BRIEFING

PERSONAL INJURY

May 2021

CONTRIBUTORS

Robert Parkin

Henk Soede

INTRODUCTION

LAURA JOHNSON
Head of the 1 Chancery Lane Personal Injury Group

S 2(2). of the Occupiers Liability Act 1957 sets out the persuasively simple proposition that an occupier owes a duty to take such care as is reasonable to see that its visitors are reasonably safe when using the premises for the purposes for which they are invited or permitted to be there. So far so familiar to a tort lawyer with the concept of reasonableness at its heart. Liability under the Act is however extremely complex and lack of familiarity with it and the cases that have interpreted it exposes lawyers to all sorts of pitfalls.

In this briefing the 1 Chancery Lane Personal Injury team consider some of the most common areas that pose difficulty. Henk Soede discusses what is meant by an occupier, who is a visitor and what happens when the claimant is present on the premises due to some sort of right. Robert Parkin looks at the extensions and restrictions to the duty of care contained in the other subsections of s. 2, including cases involving children and independent contractors, the relevance of warning signs and what happens when a visitor apparently willingly accepts a risk.

Henk and Robert are providing further training in this area in the 1 Chancery Lane Webinar series. On Thursday 10th June at 1pm they will be giving training on Occupiers Liability – Reminder of the Basics. You can register for the webinar here or for further information about the education and training offered by members of 1 Chancery Lane please visit our website or contact Emma Williams, Marketing Manager on ewilliams@1chancerylane.com. 1 Chancery Lane specialises in personal injury cases involving complex points of law and knotty arguments about the duty of care. Members of Chambers have been involved in leading cases in this area such as *Edwards v Sutton LBC* [2017] PIQR P2 and *Furmedge v Chester-le-Street District Council* [2011] EWHC 1226 (QB). We offer barristers at all level of call who are specialists in this area and can assist with any needs you might have.

Finally, you may have noticed from our website and social media that we have been delighted to welcome our clerking team back to Chambers this month. We have remained open for business throughout the pandemic accommodating changes to working and clients' developing needs. For further assistance with your legal or training needs please contact clerks@1chancerylane.com or Emma Williams.

OCCUPIERS AND VISITORS UNDER THE OLA 1957

HENK SOEDE

Under the Occupiers Liability Act 1957 ("OLA 1957"), an occupier will owe its visitors a duty to take such care as is reasonable in the circumstances to see that the visitor will be reasonably safe in using the premises for the purposes for which he/she is invited or permitted to be there (section 2(2), OLA 1957). As section 2 indicates, the duty of care owed under the OLA 1957 is only owed by "occupiers" to "visitors". Naturally, then, the question of when a legal person will be deemed an "occupier" / "visitor" assumes central importance when analysing claims of this nature. The purpose of this article is to set out some of the basic guiding principles that the courts will look for when determining these issues.

Section 1: Occupation

Starting first with the question of what constitutes "occupation". There is no statutory definition of "occupier" under the OLA 1957. Accordingly, when analysing the issue of "occupation", the answer is found by drawing on the principles set out in the case law. It is noted that cases on occupation pre-dating the OLA 1957 are still relevant to the analysis of "occupation". As was explained in *Shtern v Cumming [2014] UKPC 18*, the OLA 1957 *"did not alter the rules of the common law as to the on whom a duty of care is imposed as an occupier, or to whom it is owed; what it did was to replace different levels of duty towards different classes of visitor by a uniform "common duty of care" to all lawful visitors"*: see [17].

Case 1: Wheat v E. Lacon

A helpful starting point when analysing the issue of "occupation" is the House of Lords decision in *Wheat v E. Lacon & Co Ltd [1966] A.C. 552*, a decision which neatly illustrates the key principles underlying the "occupation" analysis. The facts were as follows. The defendant in *Wheat* was a brewing company and owner of public house. Mr Richardson was employed by the defendant as a manager and ran the ground-floor of the public house on behalf of the defendant. The defendant permitted Mr Richardson and his wife, Mrs Richardson, to use the first-floor of the premises as their private dwelling. The defendant also permitted the Richardsons to take in guests for private profit. The claimant and her husband were guests of the Richardsons. Tragically, the claimant's husband fell one evening down the back staircase in the private portion of the premises and died as a result of his injuries. The claimant brought a claim against the defendant and the Richardsons, alleging breach of the duty of care owed under section 2 of the OLA 1957. At first instance, judgment was given in favour of both the defendant and the Richardsons. The claimant appealed solely against the finding in favour of the defendant. The Court of Appeal dismissed the appeal, and so the claimant appealed again to the House of Lords. In short, their Lordships considered that both the Richardsons and the defendant were occupiers under the OLA 1957 but that the defendant had not breached its duty under section 2. The key points on the issue of occupation were as follows.

At 577, Lord Denning explained the key factors underlying the issue of "occupation":

> *"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."* (my emphasis).

In terms of that statement of principle, there are three takeaways:

1. The touchstone of "occupation" under the OLA 1957 *is whether "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"*;
2. The content of the duty of care owed by the occupier will reflect the extent of occupational control (see, for exp., Lord Pearce at 587 and Lord Pearson at 590-591 in *Wheat)*; and
3. There may be more than one occupier of any given premises.

