Neutral Citation Number: [2022] EWHC 2418 (KB)

Case No: QA-2020-000073

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 30 September 2022

Before :

MRS JUSTICE ELLENBOGEN

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Between :

Kanwarjit Singh Juj	**Appellant**
- and -	
John Lewis Partnership PLC	**Respondent**

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- -

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

Hearing dates: 16 November 2021

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice Ellenbogen DBE:

Introduction

1. This is an appeal from the judgment of HHJ Backhouse, sitting at Central London County Court, by which she dismissed the Appellant's claim, ordering him to pay the Respondent's costs, the latter not to be assessed or enforced without further order of the court. Ms Foster, who did not appear below, appeared for the Appellant. Ms Dobie, who did appear below, appeared for the Respondent. I am grateful to them both for their assistance.

2. By his claim, the Appellant sought damages for personal injury arising from a fall in a car park adjacent to the Waitrose store in Ruislip, on 17 May 2015. It was the Appellant's case that the Respondent had breached its duty of care under the Occupiers Liability Act 1957 ('the OLA'), causing him to trip on a kerb next to a disabled parking bay in which his wife had parked their car. At the relevant time, the Appellant had been 83 years old. In falling, he had hit his head, suffering a fractured wrist, maxillofacial injuries, a traumatic brain injury; a subdural haemorrhage and long-term consequences. The trial was of liability only. The Respondent denied liability, putting the Appellant to proof that the kerb had caused the fall; denying that it was an occupier of the car park and also that the kerb posed a danger. It was not in dispute that the Respondent was not the owner of the car park; that owner being the London Borough of Hillingdon ('LBH'), which collects the revenue from the pay and display system; empties the bins in the car park and undertakes repairs from time to time. The Respondent has no licence relating to, or other legal interest in, the car park; its customers, in common with those of stores on the local high street and people visiting a nearby GP surgery, use the car park. The Respondent refunds its customers for up to two hours' parking, which costs £1.50. Its branding is displayed in and around the perimeter of the car park and, until approximately 2017 or 2018, it paid LBH to advertise on the back of the parking tickets. No claim has been brought against LBH.

3. The judge identified the issues which she had to decide as follows:

    i) the cause of the Appellant's accident;

    ii) whether the Respondent was an occupier of the car park;

    iii) whether the state of the premises was such that it posed an unreasonable danger to visitors;

    iv) if the Respondent owed a duty, whether it had breached that duty by failing to have taken reasonable steps to see that visitors were reasonably safe;

    v) whether any breach of duty by the Respondent caused the Appellant's accident; and

    vi) whether the Appellant was guilty of contributory negligence.

4. In relation to the first to fifth of those issues, she found (materially):

    Issue 1

i) (judgment, [19]) *'Mr Juj suffered a serious accident with, it appears, some loss of consciousness, a traumatic head injury and subdural haemorrhage. He was in pain and confused at least initially. In my judgment, it is not surprising that he did not immediately recollect what had happened to him. I note that he spoke normally to his wife through the open boot when he was putting the shopping in the car, and neither she nor he report him suffering from any of the symptoms that had preceded previous fainting episodes. The fall must have taken place no more than a few seconds later. In my judgment, it is more likely that it was a trip than a sudden collapse. I am satisfied, on the balance of probabilities, that Mr Juj has a real memory of tripping, and I find he did trip by catching his foot on the face of the kerb as he demonstrated.'*

ii) (judgment, [12]), *'...At my suggestion, at the end of his evidence, he demonstrated what he did with his foot, using a copy of the White Book and a marker pen. That demonstration showed that his foot caught towards the top part of the face i.e. the vertical part of the kerb, rather than slipping off the top. Mr Juj was clear in his evidence that he knew the kerb was there, that he saw it and tried to step onto it. That is his account.'*

Issue 2

iii) (judgment, [32]) *'Going back to the analysis about whether the defendant is an occupier, it appears to be the case that there is no formal legal agreement between the defendant and Hillingdon, but as Ms Wood says, [staff] 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.'*

iv) (judgment, [33]) *'...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.'*

Issue 3

v) (judgment, [34]) *'I come to the issue of whether this bay constituted an unreasonable danger. The claimant points to previous accidents, apparently involving this bay. The reports are rather imprecise and are contained in the*

various places. There is a summary of incidents and then some specific safety incident details. There is an incident on 12 December 2012, when a customer tripped over the kerb landing on his front resulting in a cut above his right eye, a cut lip and a cut knee. The specific safety incident report puts the location as, 'Outside the branch exit, by the disabled parking spaces. Witness stated the customer tripped over the kerb'. I think there is no more detail other than that. That, in my judgment, appears to refer to this bay.'

vi) (judgment, [35]) *'Then there is another possible incident on 14 March 2013. Unfortunately, this simply reads, 'Customer tripped on paving around pillar on entrance to shop', and then another incident on 9 August 2014, where it is specified that, 'The customer was stood by the back passenger side of the car whilst putting shopping in the car boot. She went to take a step forward and immediately felt her left foot trip over the curb (sic), causing her to trip and fall in the next bay face first'. Further, it said the locations had been 'non-selling area-external-carpark-disabled space'. Again, it would seem likely that that incident involved this bay and Ms Wood seemed to accept so. The customer in that incident suffered a cut to her nose and injuries to her knee, ankle and shoulder.'*

vii) (judgment, [36]) *'After the claimant's own accident there was another incident on the 3 November 2015, reading, 'Elderly gentleman was getting out of his car when he tripped and fell over the kerb which runs along the long side the disabled parking bays'. Injuries are not recorded on that one. Ms Wood said, when asked about whether this bay was, in her view, dangerous that it was, in fact, the most popular bay, used thousands of times by customers. She initially said there had been no previous accidents prior to the claimant's, but then conceded when taken to the details by Ms Whittaker that there had been at least two previous incidents but only two, she said, in two years, which she did not consider a trend requiring her to report them.'*

viii) (judgment, [38]) *'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.'*

Issue 4

ix) (judgment, [40]) *'What should Waitrose have done? In my judgment, it should have reported the accidents in 2012, 2014 and possibly that in 2013 to the London Borough of Hillingdon. It did not report anything until 2016. In the reports Ms Wood made, there is a suggestion that the kerbs should be painted to alert people to the presence of them. However, I am doubtful as to whether painting is sufficient, in this case, to address the issue. It may be that the kerb*

could be narrowed or removed altogether save around the pillars, but there is no evidence about that before me. In any event, 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. There was a suggestion by Ms Whittaker that the defendant should have put up a notice warning customers about the kerbs in this bay. However, the kerbs, as I have said, 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 is that any such 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.'

Issue 5

x) (judgment, paragraphs 41 to 44):

'41. Whilst the particulars of claim plead a great many alleged breaches, most of them fall away, being to do with design standards that came into force long after this car park was designed and built. Equally, those which are to do with maintenance or repair fall away, as this kerb was not defective. Therefore, in my judgment, when we turn to causation, the only breach that I have found by the defendant of its duty as an occupier is a failure to report accidents sooner. 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 different 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.

43. 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.

> *44. I agree with [Counsel for the Defendant] that, for this purpose, it matters not if Mr Juj slipped or tripped. Sadly, this was simply a true accident, and nothing that the defendant did or failed to do caused it. I have a great deal of sympathy for Mr Juj for what he has suffered but, in my judgment, his claim cannot succeed for those reasons and I dismiss it.'*

Issue 6

5. Given the judge's conclusion as to causation, the sixth issue (contributory negligence) fell away.

The appeal

6. With the permission of Stewart J, the Appellant advances four grounds of appeal, each of which said to raise mixed issues of fact and law:

   i) The judge had erred in limiting the Respondent's duty under section 2(2) of the OLA to dealing with what she described as 'immediate hazards' within the car park and reporting matters to LBH;

   ii) Having made a finding of fact that the Respondent ought to have known that the disabled parking bay represented an unreasonable danger to its intended users, the judge had erred in concluding that the Respondent had not been expected to take any steps other than reporting that to LBH;

   iii) Having concluded that the Respondent was in breach of its duty to report the presence of the unreasonable danger to Hillingdon in 2012, 2013 and 2014, the judge had erred in finding that proper compliance with that duty would have made no difference to whether the parking bay would have remained in that unreasonably dangerous state; and

   iv) The judge had erred in concluding that the Appellant's accident had been 'an accident in the true sense of the word', thereby disregarding any contribution to its occurrence made by the Respondent's breach of duty.

7. By its Respondent's Notice, the Respondent seeks to uphold the judgment below for the reasons given by HHJ Backhouse; further or alternatively on the basis that the judge had erred in law when she had determined that:

   i) the Respondent was an occupier for the limited purpose of reporting issues with the car park to the local authority; and

   ii) the kerb posed an unreasonable danger, such as to constitute a breach of section 2 of the OLA.

The parties' submissions

For the Appellant

8. Ms Foster submitted that this was not a case which depended upon some novel legal principle, but one in which the judge's interpretation of the law in the context of her findings of fact was in issue.

