BRIEFING

LOCAL AUTHORITY

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INTRODUCTION

LAURA JOHNSON
Head of the Personal Injury Group

Acting in cases involving local authorities is a cornerstone of the work done by the personal injury group at 1 Chancery Lane. Members of Chambers have appeared in many of the leading cases over recent decades in all areas from education and social services claims to cases involving highways and local authorities' obligations as landlord. Cases in these areas involve technical points of law that are unfortunately overlooked by parties more often than they should be.

In this briefing we explore some of the key areas of local authority liability that can pose interesting and difficult legal questions.

Roddy Abbott analyses the recent Court of Appeal decision of *Barlow v Wigan MBC* [2020] EWCA Civ 696, which addresses the difficult questions of rights of way and when is a highway not a highway maintainable at public expense, taking a tour of the important cases of *Gulliksen and McGeown*. Understanding this decision is essential for anyone dealing with claims of this sort.

Lisa Dobie's article covers issues to consider when defending cases brought under the Occupiers Liability Act 1957.

Our newest Member of Chambers Thomas Yarrow explains the legal issues that arise in cases for personal injury brought by tenants against landlords and why parties can fall into the trap of pleading them on the wrong basis or missing good legal defences.

Francesca O'Neill discusses a novel issue arising out of snow and ice on the highway.

We hope that these articles provide a useful introduction for some and a refresher for others.

Throughout the Covid19 public health emergency 1 Chancery Lane has remained open for business, albeit remotely. We continue to offer our usual array of services and have adapted to the changes in working required by lockdown. Members of Chambers are advising and conducting hearings and settlement meetings remotely. We have introduced a free legal advice line for the duration of lockdown to help clients old and new who are working away from your teams. We are providing regular briefings and weekly Thursday webinars to keep you up to date with all your legal needs. At 1 Chancery Lane we pride ourselves on being team players, offering a high quality approachable and personal service. If we can assist you in any way please do not hesitate to contact our marketing manager on ewilliams@1chancerylane.com or our market leading clerking team on clerks@1chancerylane.com

A WALK IN THE PARK: AN IMPORTANT NEW DECISION ABOUT HIGHWAY AUTHORITIES' AND OCCUPIERS' LIABILITY

RODERICK ABBOTT

A tale of Thamesmead

One of the curious features of my line of work is that I often find myself becoming an expert on the most unexpected subjects. A few years ago I was involved in a case which required me to know a surprising amount about the history of Thamesmead in south-east London.

Thamesmead was built in the 1960s on former marshland. Poor transport links and brutalist architecture discourages the casual visitor. Its dystopian feeling made it the perfect setting for parts of Stanley Kubrick's *A Clockwork Orange*.

The case I was involved with was about a young boy who had tripped over on a path in a Thamesmead park.

The occupier of the park denied liability on the basis that the path was a public right of way. That meant, they contended, that the boy was not a visitor to the park (in the legal sense) because he was using the path as of right. It followed (it said) that it did not owe him the duty owed by occupiers to visitors under s2 Occupiers' Liability Act 1957.

The highway authority denied liability too. It accepted that the path was a public right of way (and therefore a highway) but contended that it was not a highway maintainable at the public expense. If that was correct then it did not have any duty under s41 Highways Act 1980 to maintain the path because the duty imposed on a highway authority by that section only applies to highways maintainable at the public expense: see s41(1)).

It looked at first blush as if the claim was doomed to fall between two stools. Hence my research into the history of Thamesmead: I needed to find out who had built the park, when, and in what capacity because that might determine whether the path was a highway, and, if so, whether it was maintainable at the public expense.

Barlow v Wigan

The Court of Appeal has recently addressed similar issues in Barlow v Wigan MBC [2020] EWCA Civ 696. This case (a second appeal) is essential reading for anyone who deals with highway and occupier liability.

Mrs Barlow (disappointingly for fans of *Coronation Street* her first name was not "Deirdre") tripped over on a path in a public park. The park was owned and occupied by the defendant Council.

The trial judge found that the accident was caused by the dangerous and defective condition of the path (a finding which was not challenged on appeal).

However, as in my Thamesmead case, the Council denied that it had any duty to maintain the path. It contended that the path *was* a public right of way and a highway but *not* one maintainable at the public expense. If that was right then it owed no duty as highway authority.