At 579, Lord Denning analysed the case law on "occupation" and identified four basic propositions relating to circumstances in which an owner/landlord will be regarded as an occupier. Those propositions are as follows:

1. Where a landlord lets premises by demise to a tenant, he will generally be regarded as parting with all control over them, even where he has undertaken to repair the structure (579B) (see, also, *Cavalier v Pope [1906] A.C. 428*);
2. Where an owner lets floor flats in a building to tenants, but does not demise the common staircase or the roof or some other parts, he will generally be regarded as having retained control of all parts not demised by him on the ground that he is sufficiently in control of them (579D);
3. Where an owner does not let premises to a tenant but only licenses a person to occupy them on terms which did not amount to a demise, the owner still having the right to do repairs, the owner will generally be regarded as being sufficiently in control of the structure (579G-580A);
4. When an owner employed an independent contractor do work on premises, the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there. In some cases that duty might be fulfilled by entrusting the work to the independent contractor: see s.2(4), OLA 1957. In other cases, the landlord might only be able to fulfil its duty by exercising proper supervision himself over the contractor's work: see *Thomson v Cremin [1956] 1 W.L.R.* and *Davie v New Merton Board Mills Ltd [1959] A.C. 604*.

An important point to keep in mind in respect of propositions 2) to 3) is that, even if those scenarios apply, the fact an owner will be an occupier will not by itself exclude the possibility of (for example) a licensee being an occupier. Again, there can be more than one occupier of any given premises. The determinative factual question is whether the proposed occupier "*has a sufficient degree of control over premises that he ought to release that any failure on his part to use care may result in injury to a person coming lawfully there*" (577).

Further, in terms of proposition 3), there is an important caveat that also serves as a useful illustration of the fact-sensitive nature of the "occupation" analysis under the OLA 1957. As argued in Clerk & Lindsell on Torts (23rd Edition) at 11-09: "*if the license involves a parting with exclusive possession to the tenant, it is suggested that the technical difference between lease and license should be disregarded and that the licensor should not count as an occupier*". The point is a significant one. For example, if a landlord grants such a license to a third party, it will be arguable that the landlord can escape liability on a similar basis to that which exists where the relevant premises were demised to a tenant (see proposition 1) in *Wheat* above). It is thought that this approach accurately reflects the fundamental nature of the analysis under the OLA 1957 – namely, an analysis focused on the *actual* occupational control over the relevant premises.

Case 2: Furmedge v Chester-le-Street DC

The principles emphasized in *Wheat* have been applied in a number of subsequent cases. One especially instructive case is *Furmedge v Chester-Le-Street DC & Anor [2011] EWHC 1226 (QB)*. Furmedge concerned the sole question of apportionment of liability between two defendants: BIL and Chester-Le-Street District Council (the "Council"). The underlying claim arose after an inflatable structure in an art installation ("Dreamspace V") broke free from its anchorage and lifted two people inside it into the air. Those two people tragically died as a result of their injuries. A number of others were injured. The Council was the local authority with responsibility for the park where Dreamspace V was

set up. The Council had approached Mr Maurice Agis, the artist, the previous year to see if he was interested in exhibiting Dreamspace V in the area. BIL was a company that was involved in, amongst other things, the promotion and organisation of arts events. Mr Maurice Agis' son, Giles, was its Executive Director. The Council had previously accepted liability on the basis that it had failed to undertake a proper risk assessment. Sums were accordingly paid out to the claimants. The Council alleged, however, that BIL should share in liability on the basis that, inter alia, it was an occupier of the art installation and had breached its duty under section 2 of the OLA 1957. Following an instructive analysis of the issue of "occupation", Foskett J found that BIL was an occupier for the purposes of the OLA 1957. The key findings were as follows:

- Re-stating the guiding principles, Foskett J noted: "*it is clear…that the issue of who is an occupier…is a fact sensitive issue. It normally requires some degree of actual physical control over the premises even if its not entire or exclusive. An appreciation that a failure to take care could result in injury to someone coming onto the premises is another factor.*" [142]. *On Foskett J's view, BIL "became an occupier of the structure at Chester-le-Street through a combination of factors.*" [144].
- **Physical control.** (1) Through its employees, BIL played an active and central role in the initial construction of the units that comprised the Dreamspace V structure; it erected the final structure in Liverpool; it dismantled it; it transported it to Chester-le-Street; and it erected it there. Moreover, the same employees were intended to act as stewards inside and outside the structure. These factors were strong indicators that BIL were occupiers – they played a part in the control of who went into the structure and how those persons behaved within the structure, thus incurring "*some degree of physical control*" over the premises; and they had helped construct the structure, thus incurring "*some degree of physical control*" over its construction [144]. (2) Foskett J noted that "merely providing labour in connection with the stewarding would not of itself have rendered BIL an occupier for the purposes of the 1957 Act". In this case, however, the stewarding would not of itself have rendered BIL an occupier for the purposes of the 1957 Act". In this case, however, the stewarding "*represented merely one part of a continuum of activity engaged in by BIL, through its employees, that, taken as a whole, resulted in BIL becoming an occupier within the law*". [145].
- **Appreciation of risk if reasonable care not taken**. (1) An additional factor relevant to the fact of BIL's occupation was that there was (or ought to have been – see [148]) "*an appreciation by BIL that any failure by it to use care in relation to the structure could cause injury to people using it*" [147]. Foskett J accepted that Mr Giles Agis, the Executive Director of BIL, knew that Mr Maurice Agis "*lacked any engineer qualifications, expertise or knowledge other than that which he had picked up in the course of his artistic work.*" [149]. Mr Giles Agis also knew that the risk assessment provided to BIL by his father was "*basic*" and related to a previous version of the Dreamspace installation. [149] (2) The "*final stage in the journey towards resolving the question of "occupation" arose from the knowledge that BIL obtained whilst the Dreamspace V was in Liverpool about its potential instability in windy conditions*" [151]. Foskett J found that "*there was clear evidence that the anchorage used in Liverpool was not sufficient for certain conditions…*" (3) Concluding, Foskett J noted: "*if there was any doubt about the question of "occupation", then so far as that issue is influenced by an appreciation of danger within the structure if proper care was not shown, this consideration would provide yet further support for the conclusion that there was occupation within the meaning of the law*" [152].
- **Other occupiers.** (1) Maurice Agis, the artist that designed the structure, was another occupier [146] However, Mr Agis had died prior to the proceedings and there was no left money in his estate. Accordingly, he was not a party to the proceedings. (2) The Council accepted liability for the injuries, in part, as it had not carried out its own risk assessment of Dreamspace V. Accordingly, it was not strictly necessary to determine whether the Council would also have been an occupier under the OLA 1957. However, Foskett J remarked that "*I would have been inclined to say that the council was not an occupier because, whilst it owned the ground upon which the structure was erected, it*

did not have (or purport to exercise) any degree of physical control over what occurred in relation to the structure of the premises or to those going into it." [146].

Furmedge makes clear that an important factor when analysing "occupation" under the OLA 1957 is whether the proposed occupier was in a position to "appreciate" that certain aspects of the premises would pose a risk to visitors if reasonable care was not taken. This reflects Lord Denning's statement of principle in *Wheat* – that is, "*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*" (my emphasis).

Specific scenarios

Cases where the landlord has demised the relevant premises

A recent example of a case in which proposition 1) in *Wheat* – that is, that a landlord is not an occupier of premises that he has leased to another party – has been upheld is *Drysdale v Hedges [2012] EWHC 4131 (QB)*. The claimant had leased a property (the "Property") from the defendant. On the day after the claimant had moved in, she slipped on the steps outside of the Property and fell over the sidewall to the basement. These steps were part of the premises demised to the claimant under the terms of the lease. The claimant alleged that the steps were dangerously slippery as a result of the defendant (more specifically, her partner) painting the steps previously. It was also alleged that the wall at the side of the steps was not sufficiently high and/or was not provided with a guardrail or handrail to prevent someone falling down to basement level. As to the issue of occupation, counsel for the claimant submitted that the defendant was an occupier of the steps and that, although the steps were part of the premises demised to the claimant, it was unreal to suggest that she was the sole occupier – she could not "*take control of the steps in any meaningful way*" (under the lease the claimant could not carry out any decoration to the premises without prior consent) [70]. However, John Williams QC (sitting as a Deputy High Court Judge) considered that the OLA 1957 did not apply – the steps had been demised to the claimant and occupation had commenced by the date of the accident [74]. The landlord was not therefore an occupier. Further, there was no clear reason why Parliament would describe the landlord's duty in both section 2 of the OLA 1957 and section 4 of the 1972 Act: [74]. On the judge's analysis the "*landlord's duty of care should normally be confined to that set out in section 4 of the* [Defective Premises Act 1972]" [77].

A second case is *Dodd v Raebarn Estates Ltd & Ors [2016] EWHC 262 (QB)*. In *Dodd*, the claimant had injured himself whilst using a staircase that formed part of a building owned by one of the defendants. Part of that building had been leased to a developer. Although there was an issue to be tried as to the proper construction of the lease, it was ultimately found that the demised premises under that lease included the staircase where the claimant was injured. Accordingly, HHJ Parkes QC (sitting as a Judge of the High Court Court) found that the owner was not an occupier of the staircase under the OLA 1957 (see [33]), as that part of the premises had been demised to another party, and that summary judgment in respect of that claim should be upheld (see [38]).

Both *Drysdale* and *Dodd* make clear that, when contemplating a claim against a freehold owner of a building under the OLA 1957, there must be a thorough investigation into whether parts of that building had been let to other parties. If a claim is brought against a landlord under the OLA 1957 and the landlord has demised the part of the premises where the accident occurred, it is unlikely the landlord will be deemed an "occupier". *Drysdale* is also a helpful reminder that the appropriate claim against such a landlord is generally a claim under section 4 of the Defective Premises Act 1972.