Ground 1: the extent of the Respondent's duty

9. In relation to Ground 1, Ms Foster submitted that the judge had correctly identified the ingredients of occupation but had erred in the following respects:

   i) She had misdirected herself in light of the undisputed evidence (recorded in the judgment, at [28] and [32]) that the Respondent had keys for and locked the car park in the evenings; had the power to, and did, grit the car park regularly and without any approval or interference from LBH; put out cones to warn users of the car park about potholes; cleaned up spillages and debris within the car park; and refunded customers up to £1.50 per visit, thereby encouraging them to use the car park (albeit that that last point, taken in isolation, probably would not indicate control). Furthermore, although not referred to in the judgment, the evidence of Ms Wood (the Respondent's branch manager between 2011 and 2018) had been that the Respondent could close the parking bay if, for example, the roof above it collapsed. As a matter of law, contended Ms Foster, the judge ought to have taken all such evidence into account when delineating the scope of the Respondent's duty: see *Wheat v E Lacon & Co Ltd* [1966] AC 552, at 577-579.

   ii) She had appeared to have relied upon an unprincipled distinction drawn between potholes in the car park, in relation to which the Respondent had admitted at trial that it had the power to and did take action (see above) and hazardous changes in height, such as in a kerb, which she had implicitly categorised as falling outside her definition of "immediate hazards" for the purposes of delineating the Respondent's duty (judgment, [33]), despite the fact that the latter had been expressly included in the Respondent's risk assessment regarding the car park (judgment, [26]).

   iii) Given that the Respondent's risk assessment had expressly stated that it covered a car park, even "an adjacent one belonging to the landlord or other third party" (judgment, [25]), which required the Respondent to have in place "regular inspections" by "the Maintenance Operations Manager", and given the Respondent's witness' admission at trial that an employee of the Respondent had occupied that post at the material times (judgment, [20]), the judge had erred in her conclusions regarding the scope of the Respondent's control over the safety issues in the car park, without having had due regard to that evidence. The judge had ignored any additional control which the Respondent had had by virtue of having inspections in place, themselves indicative of the steps taken by the Respondent to monitor and supervise the car park, and forming part of the context in which the judge ought to have analysed the Respondent's duty. It was self-evident that a person who has the ability proactively to become involved has control, to some extent.

   iv) There had been a lack of any evidential basis for the judge's conclusion (judgment, [33]) that the Respondent did not have the power to paint the kerb, to be contrasted with the evidence from the Respondent's own risk assessment

that the existing measures of control which it purported to have in place included, *"Any changes in floor surface or height (eg kerb) clearly visible"* (judgment, [26]) and in the context of her finding that the Respondent had the power, and did take steps, to address hazards such as ice by gritting the car park because LBH had a policy not to grit it (judgment, [28]). Despite the fact that the Respondent had identified it as an important measure of control, the judge had fallen into error by failing to have drawn the obvious parallel between the extent of control which the Respondent evidently exercised in relation to gritting of the car park, with a view to safeguarding its visitors from the risk associated with ice, because it knew that LBH was not going to address it, and the painting of the kerb, which also had not been done by LBH. Even if the scope of the Respondent's duty had been qualified in the way found by the judge, it required that any reports of hazards should be followed up within a reasonable period of time until resolved, one way or the other, and not left to vanish into the ether. The appeal should succeed on that basis alone.

v) The judge had concluded, (judgment, [40]), erroneously, that the Respondent's duty did not extend to warning visitors to the store about the risk associated with the kerb within the disabled car parking bay, on the basis that "the kerbs … were clearly there to be seen". For the purpose of her analysis of whether or not there was a duty to warn, the judge ought to have focused on the nature of the danger as she had found it to be, rather than on Ms Wood's erroneous view that the kerb did not constitute a danger. In any event, Ms Wood herself had not identified the relevant hazard. Her evidence had shifted from saying nothing on the point to accepting, eventually, that there had been a problem.

vi) Having found, as a matter of fact, (judgment, [38]) that, although the kerb was clearly visible, *"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"*, the judge had then erroneously disregarded her own findings as to the nature of the risk when considering whether or not there was a duty to warn. In accordance with her findings, it had been a combination of the presence of the kerb and the lack of space which rendered the particular disabled car parking bay a danger to its vulnerable users and yet the judge failed to consider either the lack of space or the combined effect of the two for the purposes of determining whether or not there was a duty to warn. The judge, therefore, had fallen into error in concluding that the danger from the combination of those factors was *"obvious"*, particularly to the vulnerable/elderly users whom the Respondent knew to be using the disabled car parking bay. Had the judge taken into account her own findings at [38] of the judgment for the purposes of considering whether the Respondent had a duty to warn, she should have reached the conclusion that such a duty existed.

vii) Whilst it was difficult to divine which parts of Ms Wood's evidence had been accepted, her oral evidence had been to the effect that the Respondent could not have taken certain steps in relation to the bay, whilst, on the other hand noting that it had taken steps in other contexts, without any evidence as to funding being sought or granted for the other issues which had been addressed. The judge ought to have undertaken a more critical analysis of that evidence.

There had been no reason, on the face of it, why the Respondent had been able to remedy hazards caused by potholes, but not to reconfigure the parking bay. There had been no reason why, for example, the Respondent could not have warned its vulnerable and elderly visitors, whether by signage or other means, of the need to navigate the kerb extremely carefully and the standard of its duty ought then to have been determined in accordance with section 2(4)(a) of the OLA, namely that, in all the circumstances, the warning *'was enough to enable the visitor to be reasonably safe'*. The judge's conclusion had been that the Respondent had no power to make structural changes (which the Appellant could accept on appeal), but not that it could not have put up a warning notice. Rather, she had concluded that the latter option had fallen outside the scope of the Respondent's duty. That had been an artificial construct, operating to narrow the scope of the relevant duty, for which there had been no evidential foundation. At paragraph 40 of her judgment, the judge had not addressed the issue of the interim measures which might come into play, in the event that any report by the Respondent elicited no, or a delayed, response from LBH. All of the judge's inferences appeared to have emanated from that which the Respondent had done in practice, as opposed to that which it ought to have been doing.

viii) It followed that the judge ought to have concluded that the Respondent had been under a duty to warn its vulnerable/elderly visitors of the hazard associated with the need to navigate the kerb, given the limited space available. That situation was clearly distinguishable from the danger of diving into a shallow lake (*Tomlinson v Congleton Borough Council* [2004] 1 AC 46), or presented by an ornamental bridge with low walls, which had had no history of accidents since the 1860s (*Edwards v London Borough of Sutton* [2016] EWCA Civ 1005), being the two authorities upon which the Respondent had placed a great deal of reliance.

Ground 2: the steps to have been expected of the Respondent

10. As to ground 2, Ms Foster submitted that, having made a finding of fact that the Respondent should have known that the disabled parking bay represented an unreasonable danger to its intended users, by reason of the lack of space between the car and the kerb and the need to manoeuvre between the side of the car and the kerb (judgment, [38]), the judge had erred in concluding that the Respondent could not have been expected to have taken any steps other than to report that situation to LBH, for the following reasons:

i) It had been wrong, as a matter of law, for the judge to have concluded that it would be reasonable to expect an occupier with such knowledge as she had found the Respondent to have had not to take any other reasonable steps, particularly if the danger remained following a report to LBH. That finding had been contrary to the ratio in *Wheat v E Lacon & Co Ltd* and incompatible with the judge's own findings (judgment, [38]) that the features of the specific disabled car parking bay presented "an unreasonable danger for the class of visitors using that bay, namely the disabled".

ii) The judge's shortcut from her conclusion that the series of accidents prior to and including the Appellant's demonstrated that this particular disabled

parking bay (which was *"unique in this car park"*) represented an unreasonable danger for the class of visitors using it (judgment, [38]) to her conclusion (judgment, [40]) that the danger was *"obvious"* was unjustified, for reasons already highlighted at paragraph 9(v), above. Furthermore, such a conclusion had not been open to the judge, given her finding of fact "that the claimant's accident was by no means unique" (judgment, [38]). If the danger was obvious, such as in the case of the ornamental bridge which had not been associated with any accidents since the 1860s in *Edwards*, one would not have expected at least three accidents similar to the Appellant's to have occurred in the space of less than two years prior to his accident, and a further accident to have occurred in 2017 (judgment, [34]-[36]). Even if the danger were obvious to users who were not vulnerable (such as Ms Wood), the history of accidents disclosed by the Respondent demonstrated the position to be otherwise in respect of vulnerable/elderly users who ought to have been the cohort which the Respondent had firmly in mind in relation to this disabled parking bay.

iii) The judge ought to have found that, in addition to the reporting duty, the Respondent ought to have considered other reasonable steps which would have enabled disabled/elderly visitors to the disabled parking bay to keep themselves safe. This included placing notices warning them of the hazard associated with the kerb and/or the lack of space; painting the kerb so that it stood out in terms of its height and location; not endorsing the particular bay as a disabled bay on Waitrose-branded notices affixed to the wall; and/or putting out cones so as to restrict its use whilst the unreasonable danger remained.

iv) The judge had erred in finding (judgment, [40]) that a warning notice was not within the scope of the Respondent's duty on the grounds that the danger was obvious, for reasons set out at paragraph 9(v) above. Had she considered the nature of the danger appropriately, she should have come to the conclusion that there was a duty to warn about the specific danger associated with the kerb and the lack of space and the associated need to manoeuvre.

v) There had been no evidential basis for the judge's finding that the Respondent was not under a duty to put up warning signs advising its customers that this disabled parking bay was not for use by disabled users, on the grounds that this "would have effectively been gainsaying the decision by Hillingdon that this bay was to be for disabled customers" (judgment, [40]). Such evidence as had been available had been to the effect that disabled users did not pay for parking, meaning that there would have been no financial implications for LBH in the non-designation of the particular bay for disabled users. The disabled parking bays were endorsed by the Respondent for use as such via signs affixed to the wall of its store. Just as with gritting in icy weather, which the Respondent itself undertook because it knew that LBH would not do so, there had been no evidence to the effect that there was any impediment to the Respondent taking steps to ensure that visitors to its store were safe. One such reasonable step would have been to put up a notice on the wall of its own store stating that the Respondent did not endorse the particular bay as being suitable for disabled users, by reason of the presence of the kerb and the lack of space. Other available solutions would have been: not using the bay; robust warnings;

placing rails along the side to encourage users to walk to the back of their car; or locating pillars in a different position. At the very least, the Respondent could have put out a cone to prevent users from parking in the relevant bay.