Before the claim was issued, Mrs Barlow's representatives had suggested in the alternative that the Council might be liable as the occupier of the path. The Council denied this with reference to McGeown v Northern Ireland Housing Executive [1995] 1 AC 233. In McGeown Lord Keith said at 243E:

> *Persons using rights of way do so not with the permission of the solum but in the exercise of a right. There is no room for the view that such persons might have been licensees or invitees of the land owner under the old law or that they are his visitors under the English or Northern Irish [Occupiers' Liability] Acts of 1957.*

The Council therefore adopted the same position as the occupier in my Thamesmead case: that no duty of care was owed by an occupier to someone using a public right of way.

Mrs Barlow's representatives seemingly could not see a way around this reasoning, because they did not plead a claim under the 1957 Act. As it transpired, the Court of Appeal expressed serious doubts as to whether the

Council's interpretation of McGeown was correct (which I will deal with later); but because the occupier claim had not been pursued it meant that for the purposes of the appeal the only claim was against the Council as highway authority, and the main question on which the appeal turned was whether the path was a highway maintainable at the public expense.

First issue – in what capacity did the Council build the park?

The park was built on land acquired by the Council's predecessor in 1920. The park and the paths in it were laid out in the early 1930s.

Mrs Barlow's first line of attack was to rely on s36(2)(a) of the Highways Act 1980, which reads:

> *(2) … The following highways … shall for the purposes of this Act be highways maintainable at the public expense:*
>
> > *(a) a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority*
> >
> > *(b) […]*

Simplifying somewhat, her argument ran as follows:

a. the path was constructed by the Council's predecessor,
b. the Council's predecessor was a highway authority,
c. that path was therefore "a highway constructed by a highway authority"
d. such highways are maintainable at the public expense by virtue of s36(2)(a).

By the time the case reached the Court of Appeal, the Council did not dispute that its predecessor was a highway authority and that it had constructed the path. A literal interpretation of the phrase "a highway constructed by a highway authority" would therefore include the path.

The Council contended that s36(2)(a) only applied where a highway authority has constructed a highway when acting in its capacity as a highway authority. Local authorities, of course, perform many functions, although they are one corporate body. It was likely that the Council's predecessor had laid out the park in the exercise of its public amenity functions (e.g. in exercise of its powers under s164 Public Health Act 1875) rather than as a highway authority exercising its powers to build new highways.

The difference in the parties' positions reflected the different views expressed in Gulliksen v Pembrokeshire CC [2003] QB 123. Neuberger J (as he then was), who heard the first appeal, preferred the Council's interpretation; but *obiter* comments of Sedley LJ in the second appeal supported Mrs Barlow's interpretation. The Court of Appeal in Mrs Barlow's case preferred Neuberger J's view and therefore Mrs Barlow's challenge based on s36(2)(a) failed.

Second issue – deemed dedication

Mrs Barlow had more success with her second line of attack, and it may have significant implications for future highway litigation.

Her argument (again, simplifying slightly) ran as follows:

a. The path on which she tripped was a "public path" within the meaning that term in the National Parks and Access to the Countryside Act 1949 at the time that Act came into force (16 December 1949).
b. By s47(1) of the 1949 Act all public path in existence when it came into force became repairable by the inhabitants of the parish at large.
c. By s38(2)(a) Highways Act 1959, highways which were previously maintainable by the inhabitants at large of any area became highways "maintainable at the public expense".
d. By s36(1) Highways Act 1980 highways which were maintainable at the public expense before the 1980 Act came into force remained as such after it came into force.

"Public path" was defined by s27(6) of the 1949 Act to include "a highway over which the public have a right of way on foot only, other than such a highway at the side of the road". The real question was therefore: was the path a highway on 16 December 1949?

A highway may be created by (a) express dedication by the landowner (b) deemed dedication under s31 of the 1980 Act or (c) dedication inferred at common law. The first two did not avail Mrs Barlow, so the appeal turned on whether she could rely on the third.

To infer dedication at common law there must be evidence of continuous and unobstructed use over a long period. The burden of proving dedication rests on the party asserting it.

At first blush this presented difficulties for Mrs Barlow. She needed to prove that the path was a highway on 16 December 1949. There was plenty of available evidence of long and continuous of the path in the recent past from which it could be inferred that the path was now a highway. The park was never shut, for example, and the public enjoyed unrestricted access to it. But how on earth was she to prove what had happened between when the path was built in the early 1930s and 1949?

The doctrine of retrospective dedication rode to Mrs Barlow's rescue. This, following Turner v Walsh (1881) 6 HL 636, means that where a dedication is inferred from a long and continuous period of use, the dedication is deemed to have occurred at the beginning of the period of use. In this case, therefore, the dedication was deemed to have occurred when the park was laid out and started to be used in the early 1930s. That, obviously, was well before the coming into force of the 1949 Act.