Other occupiers (apart from owners and lessees)

An example of a case where a non-owner of land has been deemed to be "occupier" is *Collier v Anglian Water Authority [1983] 1 WLUK 90*. In *Collier*, the claimant suffered injury after she tripped on a ridge that had formed between two large paving slaps on a

promenade next to the beach. The claimant brought a claim against the local water authority (the "defendant") alleging breach of section 2 of the OLA 1957. The promenade was owned by the local council. The promenade had been constructed many years previously by the defendant's predecessors and the defendant, pursuant to its statutory powers relating to the maintenance of sea defences, was solely responsible for the structural condition of the promenade pursuant to its statutory powers relating to maintenance of sea defences. The defendant nevertheless submitted that it was not its responsibility to consider whether the promenade was safe to walk on, for that was the job of the local council. The defendant contended that the local authority alone was the sole occupier of the promenade – they owned the land; had an office on the promenade; ensured the promenade was swept and rubbish removed; and had the power to exclude the public for repairs to be affected. The Court of Appeal disagreed. Everleigh LJ found that both the defendant and the council "*shared in the occupation and control of the promenade*". More specifically:

> *While the defendants did not have exclusive control of the promenade, they certainly had control of its structural conditions, and while they had no general power to exclude the public, they did have the power to do so for the purpose relating to the structural condition of the promenade. The Council for their part had responsibility for the condition of the promenade in all other respects, for example for dangers presented by unlighted obstacles or broken glass."*

The Court then decided that the defendant had breached the duty it owed to the claimant under section 2 of the OLA 1957: no-one else could interfere with the structural condition of the wall; the displaced slab would have developed overtime and would have been present for a long period; and the defendant did not have in place a system for inspecting and repairing such slabs. It was considered reasonable to require the Defendant to have such a system.

Another case in which a party other than an owner or lessee was found to be an occupier is *Bunker v Charles Brand & Son Ltd [1969] 2 Q.B. 480*. In *Bunker*, the claimant, an employee of a constructional engineering firm, was engaged in work in a tube tunnel. The tunnel was being cut by a machine let by its owner under a contract to the defendants, the main contractors, for constructing the tunnel. The machine was assembled in the tunnel by the claimant's employers. The defendant required a modification to be carried out on the front of the machine (two new rams had to be fitted). For this purpose, the claimant was invited on-site at a weekend. The defendant provided the labour for carrying in the two rams and the defendant's site engineer was on duty (484). The walkway on the side of the tunnel had been removed, so it was necessary to climb over the machine itself to get to the front. This involved using the rollers at the side of the machine (485). The claimant's foot slipped from the angle irons on to the rollers and he fell, sustaining injuries. The claimant alleged the defendant was an occupier of the building site, including the machine, and that, as occupiers, they owed him a duty of care under section 2 of the OLA 1957. The defendant submitted that they were not in occupation of the machine and that, having employed specialist contractors to come and make a medication to the machine, they had abandoned control of the machine over the weekend and that occupation had fallen to the claimant's employers (487). O'Connor J rejected that submission and held that the defendant remained occupiers of the part of the tunnel including the machine. The defendant retained control through its employees, and it was they who controlled the people making use of this part of the tunnel (487). It was noted that there may have been joint control of the front of the machine but that did not have to be decided. As far as the rollers were concerned, these rollers were plainly occupied by the defendants (487).

Conclusion

It will be clear from the summary above that the analysis of whether a person is an "occupier" is highly fact sensitive. It is hoped the analysis above has shed some light on the factors that the courts will look for when determining occupation under the OLA 1957.

Section 2: Visitors

In brief, a visitor under the OLA 1957 is a person that at common law would be regarded as an invitee of licensee or, in other words, a person who enters / users

premises by express or implied permission of the occupier: see Lord Denning in *Greenhalgh v British Railways Board [1969] 2 Q.B. 286, 292-3.*

Express or implied permission

In circumstances where an occupier has a) granted a person express permission to use their premises for a specified purpose and b) the person uses the premises as permitted, the question of whether that person qualifies as a visitor is unlikely to be contentious. However, difficulties arise in cases where the occupier has not granted express permission but has, from the eyes of the alleged visitor, impliedly granted permission to use the premises.

An example of such a scenario can be found in the pre-OLA 1957 case of *Lowery v Walker [1911] A.C. 10*. In that case, the defendant had put a horse that was known to be dangerous in his field. The defendant also knew the field was often used by members of the public to access a local train station. The claimant was crossing the field and was attacked, bitten and stamped on by the horse. The case turned on whether the claimant had been granted implied permission to use the field by the landowner. The House of Lords held that the claimant had such permission, as the defendant knew members of the public were using the field and acquiesced in their doing so, and that the defendant was liable in negligence for impliedly permitting members of public to use the field when he knew it was dangerous for them to do so. *Lowery* indicates that permission to use premises may be inferred where, for example, a landlord knows the public are habitually using his premises and takes no steps to prevent this.