Ground 3: the effect of a breach of the duty to report

11. In relation to Ground 3, Ms Foster submitted that, having concluded that the Respondent had been in breach of its duty to report the presence of the unreasonable danger within the disabled parking bay to LBH in 2012, 2013 and 2014 (judgment, [40]), the judge had erred in finding that proper compliance with that duty would have made no difference to whether the disabled parking bay would have remained in its unreasonably dangerous state. The judge had been wrong so to find for the following reasons:

    i) She had erred in assuming that a proper report would have had the same content as that subsequently made, in November 2017. The latter had been made from the perspective of Ms Wood, whose evidence at trial had been that she did not consider the kerb and its position within the disabled parking bay to represent a danger to users. As the judge had found that view to be incorrect and that the Respondent had known, or ought to have known, that the disabled parking bay contained an unreasonable danger to its users, as a matter of law that knowledge should have been the starting point for the judge's analysis of what the content of the Respondent's reports to LBH in 2012, 2013 and 2014 ought to have been. Instead, she had erred in considering (expressly or implicitly) that, in complying with its duty to report an unreasonable danger, the Respondent would not have been expected to: (a) provide detail as to the specific nature of the danger which ought to have been identified, by reason of the previous accidents or otherwise; (b) request that something be done about it; and/or (c) follow up its request in the event that LBH did not act upon or respond to it. Her approach had been wrong in law as its effect had been to *'hollow out'* the duty which she had found to exist.

    ii) She had failed to engage with and/or properly to analyse the nature of the correspondence between the Respondent and LBH in November 2017 (judgment, [30]), which, primarily, had dealt with indentations in the surface of the car park, in fact repaired by LBH shortly thereafter. The nature of that correspondence did not warrant a conclusion that the kerb and its context had been reported as themselves causing an issue, as it had been reported that, *"A lady fell in the car park and hit her head on the curbs by the disabled parking bay"* (sic). On the basis of that correspondence, there had been no reason for LBH to have concluded that the kerb and/or its immediate context had been reported as a danger. It had been unreasonable for the judge to have concluded (judgment, [41]) that the chain of events engendered by this correspondence demonstrated that LBH would not have done anything had the unreasonable danger been reported to it, properly, by the Respondent, in accordance with its duty of care. As had been pointed out by Lord Browne-Wilkinson in *Bolitho v City and Hackney Health Authority* [1998] AC 232, at 239-240, in a factual enquiry into the issue of causation in cases where the breach of duty consists of an omission to do an act which ought to have been done, *"the answer to the question 'What would have happened?' is not determinative of the issue of causation"*, in that *"a defendant cannot escape liability by saying that the*

damage would have occurred in any event because he would have committed some other breach of duty thereafter." The judge had misdirected herself by considering what would have happened if the Respondent had communicated the danger in the same unclear and unspecific terms as it did in 2017 instead of considering what would have happened had the unreasonable danger which she had found to exist been properly reported. In other words, she had failed to consider what should have happened and allowed the Defendant to escape liability by relying on a further breach of duty.

iii) She had erred insofar as she had relied upon the absence of a response from LBH to a report of *"a couple of incidents"*, in February 2016 and August 2018, in which customers had tripped on *"the curb(s)"* within the disabled parking bays. She ought not to have drawn any inferences adverse to the Appellant from the purported absence of any response from LBH. If such reports had been made by someone objectively analysing the relevant hazard and reaching the same conclusions as had the judge, proper action to ameliorate the danger would have been taken by LBH (because it owned the car park and bore responsibility for structural issues) and the Appellant's accident would not have occurred. The judge ought to have assumed that the hazard identified would have been eliminated or ameliorated and there had been no further evidential threshold for the Appellant to overcome.

iv) There had been no evidence before the court that LBH would not have dealt with the kerb owing to budgetary constraints and the judge had misdirected herself in reaching that conclusion (judgment, [41]), by attaching unwarranted weight to Ms Wood's surmise that that might have been the case. LBH had resurfaced the car park, as appropriate, following complaints by the Respondent (judgment, [30]) and there had been no evidence to the effect that dealing with the kerb within the disabled parking bay would have had any greater financial implications. Viewed in the round, the evidence had been that LBH did respond when apprised of safety issues. The judge's finding, based as it had been on LBH's response to the raising of an unconnected issue, had been perverse. The evidence before the court had been that LBH did not charge disabled users for parking, such that the closure of the parking bay to use by disabled visitors would not have had a financial impact on the borough. Furthermore, LBH had a dedicated contact for the Respondent - Mr Barton, a council officer (judgment, [33]), and the evidence had been that he had not only been available by e-mail, but also had undertaken regular walking inspections of the car park with Ms Wood, demonstrating that LBH had been prepared to allocate resources and would have been likely to have taken the Respondent's properly expressed safety concerns seriously. This court was entitled so to conclude and could properly determine that, having lodged a proper complaint, the Respondent would have seen the matter through, chasing as necessary, and would have taken interim measures. It could also determine that LBH would have acted appropriately, on the basis that public bodies acted in accordance with their duties to the public. Judicial notice could be taken of the fact that such bodies prioritise dealing with issues which cause injury, such that issues causing injuries in a disabled parking bay would have been addressed. It was inconceivable that the Respondent, with all of its financial

muscle, would not have been able to bring pressure to bear in relation to a health and safety hazard.

v) She had misdirected herself in placing reliance (judgment, [41]) upon the fact that nothing had been done, notwithstanding a letter of claim sent by the Appellant to LBH. It was unsurprising that, in response to relatively generic early allegations about the kerb, and in the absence of any knowledge of the previous accidents recorded by the Respondent involving the same disabled parking bay and a similar means of fall, it would have been reluctant to have taken any specific steps to address the issue of the kerb, which could have amounted to an admission of liability for the Appellant's accident. The judge had ignored a critical difference between LBH and the Respondent; the former did not have the knowledge possessed by the latter of the number of accidents involving elderly people using the disabled parking bay in question. The cause of LBH's lack of awareness had been the Respondent's breach of duty in failing to have communicated the relevant facts of the previous accidents and the unreasonable danger which the disabled parking bay presented.

vi) She had considered the Respondent's evidence on the issue of LBH's financial constraints benevolently, whereas she ought to have adopted a critical approach because it had been within the Respondent's power to have disclosed evidence of the content of the conversations which Ms Wood had had during *"a number of 'walks around' the car park with council employees"* (judgment, [33]) and yet that had not been done, notwithstanding the order for specific disclosure, followed by an unless order.

vii) She had failed to take into account the fact that, when LBH had not been prepared to deal with risks (such as the risk of slipping in icy weather), the Respondent had stepped in and addressed the risk itself, notwithstanding the fact that doing so had had financial implications for it. The judge ought to have concluded, upon a proper factual enquiry in accordance with *Bolitho*, that, had the Defendant complied with its duty of care and yet still been faced with the presence of the unreasonable danger, because of the attitude adopted by LBH, it would and should have taken the same approach to that danger as it had done to the issue of ice and gritting.

viii) In considering, as an issue of fact, what would have happened in the absence of the Respondent's breach of duty, the judge had erred (judgment, [40]) by conflating the issue of what would have happened (as in what LBH would have done in response to a proper report of an unreasonable danger) with the issue of what had and had not been within the Respondent's power and control. As a consequence, she had failed properly to have addressed the nature of LBH's likely response and had deprived herself of an opportunity to consider the extent to which that would have made a difference to the likelihood of the Appellant's accident occurring.

ix) In any event, it ought to have been assumed that a proper, appropriate report would have been made and that LBH would have reacted appropriately to it. As the Respondent had acted in breach of its duty to make a report, it was not for the Appellant to prove that which the Respondent or LBH would have done had the Respondent not acted in breach of duty.

Ground 4: the conclusion that this had been 'a true accident'

12. In relation to Ground 4, Ms Foster submitted that the judge had erred in law in concluding that the Appellant's accident had been *"simply a true accident"*, thereby disregarding any contribution to the occurrence of the accident made by the Respondent's breach of duty, for the following reasons:

    i) The test which she ought to have applied had been whether the Respondent's breach of duty had caused and/or contributed to the Appellant's accident. That had required her to focus on the scope of the Respondent's duty and the state of affairs which proper compliance with that duty would have avoided. As she had erred in determining the scope of the Respondent's duty and in her determination of the factual matrix which would have existed in the absence of its breach (see Grounds 1 to 3 above), her findings as to whether or not the Respondent's breach of duty had caused and/or contributed to the Appellant's accident had been made on the erroneous premise that the extant state of affairs would have been the same. That conclusion had emasculated her finding that there had been an unreasonable danger present within the disabled parking bay in respect of which the Respondent had been in breach of duty, particularly given the intended vulnerable/elderly users of the disabled parking bay.

    ii) Given the judge's own finding that the unreasonable danger within the disabled parking bay had consisted of the lack of space between the car and the kerb together with the need to manoeuvre between the side of the car and the kerb (judgment, [38]), her conclusion that the Appellant had been solely responsible for his accident, merely because he had seen the kerb and had been trying to step over it, had been outside the parameters of the reasonable findings which had been open to her. She had failed to consider the extent to which the unreasonable danger which she had found to exist had caused and/or contributed to the *Appellant's accident, particularly in the context of her finding that the "claimant's accident was by no means unique"* (judgment, [38]). If the judge had approached the question from the correct perspective and applied the correct test, rather than dismissing the event as *"simply a true accident"*, (judgment, [44]), she would have been bound to have found that the unreasonable danger had played a causative role in the Appellant's accident. The Appellant had done exactly that which one might have expected vulnerable elderly/disabled individuals to do. Such individuals have to negotiate their way over obstacles to get back into their cars. Of course one could see that the kerb was there and of course the Appellant had tried to get over it, but that did not negate the fact that what had happened to him had been as one might expect. Thus, there ought to have been signage, enjoining disabled and elderly users to take particular care and focus in that context. Accepting the judge's findings of fact, as she was obliged to do, the appeal ought to have succeeded on causation, submitted Ms Foster.

Contributory negligence

13. Finally, submitted Ms Foster, were the appeal to succeed, the quantification of damages would need to be remitted. Were this court to consider it inappropriate to determine the question of contributory negligence, that issue too would need to be

remitted, albeit that, on the judge's findings and the evidence, it was difficult to see how any fault on the part of the Appellant could be identified; the fault lay with the configuration of the bay, not with the manner in which he had approached his car. The evidence for that could be found in the transcript of the hearing, recording the Appellant's answers under cross-examination/questioning by the judge, obliging this court to conclude that there had been no contributory negligence:

i) *Q. - and then what you say at your witness statement… – at paragraph 15, 'When I got level with the passenger door I went to step onto the raised kerb and reach the door handle. As I did so I caught my foot on the kerb and fell'.*

A. That's right.

…

Q. You say you specifically recall stepping onto the kerb but catching your foot.

A. No. I was… I tried to reach the door and try to put my foot down like, you know, to… on the kerb and my foot caught on the kerb and I fell;

ii) Q. *You saw* [the kerb]. *Your evidence is that you saw it and you stepped up onto it and you -*

A. Yes of course.

Q. - placed your foot on it.

A. Yes.

Q. So it was clear to you. It was obvious to you.

A. Well, if the kerb wasn't there I wouldn't have fallen, you know;

iii) *Q. You don't need a sign to say,-*

A. Yeah.

Q. -'Step on the kerb properly'.

A. No. Normally, I mean, the kerbs they paint it something natural, white or yellow, you know. It was just a warning and I… had there been… if they got painted I might... might have… could have… I could have avoided my fall, you know.

