be the only touchstone.

R*v Porter* [2008] EWCA Crim 1271 is an important appeal decision reviewing the current legal test of “risk” under the Health and Safety at Work etc Act 1974 (HSWA 1974). In essence, it states that there needs to be a real, as opposed to theoretical or fanciful, risk and whether the existence of a previous similar accident can be a relevant factor.

James Porter is the headmaster of Hillgrove School in North Wales. He has run the school since 1975; it is a very successful school currently educating children from the age of three plus to 16. Mr Porter is utterly dedicated to the pupils at the school; his first priority is their welfare; he is totally committed to their wellbeing. The school itself was not purpose built; it was initially a private house at the beginning of the 20th century and became a preparatory school in the 1930s.

“There had never been any complaint about the standards of health and/or safety at the school”

The school has a superb safety record, comparing very well with other schools. In fact at the trial, it quickly became apparent that its safety record was in fact better than two other schools the prosecution used as exemplars. The school site is rugged, with part of the playground built in the grounds of a disused quarry. The terrain is irregular. Satellite classrooms are reached via well-constructed brick steps. There had never been any complaint about the standards of health and/or safety at the school; the Health

and Safety Executive (HSE) had never paid a visit to the school. More importantly, there had never been an accident on “the steps” which featured in this case.

One of the pupils at the school was K who was born in October 2000. K was a bright and clever child. He was three years and nine months old when he had an accident.

On 7 July 2004 playtime took place as normal at the school; K’s age group were to play with the others of similar age, as well as juniors and infants. Playtime was supervised by a very experienced teacher.

During the break, K moved into an area which was designated as “out of bounds”; the defence evidence was that “out of bounds” was for practical and historic reasons and this designation was no reflection upon the safety, or lack of it, in the “out of bounds” area.

This area included a set of steps. He was seen, safely, to negotiate the steps downwards. When he reached the fourth step from the bottom he jumped towards the base of the steps. He thought he was “Batman”; he had a “Spiderman” toy with him. He apparently landed on the bottom step and fell forward. He bumped his head. He was distressed. It was decided to take K to hospital. He was taken to a local hospital, assessed and then transferred to Alder Hey hospital in Liverpool.

He had suffered a relatively minor head injury; there was no fracture of the skull nor even a laceration or cut of the skin. He did, though, suffer some intercranial bleeding which led to some brain swelling. The pathological evidence confirmed that such sequelae are not unusual in minor head injuries. K became inactive and immobile. He contracted pneumonia and the MRSA virus, and died on 11 August 2004.

Shortly after this accident, the HSE served an improvement notice which required the school to provide a gate. The school was warned that a failure to do so would lead to the school being closed. Accordingly a gate was provided, although there was some evidence that the existence of a gate and fence decreased the

opportunity for supervising teachers to see into the playground below.

Unfortunately the appellant was not interviewed for a period of 10 months. There then took place a long, discursive interview during which no clear allegation was ever made against him. There was, it is true, a discussion as to the levels of supervision which he provided during playtime. It was put to him in interview that he would not be content to permit infants to explore anywhere without supervision. The appellant pointed out that the staff were experienced and aware of what was necessary. He then emphasised, as he was later to reiterate, that it was important to instil in the children a sense of responsibility. He also pointed out that the nature of the playground was such that there were steps everywhere.

ALLEGATIONS

There was no specific allegation that a failure to prevent unsupervised access to the steps by a child of three years and nine months amounted to a breach of the duty imposed upon the appellant of HSWA 1974, s 3(1). This states:

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risk to their health and safety.”

The particulars of the offence which the appellant faced before the jury alleged that the risk to safety was “falling on a flight of steps”. Again, that was not accurate. It is no surprise, therefore, that in their opening the prosecution alleged:

“The flight of steps to which children aged three and four years could gain unsupervised access during break times fell within the ambit of the defendant’s conduct of his undertaking.”

It was also alleged that the appellant exposed such a child to a risk by reason of falling from the flight of steps. The prosecution alleged that they could support their case by reason of the appellant designating the steps as being out of bounds. In fact, the evidence subsequently showed that this was in order to segregate one group of children from another. The younger children (among



Photo: © stockexpert.com/Zeld

whom K could be numbered) wished to be nearer a teacher and the toilets.