Another illustrative case is *Edwards v Railway Executive [1952] AC 737*. The claimant in *Edwards*, a boy aged nine, was injured after he entered a railway line owned by the defendant. Adjacent to the claimant's land was a public recreation ground and children's playground. A wire fence had been erected by the defendant between the public recreation ground and their property. Children often entered the railway line by disconnecting the wiring that constituted the fencing. The fence itself was repaired by the defendant when it was observed to have been interfered with. Frequent repairs were required. On the morning of the claimant's accident, the fence was in proper repair. The claimant had not previously entered through the fence and had been warned not to do so by his father and an employee of the Woolwich Corporation (the owner of the recreation ground). The claimant knew the fence was there to keep him out. A central issue was whether the claimant used the railway line with the implied assent of the defendant. At 743-4, Lord Goddard held as follows:

> *"The first matter for decision accordingly is whether there was any evidence from which it could be inferred that children from the recreation ground had become licensees to enter the respondents' premises and toboggan down the embankment…There must, I think, be such assent to the user relied upon as amounts to a licence to use the premises. Whether that result can be inferred or not must, of course, be a question of degree, but in my view a court is not justified in lightly inferring it… The onus is on the appellants to establish their licence, and in my opinion they do not do so merely by showing that, in spite of a fence now accepted as complying with the Act requiring the respondents to fence, children again and again broke their way through. What more, the appellants were asked, could the respondents do? Report to the corporation? But their caretaker knew already. Prosecute? First you have to catch your children and even then would that be more effective? In any case I cannot see that the respondents were under any obligation to do more than keep their premises shut off by a fence which was duly repaired when broken and obviously intended to keep intruders out."* (my emphasis).

Notably, Lord Goddard arrived at that conclusion on the basis that the defendant knew children were using the railway line to play. But, "*even assuming that the respondents had knowledge of the intrusion of children on to the embankment, the suggestion that that knowledge of itself constitutes the children licensees, in my opinion, carries the doctrine of implied licence much too far, though no doubt where the owner of the premises knows that the public or some portion of it is accustomed to trespass over his land he must take steps to show that he resents and will try to prevent the invasion." (744).* Thus, even if an occupier has knowledge that children are using its land, such an occupier will not be deemed to grant those

children an implied license to use the land if it take steps to prevent the trespass.

Then, at 748, Lord Oaksey noted as follows:

> *"In my opinion, in considering the question whether a license can be inferred, the state of mind of the suggested licensee must be considered. The circumstances must be such that the suggested licensee could have thought and did think that he was not trespassing but was on the property in question by the leave and license of its owner."* (my emphasis).

In *Edwards*, it was found that the children could not have thought that they had the leave and license of the owners to enter the premises. They had been warned not to do so and they must have known that the fence was being continually repaired to prevent them from doing so (see 749).

The scope of the license or permission

A further issue to be aware of in the context of analysing whether a claimant is a "visitor" for the purposes of the OLA 1957 is whether that claimant has used the premises in the permitted way and/or for the permitted purpose. The importance of this proviso is made clear in section 2(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."* (my emphasis).

A case in which this issue was explored is *Harvey v Plymouth City Council [2010] EWCA Civ 860*. Whilst running away from a taxi to avoid the fare, the claimant in *Harvey* entered land owned by the defendant (the local council); tripped over a low chain link fence; and fell down a sheer drop of 5.5 metres onto an adjacent supermarket car park, thus sustaining serious injury. The claimant brought a claim against the defendant alleging breach of the duty under the OLA 1957. At first instance, the judge found the defendant was liable but also that the claimant was contributorily negligence – he was under the influence of alcohol and was behaving recklessly. The defendant appealed the finding on liability. The principal issue on appeal was whether the claimant was an implied licensee. Firstly, it was found that the defendant had granted an implied license to the public for general recreational activity on its land. However, Carnwath LJ noted that *"it is clear that the duty under the 1957 Act does not extend beyond the scope of the activities for which the license has been expressly or impliedly given"* [22]. Carnwath LJ continued: "*In deciding whether the claimant was a licensee, the question was, not whether his activity or similar activities might have been foreseen, but whether they had been impliedly assented to the by the Council.*" [27]. There was no evidence that suggested the Council had impliedly assented to members of the public using the land in a reckless manner. Concluding: "*When a council licenses the public to use its land for recreational purposes, it is consenting to normal recreational activities, carrying normal risks. An implied license for general recreational activity cannot, in my view, be stretched to cover any form of activity, however reckless*" [27]. For those reasons, it was held that the claimant was not a "visitor" for the purposes of the OLA 1957, as the manner in which he used the defendant's land went beyond that which was permitted by the implied license for general recreational activity.