Q. Well, it wouldn't have, Mr Juj, because you saw it and you placed your foot on it.

A. Yes. Of course, you know, my foot caught in there… on there;

iv) *A. After putting the…my shopping in the boot, you know, I walked on the other side of bay. The next bay, through the next bay to get in the car.*

Q. Perhaps I'll ask you this, then, Mr Juj, why did you walk into the next bay?

…

A. Well, there's a pole there and that… I can't step on that, you know, and on that, you know, pavement there.

Q. Yes. You walked into the next bay because of the pavement.

A. Yes.

…

Q. And you walked into the next bay because of the pavement, so you were very conscious and very aware of it -

A. Yes;

v) *JUDGE BACKHOUSE: Well, I have just one question and I am going to ask you, Mr Juj, to do a little demonstration for me but not with a real step because we do not want any accidents in the courtroom. Sandra, could you give Mr Juj that White Book and can you also give him this? Okay? Let me just say; now, Mr Juj, you are going to pretend that this is the kerb and this is your foot –*

…

A. And then I came on this side and put my foot… tried to put my foot on that, you know, tried to open the door, you know. I put card on the car.

JUDGE BACKHOUSE: So you are showing us that your foot did not get onto the top; it –

A. It… yes, so it got caught on the side.

For the Respondent

Ground 1: the extent of the Respondent's duty

14. Ms Dobie invited me to uphold the judge's findings that the Respondent was not an occupier in relation to the design and layout of the car park, and had no control over the placement, positioning, or state of the kerb and the parking bay. Alternatively, she sought to uphold the judge's conclusion for the different reason that the Respondent was not an occupier of the car park for the purpose of informing/updating LBH about issues and/or of dealing with 'immediate hazards' (or for any purpose).

15. Ms Dobie pointed to the following provisions of the OLA (with emphasis her own):

'1.— Preliminary

(1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

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.'

She also pointed to the judge's findings as to the status of the Respondent (judgment, [32] and [33]). Ms Dobie submitted that the OLA did not define the term "occupier", which continued to be defined by common law rules, as set out in *Wheat v E Lacon & Co Ltd*. Per Lord Morris of Borth-y-Gest, at page 586, "It may … 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." Being an occupier for certain purposes and not for others was entirely appropriate in certain factual scenarios.

16. The cornerstone of liability was not knowledge of a risk, as the Appellant contended, but control, submitted Ms Dobie. The judge had set out the law correctly, at paragraphs 21 to 22 of her judgment, from which her conclusions at paragraphs 33 to 34 had flowed and had been correct. It was without doubt that the Respondent was not an occupier for the purpose of determining the design, layout, or construction, of the parking bays and kerbs (which was the relevant duty for the purpose of this claim). If this court were not to allow the Appellant's appeal in that respect, the matter would end there. If, however, that part of the Appellant's appeal were to be allowed, the court was invited to uphold the judge's conclusion for the further reason that she had erred when finding the Respondent to have been an occupier for the limited purpose of 'immediate hazards' and/or of informing LBH of issues and/or accidents.

17. As to the finding that the Respondent was an occupier for the purpose of warning LBH and/or putting it on notice:

    i) The Particulars of Claim did not identify the factual basis for the assertion that the Respondent was an occupier of the car park and it was to be noted that:

        a) the Respondent did not own the car park and had taken no lease or occupation of it;

        b) its staff and customers were visitors to the car park;

        c) LBH operated and received all profits arising from the use of the car park and advertising in it;

d) LBH publicised that it owned and operated the car park and that it provided the terms and conditions and numbers to call where an issue arises;

e) it was correct that the car park 'served' the store, but it also served the local high street. Further, it was not the only access for the Respondent's customers. That the car park provided parking for some of its customers (and for some non-customers) did not equate with or indicate 'control' of the car park;

f) furthermore, the Appellant had to establish that the Respondent had control over that part of the premises about which he complained. Here, the complaint related to a disabled bay being positioned adjacent to a non-defective kerb. This case related to the design and location of that kerb and/or its proximity to a disabled bay (layout and design). The Defendant had no control over any such matters. It did not operate the car park and had no say over its layout, where disabled bays should be located, their width and/or the use of nearby kerbs;

g) essentially, the car park was land adjacent to the Respondent's premises. From time to time, the Respondent reported to LBH certain matters of concern, that being no more than a conscientious step. Indeed, such ad hoc and very occasional reports served to illustrate the lack of control which the Respondent had;

h) LBH remained in control of the car park's maintenance (deciding when and how works would be carried out);

i) Ms Wood had sent an e-mail to LBH on 23 August 2018 relating to two incidents in which customers had tripped on kerbs, querying whether the kerbs could be painted. LBH had made no change on the back of that suggestion, illustrating that the Respondent had no control over the matter;

j) the single car park meeting which had taken place on 15 March 2017 served simply to highlight issues which the Respondent had identified. The fact that it had taken place did not confer upon the Respondent a duty to report and/or a power to do anything about such matters. Indeed, it was clear that all of the decisions had taken place without the Respondent's authority or knowledge. The Respondent had no control over which bays were open or closed, when work started or how it was managed. LBH's reply, had been to the effect that it had appointed contractors to carry out such works as it deemed necessary. The Respondent had been merely seeking an update, but had had no control;

k) the suggestion that the existence of a risk assessment gave rise to an inference of occupier status was wrong; this had been a generic risk assessment, as a template for all stores. The risk assessments themselves identified that the Respondent would have adjacent car parks which it did not control. The 2015 risk assessment had contained

the following text, *"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"*. As Ms Wood had stated, under cross-examination:

A. There's no damage to the kerb.

Q. Well with respect, Miss Wood, is it your evidence that unless something is damaged it can't be unsafe?

A. No, not necessarily but in my accident report I also say that I've been and checked the area and it's in good state of repair as well and if there had been damage to the kerb or anything like that I would have absolutely contacted Hillingdon Council to flag it to them and that would just be a duty of care. I would have felt a responsibility but it would be their car park and for them to maintain.

ii) The Respondent repeated and adopted those matters set out at paragraph 23 of the judgment, which did not appear to be in dispute:

'23. Ms Dobie set out a list of eight factors which, she says, show that the defendant is not an occupier, and these are:

a. that the Local Authority is the owner

b. that the defendant has no licence and does not legally occupy it, i.e. under a legal arrangement

c. in general that no duties arise over neighbouring land

d. the defendant had no power to invite or exclude persons from coming on to that land

e. the defendant does not set the terms of use. These are clearly set out by the Local Authority on its notices in the car park.

f. it is the Local Authority which gets the revenue, and any contract is between the customers and the Local Authority. Further, there is a separate entrance to the store which does not involve the car park.

g. that the defendant has no duty or power to maintain or repair this car park, whereas that duty and power lie with the Local Authority. They check tickets daily, and empty the bins. The reports which the defendant made to the Local Authority about matters relating to the car park are merely the acts of a good neighbour, and done to protect staff and for good customer relations.

h. lastly, the defendant has no duty or power over the design or redesign of the car park.'

iii) LBH had always been aware of the design and layout; it was its car park, which it had installed in or about 1990;

iv) There had been no evidence that LBH had required the Respondent to put it on notice of issues with repair, maintenance and/or danger and/or accidents as part of its customers' use of the car park;

v) LBH's staff emptied the bins in the car park (judgment [4]) and attended to deal with ticket machines, which illustrated its frequent attendance;

vi) The signs in the car park indicated that it was LBH's car park, such that visitors were aware of that. Conversely, visitors were in no way directed or required to report their concerns/accidents to the Respondent (though it appeared that they did so, on occasions);

vii) The fact that the Respondent had raised concerns or requests for repairs from time to time was not evidence of occupier status; indeed, requests had been made by the Respondent which had been ignored and the Respondent had been powerless to do anything about that (judgment, [31]), illustrative of an actual lack of control;

viii) None of the factors upon which the Appellant relied established control by the Respondent; it was in the nature of the Respondent's business to advertise and to have some form of relationship with LBH, but that did not divest LBH of control which was the cornerstone of liability: see *Wheat v Lacon & Co Ltd* at page 577G, per Lord Denning: *"In the Occupiers' Liability Act, 1957, the word "occupier" is used in the same sense as it was used in the common law cases on occupiers' liability for dangerous premises. It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises." See, also, page 586D, per Lord Morris of Borth-y-Gest: "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 devolves upon a particular occupier."* Whilst the duties of joint occupiers might overlap, they could also be very different. The factors upon which the Appellant relied did not operate to shift the line indicating where it was that one occupier's control ended and the other's began. In the absence of a contract between the two, the court could look at all of the circumstances.

ix) The judge had come to the curious conclusion that the Respondent and LBH were joint occupiers, with the former having a duty to raise issues of concern with the latter, in the absence of express agreement or reliance to that effect, but being powerless to make any alteration to the state of the premises. The OLA was concerned with the state of the premises; it would be most unusual to have a reporting duty under the OLA, with no corresponding power to alter, repair or affect the state of the premises which was being reported, or to compel those who had such a power to do so. LBH had not been divested of the opportunity to have accidents reported to it. There had been no evidence to the effect that LBH had been ignorant of any concerns and its number had been displayed in the car park and advertised online. It was not known whether

any accidents had been reported to it directly. In the end, however, a duty to report might be irrelevant for the purposes of this appeal because the judge had found the Respondent to have owed no *relevant* duty of care to the Appellant.

Ground 2: the steps to have been expected of the Respondent

18. The judge had been wrong to find that the kerb posed an unreasonable danger and had erred in finding that it posed an unreasonable risk to visitors, such as to constitute a breach of section 2 of the OLA, for which, different, reason the order of the lower court ought to be upheld.