The prosecution called no expert, but they called witnesses who worked and taught at two other schools to establish that they operated a level of supervision higher than that operated by Hillgrove School, a pupil ratio of 2:26. This was mirrored in a guideline to which the prosecution attached importance, namely that the Department of Health in 1991 had recommended that in respect of nursery classes in schools maintained by local education authorities, the minimum ratio should be 2:26. No one suggested that that necessarily applied to playgrounds, nor could point to any published guideline that that was the level of supervision required within a playground. As set out above this high point of the prosecution's case was somewhat diminished by the evidence elucidated in cross-examination—that the safety record of the other schools was far lower than that achieved by Hillgrove.

In *Porter* the Court of Appeal has refined the test of the meaning of “risk”, that is the trigger point of the Health and Safety offences under ss 2, 3, 7 and 37 etc.

In the court's judgment Moses LJ said:

“In our view it is not necessary to provide any paraphrase of the statutory concept of risk, even though judges have in the past felt it necessary to do so: see, for example, *R v Board of Trustees at the Science Museum* [1993] 1 WLR 1171, 1171D, [[1993] 3 All ER 853], in which the court referred to the concept of risk as containing the idea of ‘a possibility of danger’. What is important is that the risk which the prosecution must prove should be real as opposed to a fanciful or hypothetical: see *R v Charget Ltd* (trad-

ing as *Contract Services*) and *Others* [2007] EWCA Crim 3032 at para 26 [[2007] All ER (D) 198 (Dec)]. There is no obligation under the statute to alleviate those risks which are merely fanciful.”

Lord Justice Moses continued:

“How then is the line to be drawn between those risks which are real and those which are hypothetical? It does not suffice merely to say that that must be left to the good sense of the jury, unless the jury is directed that under the statute a clear line must be drawn if the prosecution is to prove its case. How is the jury to draw that line? There is no objective standard or test applicable to every case by which the line may be drawn. But in most, if not every, case there will be one way or the other important indicia—factors—which the jury are obliged to take into account to determine whether the risk is real or fanciful. None of them is determinative; but many (depending on the facts of any particular case) will be of importance. For example, the absence of any previous accident in circumstances which occur day after day will be highly relevant. That was a relevant feature in the instant case. The factors which led to this tragic incident must have replicated themselves over and over again throughout the years, but no child fell in such a way as to injure himself as the evidence seems to prove. Furthermore, no previous accident occurred, despite the same allegedly inadequate level of supervision. There will have been countless times when a child moved, unsupervised, up or down those steps, or chose to jump from one level to another, without any previously recorded accident. Further, there was nothing wrong with the construction of the steps themselves.

“We acknowledge that the fact that an accident is unavoidable goes primarily to the reasonable practicability of the measures which a defendant might take, rather than the risk to safety. But that is not exclusively so. As we have said, that the risk is part of the everyday incidence of life goes to the issue as to whether an injured person was exposed to risk. Where the risk can truly be said to be part of the incidence of everyday life, it is less likely that the injured person could be said to have been exposed to risk by the conduct of the operations in question.”

This judgment has in one swoop clearly developed the law substantially from the legal position as set out in the *Trustee* case which has hitherto been the trigger point for all prosecutions under HSWA 1974. For instance in the Hatfield Train Crash Appeal a possibility of danger had been the relevant test.

EXTENDING THE LAW

The *Porter* decision has arguably extended the law to adopt the realities of day-to-day life, and appears to have gone a substantial way in redeeming the current status quo. Crucially, it states that the lack of a similar accident is a vital factor to be considered.

“There is no objective standard or test applicable to every case by which the line may be drawn”

It will be an important case, *inter alia*, for prosecution authorities in deciding whether to prosecute for health and safety (and corporate and gross negligence manslaughter), for defence terms advising their clients and for judges arbitrating on trials and *Newton* hearings.

In the future real, not theatrical or fanciful, risk will be the only touchstone. Interestingly, the prosecution have recently announced that they are seeking leave to appeal to the House of Lords on a point of law to obtain clarification on the law regarding the issue of risk. We will have to wait and see how this develops.

Patrick Harrington QC is a barrister at Farrar's Building. Gerard Forlin is a barrister at 2–3 Gray's Inn Square. Both appeared in the Court of Appeal for Mr Porter