The path was therefore:

a. Deemed to have been a public right of way (and highway) as from the point it started to be used in the early 1930s;
b. A highway on 16 December 1949;
c. On 16 December 1949 became a "highway repairable by the inhabitants of the parish at large" by s47(1) of the 1949 Act;
d. Became a "highway maintainable at the public expense" by s38(2)(a) of the 1959 Act.
e. Remained a "highway maintainable at the public expense" when the 1980 Act came into force;
f. As a highway maintainable at the public expense was a highway which the Council had a duty to maintain under s41 of the 1980 Act.

So Mrs Barlow's appeal (and her claim) succeeded. Given the combined effect of the 1949 Act and the doctrine of retrospective deemed dedication, future cases of this type are likely to require similar historical research to determine exactly when the paths in question were built.

Occupiers' Liability

Mrs Barlow's claim succeeded because of when the path was built. But on different facts it might not have become maintainable at public expense. Against whom (if anyone) could she have brought a claim then?

I noted earlier that the Council's reliance on McGeown was enough to persuade Mrs Barlow's representatives not to bring a claim under the Occupiers' Liability Act 1957. McGeown was based on a long-standing principle that owners of land over which public rights of way ran did not owe duties to maintain or repair them. That principle can be traced back to Gautret v Egerton (1867) LR 2 CP 371 where it was put thus:

> *If I dedicate a way to the public which is full of ruts and holes the public must take it as it is. If I dig a pit in it I may be liable for the consequences; but if I do nothing, I may not.*

The reluctance to impose liability for landowner nonfeasance (rather than malfeasance) was clearly rooted in policy concerns about the implications of doing so. This was made explicit in McGeown where Lord Keith said at 243E:

> *… Rights of way pass over many different types of terrain and it would place an impossible burden upon landowners if they not only had to submit to the passage over them of anyone who might chose to exercise the right, but also were under a duty to maintain them in a safe condition.*

Let us assume the path was a highway but not one maintainable at the public expense. If the Council's interpretation of McGeown is correct then it would mean that for as long as Mrs Barlow was on the path it would have owed her a duty neither as occupier nor as highway authority but, paradoxically, had she strayed off the path to the grass on either side of it the Council would have owed her a duty as occupier.

Bean LJ considered this situation "absurd": see paragraph 9. He did not, however, explain exactly how the absurdity was to be avoided. The closest he got was at paragraph 13 where he said (my emphasis):

> *I suspect that the true ratio of [Gautret] and [McGeown] is that if a person is only lawfully on a defendant's land because of the existence of a right of way which he or she is using, then there is no duty of care owed by the landowner either at common law (save in respect of dangerous acts such as digging pits) or under the Occupiers' Liability Act.*

"Only" is the key word in that sentence. It seems to suggest the possibility that where a person is or could be on land pursuant to a right of way and also in some other capacity then that person might be owed a duty by the occupier.

Although he did not say so, Bean LJ's observations echo what was said by Lord Browne-Wilkinson in McGeown when the latter expressed doubts as to the effect of the decision, and raised the possibility of occupiers owing a duty of care in certain circumstances. He said at 248A-E:

> *I am very reluctant to reach a conclusion which will leave unprotected those who, for purposes linked to the business of owners of the soil, are encouraged, expressly or impliedly, to use facilities which the owner has provided.*
>
> *[…]*
>
> *… it does not necessarily follow that the existence of a public right of way is incompatible with owner of the soil owing a duty of care to an invitee, as opposed to a licensee. In the case of an invitee there is no logical inconsistency between the plaintiff's right to be on the premises in exercise of the right of way and his actual presence there in response to the express or implied invitation of the occupier. It is the invitation which gives rise to the occupier's duty of care to the invitee. I do not understand your Lordships to be deciding that it is impossible to be an invitee (and therefore a visitor) on land over which there is a public right of way. I wish to expressly reserve my view on that point.*

The approach advocated by Lord Browne-Wilkinson reconciles the understandable reluctance to impose a repairing liability on those who give no encouragement to the public to use a way across their land (e.g. a farmer) and those who, for commercial or other reasons, effectively give that encouragement.

Applying that logic to the facts of Mrs Barlow's case, it could be said with some force that the Council had impliedly invited her into the park (including the paths within it) and that it therefore did owe her a duty of care as occupier of the path notwithstanding that it was also a public right of way. However, as the point did not fall to be decided on the facts the law remains unclear until such time as it is clarified by a later decision.