19. The issue of 'unreasonable danger' had been addressed at paragraphs 34 to 38 of the judgment. In the Respondent's submission, the judge had erred in law in concluding that *"the presence of the kerb to the left [of the bay], is an unreasonable danger for the class of visitors using that bay, namely the disabled"*. In so concluding, she had relied upon: a) the fact that the accident had not been unique; and b) the 'features' of the bay: *"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"* (judgment, [38]). As to the issue of danger, not every foreseeable risk had to be guarded against; the duty is simply to see that visitors are *'reasonably safe'*, requiring an assessment of the risk posed (*Tomlinson v Congleton* [2004] 1 AC 46). The courts had reiterated, repeatedly, the absence of a need to take precautions, or warn, against obvious risks (*Edwards; Rochester Cathedral v Debell* [2016] EWCA Civ 1094). In the Respondent's submission, misjudging a kerb constituted one such example. That, trite, principle had been illustrated, neatly in *Edwards*:

> *"42 .... Ornamental bridges with low walls, together with water features, are likely to be common features of decoration in public gardens. Any structure of this type presents the risk that the user may fall from it. Unlike natural land features, such as steep slopes or difficult terrain or cliffs close to coastal paths, which Lord Hobhouse in Tomlinson said could hardly be described as part of the "state of the premises", it seems to me that a bridge with no sides or only low ones may present a danger from the "state of the premises" such as to give rise to the common duty of care. However, while I am prepared to assume that there was objectively a "danger" arising from the state of the premises in this respect here, does this mean that, in order to discharge the common duty of care, arising from that objective possibility of danger, no such bridges must be left open to visitors or must not be left open to visitors without guard rails or express warnings? In my judgment, the answer to this question is a clear "no".*
>
> *43. The reason for this answer lies, I think, in two well recognised principles of law. First, there is the proper treatment in law of the concept of risk. Secondly, occupiers of land are not under a duty to protect, or even to warn, against obvious dangers. Both these propositions appear in the speeches in Tomlinson's case."*

20. Ms Dobie submitted that the judge had failed, adequately or at all, to consider whether the risk posed by the 'features' was one which was of sufficient magnitude that it had to be guarded against by an occupier. The fact or absence of earlier accidents fell to

be considered, though the existence of accidents of some kind would not be surprising. As had been observed in *Debell* [8]-[9], per Elias LJ:

> "*8. When does inaction constitute a breach of the duty of care? There are a number of factors which, depending on the circumstances, may be material when determining that issue. They may include the likelihood of the risk of injury; whether there was a system in place to identify the danger so that it could be removed speedily; and the difficulty and cost of removing the danger. The overriding question is whether the visitor will be reasonably safe in using the premises.*
>
> *9. This particular accident in this case involved a pedestrian using a footpath. Tripping, slipping and falling are everyday occurrences on the roads and pavements. No highway authority or occupier of premises like the Cathedral in this case could possibly ensure that the roads or the precincts around a building were maintained in a pristine state. Even if they were, accidents would still happen; it is part of the human condition. There will always be some weathering and wearing away of roads, pavements and paths resulting in small divots, slopes or broken edges which might provide some kind of risk to the unwary and lead to accidents. The law does not seek to make the highway authority or the occupier of land automatically liable for injuries caused by such accidents. The obligation on the occupier is to make the land reasonably safe for visitors, not to guarantee their safety. In order to impose liability, there must be something over and above the risk of injury from the minor blemishes and defects which are habitually found on any road or pathway. The law has to strike a balance between the nature and extent of the risk on the one hand and the cost of eliminating it on the other."*

21. Ms Dobie submitted that this had been an ordinary kerb, which it was not suggested had been defective, or in a state of disrepair, and could not be regarded as posing an unreasonable danger: at paragraph 40 of her judgment, the judge had rejected the argument that a sign ought to have been placed in the bay to warn of the presence of the kerb. She had properly done so on the basis that *"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 customers of the kerbs in this bay".* In Ms Dobie's submission, the change in height, which had not differed from the norm, could not be considered surprising. It might lead to some accidents, but was not an unseen trap, nor was it situated where anyone would not expect it to be. The fact that it was situated in a bay for disabled users was a relevant feature of the case, but the range of disabilities and ages of those using the bay was enormous and the OLA did not differentiate between classes of user. The question was whether the full range of users would expect the kerb to be there, and whether the bay was reasonably safe for their use. In this case, it had been the Appellant's wife, not the Appellant himself, who had been disabled. Car park users would choose a bay which suited their needs. The car park offered a range of spaces from which to choose and the presence of a kerb to the left of the particular bay was not necessarily dangerous. The driver of a large vehicle might choose to use a larger bay, which had no kerbs. In this case, the driver had chosen to use the kerb and park against it.

22. At paragraph 43 of her judgment, the judge had held 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". At paragraph 38, she had held, *"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".* The height of the kerb was held to have been nothing but ordinary: *"this was not a high step by any measure"* (judgment, [42]). The Appellant's wife (the driver) had given evidence to the effect that she had parked on the left hand side of the disabled bay so that the Appellant, as front passenger, could step out of the car and onto the kerb. It followed that the kerb had been visible and obvious to the Appellant's wife as she had driven into the bay, and she had parked closer to it, in order that it could be used. Furthermore, there had been no inconsistency between the judge's findings at paragraphs 38 and those at paragraph 43 of her judgment. The Appellant had not been standing between his car and the kerb; he had been in the adjacent bay, using the kerb in the ordinary way – that had been no different from the situation in which any driver who had parallel parked on the street and needed to use the kerb in order to cross the street would find himself.

23. As had been held by the Court of Appeal in *Staples v W. Dorset DC* [1995] PIQR 439, per Kennedy LJ, cited in *Edwards* [49]:

"It is, in my judgment, of significance that the duty is a duty owed by the occupier to the individual visitor, so that it can only be said that there was a duty to warn if without a warning the visitor in question would have been unaware of the nature and extent of the risk. As the statute makes clear, there may be circumstances in which even an explicit warning will not absolve the occupier from liability ...; but if the danger is obvious, the visitor is able to appreciate it, he is not under any kind of pressure and he is free to do what is necessary for his own safety, then no warning is required. So, for example, it is unnecessary to warn an adult of sound mind that it is dangerous to go near the edge of an obvious cliff (see Cotton v. Derbyshire Dales District Council (June 10, 1994, C.A, unreported)..."

24. In any event, the 'features' upon which the judge had relied (the potentially restricted space between a car and the kerb) had not been established on the evidence. Ms Wood had given evidence that there was sufficient space to open both car doors and allow free access and egress. There had been no measurements or objective evidence to rebut that evidence. The Appellant had used the bay in the past, without issue. Removing the kerb and/or reporting would have made no difference. On the Appellant's case, if a visitor were to go into the adjacent bay and step up onto the kerb, the only way to avoid an accident would be if the kerb were not there. That had not been the danger which the judge had found to exist and she had held that it had not been within the Respondent's control, or gift, to remove the kerb.

25. The net effect of the photographs of the bay and kerb (of which this court could form a view); the evidence of the Appellant and his wife; and the totality of the judge's findings was that this was a non-defective kerb which had been entirely visible, obvious and ordinary. Furthermore, the Appellant could not have his cake and eat it, too: if the fact of previous accidents were considered to be of relevance, the existence of only two accidents prior, and one subsequent, to the Appellant's, given the

frequency with which the bay was used, did not suggest that disabled users experienced great difficulty when using the bay. Caution was urged when distinguishing the particular bay from any other part of the car park; slips and trips are a fact of life and it was apparent, from the Respondent's disclosure, that there had been trips at kerbs elsewhere in the car park. There was no duty on an occupier to eradicate all danger. On the correct application of section 2 of the OLA, the conclusion had to be that the kerb/premises did not pose an unreasonable risk to visitors to the car park. The judge had failed to consider whether they posed a risk to be guarded against and/or to give any, or any sufficient, weight to the findings summarised at paragraphs 21 and 22, above.

26. The suggestion that the Respondent had been under a duty to take matters into its own hands to alter the layout of the kerb, were LBH to do nothing, was surprising, for the following reasons:

i) Ms Wood had been clear that, on the few occasions on which she had e-mailed LBH and/or walked the car park with its representative, the Respondent had had no power, or say in a) the works, if any, to be carried out; b) their timing; and/or c) the way in which they were to be carried out;

ii) The factual premise of the Appellant's case had been overstated in order to establish control. The Respondent had never remedied a pothole; the example given had been hypothetical; Ms Wood had stated that she might put a cone over a particularly bad pothole and then contact LBH to let it know about it: *"…but … that wouldn't be something that we would do all over the car park. It would be something that's exceptional that we would then contact the car park about… Hillingdon about and there… I've got emails that highlight that where we've emailed Hillingdon Council to highlight issues with the car park…"* In similar vein, she had stated, *"So if somebody had spilled something in the car park then, even though it's not our car park, we would have absolutely cleaned it up. So there are examples where, for example, somebody might drop a bottle of wine, something like that, as they were putting their shopping in their car. We would just go and clear it up because that would be the right thing to do both to stop anybody cutting themselves, stepping on it, slipping on it, even though it's Hillingdon's car park. It would feel right that we would do that."* Ms Wood had also given evidence that, at times when the car park had been particularly icy, the Respondent would use some of the grit which it had purchased in order to grit its loading bay, for the protection of its staff. None of those activities equated with a system. To suggest that a sensible approach to transient dangers should found a conclusion that the Respondent had a duty to alter the design and layout of a kerb and/or parking bay after a local authority (owner and occupier) had declined to do anything about them constituted an enormous and unwarranted leap. Ms Wood's evidence had been that the Respondent had no power to insist that the kerb be painted in a different colour and that the Respondent could only close the bay if it considered there to be an immediate risk, for example if the roof canopy had been falling down, but it could not close it 'in its entirety', without good reason. She had not considered the bay to have been dangerous or to have posed a risk such that it should have been reconfigured; it had been used thousands of times without any issue or incident, in relation to which the

number of incidents which had occurred had been tiny. The judge had found that the Appellant had not been entitled to prevent use of a particular bay (which, Ms Dobie submitted, would include placing a cone in it), or to make any long-term changes, from which finding there had been no appeal.

iii) The Appellant's suggestion that an analysis akin to that in *Bolitho* should be adopted was novel. To suggest that the Respondent, as the owner and occupier of an adjacent store, should have taken it upon itself to remove, alter or redesign the layout of a kerb installed in a local authority car park, in circumstances in which the local authority had chosen not to exercise its own powers to do so, would be surprising. The Respondent had some sympathy with the Appellant's submission that a reporting duty devoid of control is hollow, which was why no such duty ought to have been found. At the least, the limited nature of the Respondent's activities in practice operated to limit the extent of its duty. If the Respondent had assumed no role in relation to the car park, there could have been no finding of control. In fact, the Respondent had acted simply as a good neighbour. When a letter of claim had been sent to LBH, it had accepted that it was an occupier and had not asserted that the Respondent had that status.