Another illustrative case is *Spearman v Royal United Bath Hospitals NHS Foundation Trust [2017] EWHC 3027 (QB)*. The claimant in *Spearman* had previously suffered a brain injury. The claimant was also diabetic and suffered frequent hypoglycaemic attacks. After one such attack, the claimant had been admitted to the hospital. Shortly after his admission, and whilst he was unattended, the claimant attempted to leave the hospital. He left through an unsecured fire door and ended up on a roof surrounded by safety fencing. The claimant then climbed over the fence using furniture that was there and fell into a courtyard below, suffering a severe traumatic brain injury. One of the issues was whether the claimant was a "visitor" under the OLA 1957 or a "trespasser" under the OLA 1984. The defendant submitted that the claimant became a trespasser after he left the Emergency Department and went up the stairs onto the flat roof. At [56], Martin Spencer J reasoned as follows:

> *"Firstly, in my judgment whether a person is or is not a*

> *trespasser is not solely determined by whether the place where they are is or is not an "authorised" place. A person's state of mind and intention is an important additional factor… If a patient, who is a lawful visitor to a hospital (whether the Emergency Department or any other department) has finished his or her treatment and is leaving, he or she does not cease to be a visitor in general until they leave the hospital premises. The position may be different if they deliberately enter an area marked "no entry", or "private" or know that they are entering a part of the hospital where they have no right to be. But if the patient simply makes a mistake and goes the wrong way, it could not possibly be suggested that such a person was now a trespasser. So here, intending to leave the Emergency Department, Mr Spearman, in his confused state of mind, thought (wrongly but honestly) that he needed to go upstairs to get out and, indeed, go over the barrier to get out. His belief meant that he remained a lawful visitor and, in my judgment, he did not become a trespasser at any time material to this case.*" (my emphasis).

I note in passing that the judgment in *Spearman* is criticised by the authors of Clerk & Lindsell in the footnotes at 11-18: "*Martin Spencer J seemingly suggested at [56] that an honest mistake sufficed, but this arguably goes too far: it seems unacceptable to a landowner to burden him with the consequences of unreasonable errors.*" Readers will need to make up their own mind as to whether that criticism is justified!

A final case that can be briefly mentioned is *Tomlinson v Congleton BC [2003] UKHL 47*. The claimant suffered injuries after he dived into the shallow water at the edge of the lake. The defendant was the owner and occupier of the country park in which the lake was situated. The claimant was a permitted user of the country park. However, the defendant had erected notices and distributed leaflets warning of the dangers of swimming in the lake. Although the claim was initially pitched on the basis that the claimant was a "visitor" for the purposes of the OLA 1957, it was later conceded that the claimant was a trespasser when he entered the water to swim. The claim was then brought under the OLA 1984. Lord Hoffman considered that the concession was correctly made. At [13]:

> "*I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do. In both cases, the entrant would be imposing upon the landowner a duty of care which he has not expressly or impliedly accepted*".

Tomlinson illustrates the circumstances in which a visitor, during permitted use of occupied land, will become a trespasser. Lord Hoffman made clear that there is no substantive difference between a person who uses occupied land without permission and a person who uses occupied land with permission but later uses the land in a way that was not permitted. In both scenarios, if the person is injured whilst using the land in a non-permitted way, that person will not be an occupier for the purposes of the OLA 1957.

The carve out under section 2(6)

In circumstances where a person enters premises for any purpose in the exercise of a right conferred by law, they will be classified as visitors, even if the occupier has not granted express permission to use those premises: section 2(6), OLA 1957. More specifically, Section 2(6) provides as follows:-

> "*For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not*."(my emphasis).

Examples of such rights can be found in statutes such as the Police and Criminal Evidence Act 1984 (specifically, section 17, which empowers police with search warrants to enter premises in the act of pursuing criminals) and the Fire and Rescue Services Act 2004 (specifically, section 44(2), which empowers employees of fire and rescue authorities to enter premises or a place without consent in circumstances where, for example, the employee reasonably considers a fire to have broken out). So, for example, firemen/women and police officers entering the occupier's premises without permission pursuant to their statutory rights will be classified as visitors under section 2(6) of the OLA 1957.

It should be noted that the "right to roam" provided for in the Countryside and Rights of Way Act 2000 is dealt with specifically at section 1(4) of the OLA 1957. Section 1(4) provides that persons exercising such rights to enter another's land will not be classified as visitors by operation of section 2(6).

Public / private rights of way

In circumstances where a person is using a public right of way, it has been held that such persons would not classify as visitors under the OLA 1957 of the owners of the sub-soil. The leading authority on this point is *Greenhalgh v British Railways Board [1969] 2 Q.B. 286*. The claimant in *Greenhalgh* was walking over an old railway bridge in Lancashire and was injured after she tripped over a pot hole. The defendant had a statutory duty to maintain the accommodation bridge. The claim was brought on the basis that, *inter alia*, the claimant was a "visitor" under the OLA 1957 and that the defendant, as occupier of the bridge, had breached its duty under section 2(2). The House of Lords found that the claimant was not such a "visitor". As explained by Lord Denning at 292-3:

> *A person is a "visitor" if at common law he would be regarded as an invitee or licensee: or be treated as such, as for instance, a person lawfully using premises provided for the use of the public, e.g., a public park, or a person entering by lawful authority, e.g., a policeman with a search warrant. But a "visitor" does not include a person who crosses land in pursuance of a public or private right of way. Such a person was never regarded as an invitee or licensee, or treated as such."* (my emphasis).