27. The breach as found by the judge had been more limited in scope than the duty which she had found to exist. The latter had been defined at [33]: *"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."*. The breach had been identified at [40*]: "What should Waitrose have done? In my judgment, it should have reported the accidents in 2012, 2014 and possibly that in 2013 to the London Borough of Hillingdon."* The Appellant's submissions were founded on there having been a breach of the full scope of the duty, a matter which was also of relevance to Grounds 3 and 4.

Ground 3: the effect of a breach of the duty to report

28. Ms Dobie submitted that there had been no evidence before the court that an earlier report by the Respondent to LBH would have made any difference and that there had been evidence pointing to the contrary:

i) In 2016, the Respondent had informed LBH about various incidents involving kerbs in the car park, one of which being in a different area. LBH had made no changes to any kerbs in the car park;

ii) LBH displayed its own notices in the car park. It was not known whether any car park-related accidents had been reported directly to LBH, or, if so, their nature and/or what (if anything) had been done in response;

iii) LBH had been made aware of the Appellant's accident and claim, yet the kerb and the parking bay had remained (and, at the date of the appeal hearing, remained) in exactly the same state. The letter of claim dated 24 August 2015, sent to LBH three months after the Appellant's accident, had set out the issue, allegations of fault, and the Appellant's injuries. The reply to that letter had

not denied that LBH was an occupier, or asserted that the Respondent was an occupier, and no action had been taken thereafter. A breach of the OLA had been denied on the basis that the kerb had been obvious and not a danger. Whilst the lack of assertion of joint occupation could not be conclusive, LBH had not asserted that it had relied on the Respondent to report accidents, or to assume even interim responsibility for alleged defects. If a report or complaint had contained that which was later set out in the letter of claim, it is clear that LBH would have done nothing. The accident record later completed by the Respondent - a trip on a kerb outside the store would have been the nature of a contemporaneous report. The actual report had been made in February 2016, which had relied on the Appellant's incident and an incident in November 2015. There had been no reply.

iv) It was the Appellant's position that, as a matter of causation, the judge had only addressed what would have happened had there been an earlier report of the nature later made and whether it would have made any difference. He contended that the judge had erred in failing to have asked: (1) what the nature of report would have been; (2) what would have happened had it been made; (3) what should have happened had it been made; and (4) whether a report would have made a difference in this case. Essentially, the Appellant asserted that the judge had not addressed causation in its totality. In oral submissions, the Appellant had gone further in contending that the judge's findings in connection with ground 3 had been perverse. The judge had not erred in that respect. She had made a finding as to what would have happened, namely that LBH would not have responded, which had been open to her on the basis of the available documentation and of the following evidence, given by Ms Wood in re-examination:

Q. Did Hillingdon paint these kerbs after you made the request?

A. No.

Q. And after your email … about accidents near the disabled bays under the canopy, there's reference to indentations but also to the kerbs, did Hillingdon do anything with the kerbs under the canopy?

A. No.

Q. - at that point?

…

Q. I mean, did Hillingdon ever contact you to find out any information about anything about their car park?

A. No.

v) All of the matters summarised at paragraphs 28(iii) and 28(iv) above constituted overwhelming evidence as to what would have happened, irrespective of the content of the report.

vi) It had been for the Appellant to satisfy the court of what would have happened; it had been for him to establish the relevant duty; its breach; and that the breach had been causative of his accident and of the loss and damage claimed. Having sent a letter of claim to LBH and then decided not to pursue LBH for damages, it had been open to the Appellant to approach LBH for a witness statement as to how it would have responded to the provision of information at an earlier stage, had that information been provided. He had not done so.

29. Thus, submitted Ms Dobie, there had been ample material from which the judge had been able to conclude that she could not be satisfied, on the balance of probabilities, that an earlier report to the local authority would have made any difference to the layout/design of the parking bay and kerb.

Ground 4: the conclusion that this had been 'a true accident'

30. Ms Dobie submitted that Grounds 1 and 2 raised mixed questions of law and fact, which fed into the factual findings the subject of Ground 4.

31. Even within the Appellant's argument, it was self-evident why the judge had made the findings which she had made. Any criticism which she had made of the potential lack of space between the car and the kerb were wholly irrelevant to this claim because:

i) the Appellant and his wife had given unchallenged evidence to the effect that the Appellant's wife had parked close to the kerb in order that he could step out of the car onto the kerb and use it; and

ii) the Appellant had not walked between his car and the kerb (judgment, paragraphs [9], [12] and [43]).

32. From the totality of the judgment and from the Appellant's description of the accident, it was clear that there had been nothing within the Respondent's gift, power or duty which would have prevented it.

Contributory negligence

33. Ms Dobie submitted that the Respondent was neutral on the question of how the issue of contributory negligence ought to be addressed, were it to arise; it was open to this court to decide the issue for itself (and it had sufficient evidence with which to do so, in the form of the full transcript of the Appellant's evidence), or to remit it for consideration by the court of first instance, which would also deal with quantum. Broadly put, the Respondent's case was that the Appellant had misjudged his step on a kerb which he had known to be present, resulting in an accident for which only he had been responsible. A person who finds difficulty in stepping onto a kerb and who overreaches for the car door is not taking sufficient care.

The Appellant's submissions in reply

34. In reply, Ms Foster submitted that the Respondent's position on the issue of control would require this court to overturn the judge's finding, because control implied the

ability to affect the state of the premises. In essence, the Respondent's case was that it lacked control because, having discharged its duty to report, there had been nothing which it could have done thereafter. In support of that submission, Ms Dobie had relied upon the evidence of Ms Wood. Significantly, she had not drawn attention to the following passage of cross-examination, from which Ms Wood's acceptance that she had been in a position to put out cones and warning signs was clear:

A. …there's obviously a change in concrete colour so the kerb edge is in theory highlighted.

Q. I see. So that's… so do you think your department manager was thinking of it being clearly visible because there's a change in the colour of the pavement paving stone that's used?

A. That would be my best assumption. I would have expected them to go out and look at these things and make a visible judgment.

Q. I see. So you would have expected her to go and inspect that kerb before ticking, or circling rather that tick [in the risk assessment]*? Right. Because, so that we're clear, if it did represent a hazard then you would have had to do something about it.*

A. Yes.

Q. Yes. And the measures that you could have taken would have ranged from reporting it to Hillingdon or putting cones, warning signs, yes?

A. Yes.

Ms Wood's evidence, in re-examination, that she had had the power to close the bay in the presence of an immediate risk to health and safety (for example, if the roof of the canopy had been falling down) afforded further support for that position, submitted Ms Foster.

35. Ms Foster reiterated her submission that the Respondent's position as to the content of a proper report to LBH was also flawed. Such a report would have reflected the judge's assessment of the risk, as opposed to Ms Wood's own misguided view.

36. LBH's response to the Appellant's letter before claim had been drafted by a claims adjuster and could not serve as evidence of the likely result of an investigation by the Respondent into a hazard as identified and encapsulated by the judge at paragraph 38 of her judgment. There had been no indication that any investigation had been undertaken by the Respondent. Furthermore, the following evidence from Ms Wood did not support the proposition that a proper report would not have been taken seriously by Hillingdon:

Q. But in the past when you reported your concerns, they took them seriously, didn't they?

> *A. I… so I emailed Chris Barton… who was my contact at Hillingdon after there'd been a number of incidents quite close together, so that's a number – there was three, I think – in an equal space of months that were about different things. They were largely about the potholes that were appearing in the car park which caused then an uneven surface where you wouldn't expect them to; you'd expect it to be on level ground, so I highlighted it to Chris because I felt like if he had the responsibility of the car park he should be aware that there was potentially an issue. They then did repair the car park but it was sometime afterwards and these discussions had been going on for a long time so did they take them seriously? I think so but I also think they were governed by their other priorities and their budgets but I don't know any of that. I'm making a lot of assumptions.*

In Ms Foster's submission, hazards in areas of the car park designated for use by disabled people would not have been treated as being of low priority.

37. Ms Foster contended that the Respondent had sought to import a concept of 'unreasonable danger' into the OLA, which could not be found in that statute. The question of control over the car park did not arise in relation to the Appellant's accident; it was a generic question – a question of fact, to which the judge had provided a straightforward answer. Whether the Respondent had acted in breach of duty fell to be considered by reference to the wording of the OLA and to the definition of an occupier's duty of care for which section 2(2) provided. The limit of the duty which the judge had found represented no more than her conclusion that, in the particular circumstances, the Respondent had been required to report the hazard and adopt interim measures, pending resolution of the issue. The judge's conclusion as to the steps which it would have been reasonable for the Respondent to have taken had been rooted in the evidence, viewed as a whole. The Respondent's approach derived from a contrived analysis of the measures which could have been taken and did not reflect the evidence summarised at paragraphs 34 and 36, above.

38. Section 2(2) of the OLA provided that the common duty of care was a duty to take such care as in all the circumstances of the case was reasonable to see that the visitor would be reasonably safe in using the premises for the purposes for which he was invited or permitted by the occupier to be there. Section 2(3) provided that *"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, so that (for example) in proper cases - (a) an occupier must be prepared for children to be less careful than adults; and (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so."* Those statutory provisions justified the judge's conclusions, for the reasons which she had set out at paragraph 38 of her judgment.

39. Finally, submitted Ms Foster, it was not feasible for the Respondent to contend that the risk identified by the judge had not been the cause of the Appellant's accident. It had been the amalgamation of all features of the parking bay which had led to her conclusion that it posed a danger. The Respondent's submissions, for which it relied upon *Edwards* and *Debell*, attempted to isolate the kerb from the other features of the bay, submitting that the kerb itself had been obvious. Both *Edwards* and *Debell* had been fact-specific and had set out trite principles of law in this area. In *Edwards*, there

had been no prior accidents involving a bridge which had been in place since the 1860s. The court had found there to have been a remote risk of injury, but, for a variety of reasons, had also found the judge at first instance to have erred in determining that there had been a breach of duty. That case, in which a fit cyclist had fallen over the edge of the bridge, had concerned facts entirely different from those of the instant case. Relevant for present purposes was paragraph 60 of *Edwards*, per McCombe LJ:

"I agree that the existence of new standards for side barriers to be fitted to new and different structures cannot necessarily lead to a conclusion that an occupier is liable in negligence if an older structure does not meet those standards. I do not consider, however, that such an argument necessarily relieves an occupier of liability for breach of the common duty of care when an accident, for which a serious risk of occurrence exists, results from a dangerous state of premises which could readily be remedied by proportionate works of renovation. For the purposes of the present case nonetheless, it seems to me that there was no requirement to provide this bridge with the type of side barriers advocated on Mr Edwards' behalf. Such additions would have altered the character of the bridge significantly and to an extent out of proportion to a remote risk which had never materialised in its known history."

That paragraph diluted the impact of the Respondent's persistent submission that, where a hazard is obvious, one does not need to do anything about it, submitted Ms Foster. In this case, the hazard as identified by the judge had not been obvious, by reason of the combination of factors which had created it. There had been a real and present danger, in circumstances very different from those under consideration in *Edwards*.

Discussion and conclusions

The approach to be adopted on appeal

40. I remind myself that, so far as material in this case, the appeal court will allow an appeal only where the decision of the lower court was wrong (CPR 52.21(3)). A decision may be wrong because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. It is not enough that the appellate court might have arrived at a different conclusion (per Lord Carnwath in *R (AR) v Chief Constable of Manchester Police* [2018] UKSC 47, [64]). As summarised in *Perry v Raleys Solicitors* [2019] UKSC 5 [52], where an appeal is brought from a judge's determination of the facts, its success requires the appellate court to conclude either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one which no reasonable judge could have reached.

Was the Respondent an occupier of the car park?

41. By virtue of section 1(2) of the OLA, the Act does not alter the rules of the common law as to the persons on whom a duty is imposed, or to whom it is owed, and the persons who would at common law be treated, respectively, as an occupier and his invitees and licensees, are to be treated, respectively, as occupiers and visitors for the purposes of the OLA. As the judge observed (judgment, [21]), the classic exposition of the common law test of whether a person is an occupier was set out in *Wheat v E*

Lacon & Co Ltd, per Lord Denning, and is based upon the degree of control which the relevant person exercises [577G-578F and 579A]:

"In the Occupiers' Liability Act, 1957, the word " occupier " is used in the same sense as it was used in the common law cases on occupiers' liability for dangerous premises. It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises. Those persons were divided into two categories, invitees and licensees: and a higher duty was owed to invitees than to licensees. But by the year 1956 the distinction between invitees and licensees had been reduced to vanishing point. The duty of the occupier had become simply a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on to them: and it made no difference whether they were invitees or licensees:… The Act of 1957 confirmed the process. It did away, once and for all, with invitees and licensees and classed them all as "visitors"; and it put upon the occupier the same duty to all of them, namely, the common duty of care…. Translating this general principle into its particular application to dangerous premises, it becomes simply this: 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.

…

If a person has any degree of control over the state of the premises it is enough."

42. In this case, the Appellant does not suggest that LBH, as owner of the car park, in some way divested itself of occupier status; what is said is that the Respondent itself had sufficient control to render it, too, an occupier. As the matter was put in *Wheat v E Lacon & Co Ltd*, by Lord Morris of Borth-y-Gest, with reference to earlier authority [583E, 586D],

"…there may be someone who would ordinarily be regarded as the occupier of premises while at the same time there may be another occupier who has "control so far as material."

…

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."

43. Lord Pearson put the matter in this way [589F]: *"The foundation of occupier's liability is occupational control, i.e., control associated with and arising from presence in and use of or activity in the premises."*

44. In the context of those dicta, Ms Dobie is right to emphasise the need for material control, rather than control in the abstract, or in some irrelevant respect.

45. The judge first described the parking bay in question, at paragraphs 7 and 8 of her judgment, before going on to identify the hazard which she considered it to create, at paragraph 38 (with emphasis now added):

> *"7. The photos I have show that 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, judging from the photos I would say 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. These appear to support the canopy.*
>
> *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. From the photos, there are other disabled parking bays, both under the canopy, and elsewhere in the car park. 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 suggested that it is wider than a normal bay, although not obviously much wider, in my judgment, looking at the photos. 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.*
>
> *...*
>
> *38. ...As far as the evidence shows, 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."*

46. The design and construction of the bay were not matters over which the Respondent had any control. Were that to be the only relevant consideration, Ms Dobie would be right to contend that the Respondent was not an occupier of the car park. As a matter of principle, however, if a person's control of premises extends to an ability to warn of and/or otherwise ameliorate relevant risks, that could constitute *'control so far as material'* in circumstances such as the present. In my judgment, the flaw in Ms Dobie's analysis lies in its premise that the only form of control material for current purposes is the power to design and/or to remove or otherwise alter the parking bay, or to compel LBH to do so. Similarly, Ms Dobie places greater weight on the wording in section 1(1) of the OLA - *'the state of the premises'* - than it can properly bear, hence Lord Pearson's reference, in *Wheat v E Lacon & Co Ltd*, to *"control associated with and arising from presence in and use of or activity in the premises"*, consistent with the provision made by section 1(1) of the OLA that the rules enacted by sections 2 and 3 shall have effect to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them. Thus, for example, a person who has the ability, but declines, to put up signage can thereby affect the state of the premises, or omit to do something on them, in either case giving rise to a danger. Once that is acknowledged, there can be no principled objection to the judge's finding that, by reason of its limited control, the Respondent was an occupier of the car park, for limited purposes. All of Ms Dobie's objections to occupier status are directed towards the Respondent's inability to make or compel structural changes to the car park (accepted by the Appellant, on appeal), or its lack of contractual or other obligation to draw issues to the attention of LBH. They do not afford an answer to occupier status founded upon the more limited control which the judge found the Respondent to have had (judgment, [33]), or for which the Appellant contends in this appeal, the extent of which (see Lord Morris of Borth-y-Gest, in *Wheat v E Lacon & Co*) becomes a pointer to the nature and extent of the duty which reasonably devolved upon the Respondent.

47. What, then, was the extent of that control? I am not persuaded that matters such as the Respondent's commercial decision to refund up to £1.50 in customer parking costs (where incurred) to customers spending a specified amount, or its holding of keys to the car park, establishes material control for the purposes of this claim. Its decision to grit the car park when necessary, predominantly for the benefit of its staff, and to clean up spillages and debris arising from customer use are indicative of its power to deal with what the judge referred to as immediate hazards, but of no more than that. I accept Ms Dobie's submission that Ms Foster seeks to make too much of the evidence regarding potholes, as to which, in addition to the evidence on which Ms Dobie relied (see paragraph 26(ii) above), Ms Wood had given the following evidence, from which it is clear that she had been giving a hypothetical example of a particular immediate hazard which might incline the Respondent to place a cone in the affected parking space:

A. If there was – I can't think of an example – but if there was something in the car park that was causing an immediate hazard to customers, then I would do something to try and limit that because I wouldn't want any customer to have an accident so, I don't know, so there were potholes in the car park where the pressure from car tyres had shaped the tarmac so if there was one that was particularly bad we would potentially put a cone at the end of the space and contact Hillingdon Council and let them know about it.

Q. So a bad pothole you would take steps.

A. For example, yes.

Ms Wood's evidence regarding the Respondent's ability to close the parking bay in the hypothetical event of the collapse of the canopy roof had been in similar vein, and she had been clear that the Respondent could not close off the bay *'in its entirety'*, by which, in context, it is apparent that she meant other than on an ad hoc, short-term basis.

48. The Respondent's risk assessment was a template document, used for all Waitrose stores. As the judge observed, the 2015 assessment had included the following pro forma wording, *"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."* The pro forma question, *"Are any changes in floor surface or height (eg kerb) clearly visible?"* did not serve to imply that it was for the Respondent to (for example) paint a kerb itself, if they were not. Ms Foster's submission that the judge's conclusion [33] that the Respondent had had no power to paint the kerb lacked evidential foundation is simply wrong; page 80 of the transcript of evidence records the following exchange with Ms Wood, in re-examination:

Q. Had that kerb ever been painted since you've been there in 2011?

A. No.

Q. Can you paint it? Not you personally, but can the defendant, anybody from them, do they have power to?

A. No.

49. Similarly, regular maintenance inspections by an employee of the Respondent were a means of identifying matters which needed to be drawn to LBH's attention. Their existence did not imply any control over such matters on the part of the Respondent. 'Walk-arounds' of the carpark, together with a dedicated point of contact within LBH, afforded the opportunity for the Respondent to identify matters requiring attention by LBH, including those which had previously been pointed out by the Respondent and which had not (yet) been attended to by LBH. It is clear, from the photographs which were before the judge and before me, that the Respondent had the ability to, and did, put up Waitrose-branded signage in and around the car park, as the judge found [33].

50. Standing back, in my judgment it is clear that the judge was right to find that the extent of the Respondent's control of the car park encompassed dealing with immediate hazards; putting in place interim measures to deal with hazards; and

reporting issues to LBH. On the evidence which she had received, she was also right to find that its control did not extend to painting kerbs, or to the making of any long-term or structural changes, or to preventing use of any particular parking bay, other than on a short-term basis. She was wrong, however, to conclude that the limit of the Respondent's control was as she had found it to be; on the evidence, that control had extended to the ability to put up warning signage, where necessary, and to reiterating, with reasonable frequency, any concerns regarding issues which had not been attended to by LBH within a reasonable period (the duration of such period being issue-specific).