Counsel for the claimant also sought to argue that the claimant's use of the bridge fell within section 2(6) of the OLA 1957. This argument was also rejected. At 293, Lord Denning held:

> *In relation to section 2(6) "The important words to notice are the opening words: "For the purpose of this section," i.e., for the purpose of section 2 , which defines only the extent of the occupier's duty to acknowledged visitors. It does not expand the range of persons who are to be treated as visitors. Section 2 (6) applies, for instance, to persons who enter a public park, or a policeman who enters on a search warrant, for they enter in the exercise of a right conferred by law and are treated as if they were invitees or licensees. They are acknowledged "visitors." Section 2 (6) shows that the occupier owes to such persons a duty of care when they are using the place for the authorised purpose, but not when they are abusing it. But section 2 (6) does not apply to persons crossing land by virtue of a public or private way: because they are never "visitors" at all." (my emphasis).*

Accordingly, a user of a public right of way will not be deemed a "visitor", as such a person cannot be regarded as an invitee or licensee of that right of way. That also entails that section 2(6) does not apply to such a person, as section 2(6) only applies to persons already deemed invitees or licensees. Section 2(6), as Lord Denning explains, does not expand the range of persons who are to be treated as visitors.

Similar principles seem to apply where a person is using a private right of way over another's land. This point was made clearly in *Holden v White [1982] Q.B. 679*, where the court drew heavily on the dicta in *Greenhalgh*. In *Holden*, the claimant (a milkman) suffered injury after his foot fell through a defective manhole situated on the defendant's land. At the time, he was delivering milk to the house of a third party via a right of way across the defendant's land. At 686, Oliver LJ held as follows:

> *"Stocker J. [the judge below] distinguished Greenhalgh's case on the footing that it did not support the broad proposition that a person such as a milkman, lawfully using the only pathway to the door of one of a terrace of houses, is owed no duty by anyone in respect of dangers which cause him injury. That may be so, but the question was not whether anyone owed the plaintiff a duty but whether the first defendant, as owner of the land on which the manhole was situate, owed him a duty, and in order to substantiate the existence of such a duty under the statute, he had to bring himself within the four corners of the statute by establishing his status as her visitor, i.e. her invitee or licensee. For my part, I am unable to conclude that he ever did do that, for it does not seem to me that any analysis of the position enables one to arrive at a conclusion that the first defendant had*

> *issued any invitation or permission to him to be at the place where he was injured. He was there because the owners of no. 10 had a legal easement which enabled them to insist, as against the first defendant, on his being there."* (my emphasis).

That reasoning was then expanded on by Ormrod LJ at 687:

> *"The common law imposed no duty on the owner of land, towards a person exercising a right of way over his land, to maintain the way in reasonable condition; his only duty was not to obstruct it. This is clearly established where public rights of way are concerned (Gautret v. Egerton (1867) C.P. 371 and Greenhalgh v. British Railways Board[1969] 2 Q.B. 286); and no authority has been cited to us to show that the user of a private right of way is in any better position…The plaintiff was using the pathway pursuant to the right of way owned by the owner of no. 10. He was, of course, not a trespasser; he was on the path pursuant to an implied licence or invitation by the owner of no. 10 in the exercise of the right of way attached to no. 10, and not by the permission or invitation of the defendant, who has no control over persons lawfully using the path, pursuant to the rights of the owner of no. 10. Consequently, assuming that the defendant is to be regarded for this purpose as the "occupier"…the claimant was not her visitor."* (my emphasis).

Put shortly, then, the defendant had not issued the claimant with an invitation or permission for him to be at the place where he was injured, and thus could not be regarded as the defendant's visitor. It is also worth keeping in mind that Ormrod LJ considered that the principles that applied in *Greenhalgh* applied equally in cases involving private right of ways (see above).

Notably, Oliver LJ also suggested that the principle above would not apply in circumstances where (for example) the lessor of a block of flats retains control of an entrance hall and a person has a right of way to use that entrance hall to enter their own flat. Cases such as *Fairman v Perpetual Investment Building Society [1923] A.C. 74* and *Jacobs v London County Council [1950] A.C. 361* were fundamentally different factual scenarios (see 684). Again, it is thought that this reflects the fact-sensitive nature of the analysis under the OLA 1957.

Conclusion

Naturally, the case law underlying the issues discussed above is too voluminous to summarise in one briefing note. However, it is hoped that this article will provide a good starting point for practitioners involved in bringing or defending claims under the OLA 1957. Members of 1CL have acted in many of the cases cited above and are well placed to advise on any issue relating to occupiers' liability.

NATURE OF THE DUTY

ROBERT PARKIN

The duty to visitors is described in s.2(2) Occupiers Liability Act 1957:

(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.

The duty relates to risks caused by the state of the land, not by acts carried out upon it, even if anticipated and foreseen- see *Geary v JD Wetherspoon Plc* [2011] EWHC 1506[1]. This is both because of the wording of the legislation itself and because the courts are reluctant to impose liability where the claimant is injured as a result of their own reckless act.

Exclusion

Liability can be excluded under s.2(1) in so far as the occupier is otherwise legally permitted to do so:

(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.

However, circumstances where this would be of actual use are limited- a business may not exclude liability for negligently caused personal injuries or death to consumer customers under s.2(1) Unfair Contract Terms Act 1977 as preserved by s.65(1) Consumer Rights Act 2015.

That does not, of course, prevent business-to-business exclusion, or exclusion of liability where there was no negligence, or in principle a term imposed by a private individual.

For an example of successful exclusion of liability[2] see *White v Blackmore* [1972] EWCA Civ 11[3].

Children

What steps are reasonably required are influenced by two statutory considerations; first, under s.2(3)(a), to take account of the special vulnerability of children:

(3)The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(a)an occupier must be prepared for children to be less careful than adults; and

The classic example is of poisonous berries in a garden accessible to the public (*Taylor v Glasgow City Council* [1921] UKHL 2[4]). An adult would know not to eat these, a child would not.

The principle will confer liability even where the child claimant acted very foolishly but only if the danger related to the condition of the land or things kept upon it, not the foolish act itself, see *Jolley v Sutton London Borough Council* [2000] UKHL 31[5].

Skilled Visitors

Secondly, an occupier is entitled to assume that professionals called to a potentially dangerous situation will know of risks associated with their profession and take reasonable steps to mitigate it- see s.2(3)(b):

(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.

The emphasis is, however, on whether or not risk could have been avoided with competence. Thus, an occupier was not liable to chimney sweeps who knowingly, avoidably, and ineptly exposed themselves to carbon monoxide poisoning (*Roles v Nathan* [1963] EWCA Civ 6[6]) but not to a fireman injured by a fire caused by the occupier despite the fireman taking all reasonable precautions to prevent the injury (*Ogwo v Taylor* [1987] UKHL 7[7]).

Warning Signs

There are then two statutory defences. Under s.2(4)(a), it is a potential defence to show that a sufficient warning of the existence of the risk was provided:

(4)In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a)where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe;

The degree of warning required is fact sensitive- the more obvious the risk, the less need there is to provide a warning; and even aesthetic considerations can come into play, for example, in a beauty spot- see *Tomlinson v Congleton Borough Council & Ors* [2003] UKHL 47[8].

A good illustration is in *English Heritage v Taylor* [2016] EWCA Civ 448[9]. A steep slope in a historic castle was an obvious risk and did not require a warning; a hidden sharp drop immediately behind this slope was not; and did; but the risky use of the steep slope was effectively contributory negligence.

Independent Contractors

Under s.2(4)(b), it is an alternative potential defence to show that management of the risk was responsibly subcontracted where it relates to construction, maintenance, or repair:

(b)where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

Thus, it was reasonable to assume a demolition expert would act in a safe and competent way unless there was evidence that the occupier knew or ought to have known that the expert had a poor safety record- see *Ferguson v Welsh* [1987] UKHL 14[10]. However, it was not reasonable to fail to check that a service provider had valid insurance- see *Gwilliam v West Hertfordshire Hospital NHS Trust & Ors* [2002] EWCA Civ 1041[11]. It is unlikely that this defence extends beyond duties relating to construction work.

Risks Willingly Accepted

There is no duty in respect of risks willingly accepted by the injured party, as set out in s.2(5):

(5)The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

This is essentially a statutory application of the common law principle of *volenti non fit injuria*[12] and the same principles apply. There can be no claim by a person who freely agrees (expressly or by conduct) to accept a risk, knowing the full nature and extent of that risk, and is injured as a result.

As a result, there was no liability[13] to teenagers using a broken fence to cross a railway line- knowing full well the dangers of walking on the track but doing so anyway; see *Titchner v British Railways Board* [1983] UKHL 10[14].

Persons Permitted to Enter by Law

The duty does apply certain persons permitted by law to enter the premises are treated as visitors- irrespective of actual permission by the occupier- and so fall within the general duty. This is as set out in s.2(6):

(6)For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

This might apply, for example, to a bailiff entering pursuant to a court order or an engineer gaining access under sch.4 Electricity Act 1989 or under s.14 Land Drainage Act 1991, or any similar provisions.

[1]https://www.bailii.org/ew/cases/EWHC/QB/2011/1506.html
[2] Before the Unfair Contract Terms Act 1977
[3]https://www.bailii.org/ew/cases/EWCA/Civ/1972/11.html
[4]https://www.bailii.org/uk/cases/UKHL/1921/2.html
[5]https://www.bailii.org/uk/cases/UKHL/2000/31.html
[6]https://www.bailii.org/ew/cases/EWCA/Civ/1963/6.html
[7]https://www.bailii.org/uk/cases/UKHL/1987/7.html
[8]https://www.bailii.org/uk/cases/UKHL/2003/47.html
[9]https://www.bailii.org/ew/cases/EWCA/Civ/2016/448.html
[10]https://www.bailii.org/uk/cases/UKHL/1987/14.html
[11]https://www.bailii.org/ew/cases/EWCA/Civ/2002/1041.html
[12] "No [wrongful] injury is done to a willing person"
[13] Under equivalent provisions in Scotland
[14]https://www.bailii.org/uk/cases/UKHL/1983/1984_SC_HL_34.html