The nature and extent of the Respondent's common duty of care

51. The extent of the Respondent's control as a joint occupier of the car park in turn serves as a pointer to the nature and extent of the duty which reasonably devolved upon it, as the judge held. That being so, in addition to the constituent elements of the common duty of care as found by the judge ([33]: dealing with immediate hazards, putting in place interim measures to deal with hazards and reporting matters to LBH), that duty extended to putting up warning signage, and to reiterating to LBH, with reasonable frequency, concerns regarding any unresolved issues, in each case where, in all the circumstances of the case, that was reasonable to see that the visitor would be reasonably safe in using the car park – always a fact-sensitive question. Notwithstanding its designation by LBH as a bay for disabled users, as a matter of principle it seems to me that the Respondent's control and associated duty extended to putting up signage to the following effect, <u>if warranted</u> (without seeking to be prescriptive of the form of words which might be used): *"Waitrose draws your attention to the narrow gap between your vehicle and the kerbs in this parking bay – please take care!"* Wording of that ilk would not have operated to gainsay LBH's designation of the bay and would have been unobjectionable, for that reason.

The steps required of the Respondent in all the circumstances of this case

52. I turn, therefore, to consider the steps required of the Respondent by the duty which I have found it to have had, in all the circumstances of this case, having regard to section 2(3) of the OLA, whereunder relevant circumstances include the degree of care, and of want of care, which would ordinarily be looked for in a visitor using the premises for the purposes for which he is invited or permitted by the occupier to be there. In considering the requisite steps, I bear in mind the dicta of Kennedy LJ in *Staples v W. Dorset DC*, cited in *Edwards* and set out at paragraph 23 above, to the effect that the duty is owed to the individual visitor, such that it can only be said that a duty to warn arises if, without a warning, the visitor in question would have been unaware of the nature and extent of the risk and that, if the danger is obvious, the visitor is able to appreciate it, is not under any kind of pressure and is free to do what is necessary for his own safety, no warning is required.

53. I am satisfied that, as an elderly user and the husband of a disabled person, albeit not himself disabled, the Appellant fell within the category of persons who might reasonably have been expected to use the particular parking bay. Thus, the starting point is the danger as identified by the judge [38]. As previously recorded, she had found that to have been the presence of the kerb itself, observing, *"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."

54. Having reviewed the numerous photographs of the relevant bay with which I have been provided and the number of accidents recorded, in the context of the *"thousands of people using it"* to whom Ms Wood referred in evidence[1], I conclude that the size of the bay and the presence of the kerb would be obvious to a user entering it, as would be the need to manoeuvre between the side of the car and the left hand kerb, in particular having regard to the judge's finding that the kerb is clearly visible as one drives into, or walks towards, the parking bay (as it was to the Appellant and his wife on the occasion in question). They had used the bay before, without encountering any difficulty[2]. The kerb itself was not of abnormal height, defective, or in a state of disrepair. The kerb stones were lighter in colour. In such circumstances, neither the presence of the kerb nor its proximity to a car parked in the bay constituted a trap, nor was the kerb situated where a user of the bay would not expect it to be, as the judge herself found [43]. Ms Dobie is right to submit that all such features were readily discernible and that, were a particular elderly or disabled user to consider that s/he required greater space, or room for manoeuvre, there were other designated disabled bays available which did not have a kerb and/or might have been wider. The gap between the car and the kerb and the need to manoeuvre accordingly would be readily appreciable, in particular as one opened the car door or reapproached the vehicle on foot. It follows that, in my judgment, in the circumstances with which this case is concerned, the Respondent came under no duty to warn visitors, including the Appellant, of the danger identified by the judge; on the evidence before the judge it could not reasonably have been concluded that, absent a warning, the visitor in question would have been unaware of the nature and extent of the risk. The danger was obvious, the visitor was able to appreciate it, was not under any kind of pressure and was free to do what was necessary for his own safety; no warning was required. For the same reasons, I conclude that, in the circumstances of this case, the Respondent came under no duty to draw the danger to the attention of LBH (repeatedly or at all) notwithstanding earlier accidents in or around the bay. The judge had referred to: an incident on 12 December 2012, when a customer had tripped over the kerb, landing on his front, sustaining a cut above his right eye, a cut lip and a cut knee [34]; a 'possible' incident on 14 March 2013, the record of which had read, simply, *'Customer tripped on paving around pillar on entrance to shop'* [35]; and to another incident, on 9 August 2014, in which a customer had tripped over the left-hand kerb, suffering a cut to her nose and injuries to her knee, ankle and shoulder [35]. Following the Appellant's own accident in May 2015, a further accident had taken place, on 3 November 2015, the record of which had read, *'Elderly gentleman was getting out of his car when he tripped and fell over the kerb which runs along the long side of the disabled parking bays'* [36]. The judge had then noted that, *"It appears that there have been no incidents involving kerbs in this bay since about 2017."* [36]. Thus, notwithstanding the extensive usage of the parking bay in

[1] Transcript of evidence, p65
[2] Transcript of evidence, p8

question, only four, or possibly five, incidents had been recorded (in rather imprecise terms, as the judge observed [34]) and none since approximately 2017.

55. In short, in my judgment the degree of risk was not such as to trigger section 1(1) of the OLA. In the language of Lord Hobhouse, in *Tomlinson* [80]: *"…the degree of risk is central to the assessment of what reasonably should be expected of the occupier and what would be a reasonable response to the existence of that degree of risk. The response should be appropriate and proportionate to both the degree of risk and the seriousness of the outcome at risk. If the risk of serious injury is so slight and remote that it is highly unlikely ever to materialise, it may well be that it is not reasonable to expect the occupier to take any steps to protect anyone against it. The law does not require disproportionate or unreasonable responses."* In this case, a proportionate and reasonable response to the degree of risk and the seriousness of the outcome at risk did not, in my judgment, require that the Defendant report it to LBH (and irrespective of whether the content of that report ought to have been the incidents which had occurred and/or a description of the danger as identified by the judge), nor 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. There being no such duty, there can have been no breach, from which it follows that questions going to the likely consequences of a report or warning fall away.

56. For the sake of completeness, I reject Ms Foster's submission that a duty to report, where it arises, absent a corresponding duty to remove the source of danger is hollow. It is an inevitable consequence of an occupier's common duty of care being framed by reference to the nature and extent of its control, that dual or multiple occupiers may have different and complementary responsibilities. Furthermore, in this case, no explanation has been proffered for the Appellant's decision to sue the Respondent, but not LBH as owner of the car park which had the ability to make structural amendments to the relevant parking bay, or redesignate it as being unsuitable for use by disabled or elderly visitors. It is for a claimant to identify the occupier (if any) who bears the relevant duty, the breach of which caused the injury in question.

The cause of the Appellant's accident and injuries

57. That leads me to the *'more fundamental problem'* with the Appellant's case, as the judge rightly characterised it. If he is to succeed in his claim, it is for the Appellant to establish the duty for which he contends, its breach and that such breach caused his injuries and any related loss and damage. The Appellant's evidence was that he had *'opened the door fully and ..stepped on the pavement and got out'*[3]. He said that he had been consciously aware that he had stepped out onto a kerb and aware that he had been required to step down from the kerb into the adjacent empty parking bay, which he had navigated safely[4]. Upon his return from the store, he had deposited the items which he had purchased in the boot of the car, consciously walking around the kerb end and into the opposite bay, before attempting to step up onto the kerb to reach the passenger door handle. He then said that his foot had caught on the kerb and he had fallen. He had been aware that the kerb was there[5] and had walked into the next bay because of the pavement, of which he had been conscious and aware[6]. He later

[3] Transcript of evidence, p8
[4] Transcript of evidence, p10
[5] Transcript of evidence, p12
[6] Transcript of evidence, p23

demonstrated to the judge that he had caught his foot on the side of the kerb. All such evidence was recorded by the judge [9]:

"The claimant's account is as follows. ...Mrs Juj was driving; she has a blue badge. The car park was quiet, and they parked in the bay nearest to the entrance. As Mrs Juj was not getting out, she parked over to the left of the bay in order, she said, that the claimant could step onto the kerb. He said he got out onto the kerb, and stepped down into the empty neighbouring bay, then went round the back of the car and into the store. A few minutes later, he came out with shopping bags which he placed in the boot, and walked around the back of the car into the neighbouring bay. When he got level with the front passenger door he went to step onto the kerb to reach the door handle. He said he caught his foot on the kerb and fell; he does not remember hitting the ground. He has a hazy memory thereafter…"

58. From that evidence, it is clear that, irrespective of whether the relevant bay posed the danger identified by the judge, and of whether the Respondent had been under an obligation to warn of/report that danger and any earlier accidents to LBH, neither the danger as identified by the judge nor the breach of any duty by the Respondent caused the Appellant's accident. He had not been attempting to navigate between his car and the kerb within the relevant parking bay at the time. He had been fully aware of the kerb, had walked around it into an adjacent empty bay and had simply misjudged his step, as he might have done on any street kerb, in any location. As the judge rightly expressed the position, *"...this was simply a true accident, and nothing that the [Respondent] did or failed to do caused it."* Whilst I share the judge's sympathy for the serious injuries which the Appellant sustained, she was right to have concluded that the claim could not succeed and to have dismissed it for that reason. In the language adopted by McCombe LJ, in *Edwards* [60], *"...not every accident (even if it has serious consequences) has to have been the fault of another; and an occupier is not an insurer against injuries sustained on his premises."*

Overarching conclusion

59. It follows from the above analysis that:

i) **Ground 1:** the judge rightly concluded that the Respondent was an occupier but erred in her framing of the nature and extent of the common duty of care which the Respondent owed to visitors to the car park;

ii) **Ground 2:** the judge unreasonably found as a fact that the bay posed a danger to its intended users which was other than obvious. Accordingly, the Respondent's common duty of care did not require that it take any steps to see that a visitor to the bay would be reasonably safe in using it for the purposes for which he was invited or permitted by the occupier to be there. In particular, there was no duty to warn visitors or to report the danger identified by the judge in this case to LBH;

iii) **Ground 3:** in light of my conclusions as to ground 2, ground 3 falls away;

iv) **Ground 4:** the judge was right to conclude that the Appellant's accident had been a *'true accident'*, to which no breach of duty on the part of the Respondent had contributed;

v) It follows that the issue of contributory negligence by the Appellant does not arise for consideration.

60. The appeal fails and is dismissed.

The Appellant's application for permission to appeal

61. Following circulation of my draft judgment the Appellant sought permission to appeal, stating that he was content that it be considered on the papers. The application relates to a decision of the High Court which was itself made on appeal and, thus, must be made to the Court of Appeal, in accordance with CPR 52.7.