DEFENDING OCCUPIERS' LIABILITY ACT 1957 CLAIMS

LISA DOBIE

Over the years I have had a number of memorable Occupiers' Liability Act 1957 ('OLA') trials. Some have been fun (where Claimant suddenly declares that the defect is not what caused their accident), others frustrating (where judges have failed to engage with the assessment of danger and an appeal is required) and others have involved facts which are so surprising, you are left wondering whether you are taking part in some imaginative mock trial.

This is a well-trodden area of law for local authorities, but there is often a fair amount of litigation risk in those cases that go to trial.

What I have set out below are some of the key issues that arise time after time in OLA claims, and set out some practical points which might assist you to defend such future claims.

Does the Act apply?

Local authorities are 'responsible' for lots of different areas and types of land and premises. Their rights and obligations in relation to these differ. Often the starting point in a personal injury case is to establish the nature of the land and what obligations the local authority has

in relation to it. It is not uncommon to see CNF's, letters before action and/or pleadings which are imprecise about the status of the land / premises or have imprecisely pleaded several causes of action (this being more common at the fast track level, but high value cases are not immune from this).

You want to ensure that you have satisfied yourself that the OLA is the relevant cause of action:

- If this is highway maintainable at public expense, the OLA does not apply and you are within the Highway Act 1980;
- If this is a public right of way, then users of that public right of way are not visitors for the purpose of the OLA because they are there as of right. Thus, the OLA does not apply;
- Is the premises subject to a lease or a tenancy? If the latter then the tenant will have exclusive possession and so you will not be regarded as an occupier (but you are still likely to occupy to common parts, such as the staircase etc). The tenant's cause of action would the Defective Premises Act 1972;
- Query whether you are the occupier. Often this is straightforward, but there may be facts giving rise to joint occupation. In such circumstances you need to explore the extent to which the local authority has control of the premises (and, in particular, control over the part of the premises that is said to have given rise to the accident).
- Look at the circumstance of the accident (pre action you may need more information). Sometimes the description of the accident is such that that danger complained of does not arise from the 'state of the premises', in which case there may be a common law claim in negligence or nuisance (depending on the facts).

If the matter is clear cut on documentary evidence, it may be a case for strike out. However, it is often the case that there is an argument about joint occupation which will require oral evidence from several parties. If that is the case and a number of witnesses will give evidence about the extent of control of the premises, the issue will be determined at trial.

There are other articles in this briefing which look at the other common causes of action that local authorities face, so I will say no more about the application of the OLA.

Circumstances of the accident:

Where there is evidence to deny the circumstances of the accident, then do so. However, it is more often the case that you simply put a Claimant to proof. You should always do so.

Sometimes there is circumstantial evidence in the medical notes or accident form(s) that can be put to the Claimant in cross examination to challenge their account. In some cases it is patently obvious that the accident was as described and after a few questions we can move on from this issue. But I am often surprised by the advances that can be made at trial when exploring the accident circumstances and the concessions /revelations that are sometimes made.

There a few things I ask for when looking at the accident circumstances:

- Part 18 questions as to the accident location, direction of travel, mechanism of the accident (trip, slip, skid), what they saw and heard in the moments before. Sometime the Claimant will draw a sketch, other times it is helpful to attach a plan to the part 18 questions if you have a formal plan that can be agreed;

- Ambulance records – these can be very useful documents. They do not always form part of the GP or hospital records and so a specific request is sometimes required. They are often the first record of the circumstances of the accident. Claimant will often allege that they were in pain and disorientated when they spoke to the ambulance technician (which is sometimes precisely the case). So carefully look at the time of attendance, whether the information contained in the record is being reported by the Claimant and their ability to answer other questions about themselves and their health. Sometime it leads to nothing, on other occasions it can become key;
- Training for your managers and supervisors: document completion and retention is obviously key. The documents should be completed carefully. If other staff were present and witnessed the

accident, identify them and take a short statement if you can (signed and dated). (Ensure the injured person (and potential future claimed) has seen and signed the accident form where possible and record that they read and understood it.

What danger is there? Is there a duty to guard against it?

> *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.*

This is fertile ground for legal argument. The duty is not to eliminate danger. It is not even to reduce risks to the 'lowest level reasonably practicable' (a term borrowed from the Regulations under the Health and Safety Act 1974 that we see in employers' liability cases). No, it is a duty to take *reasonable* steps to see that visitors are *reasonably* safe.

Thus, not every potential foreseeable danger has to be eliminated or guarded against. This is sometimes misunderstood by parties and judges alike.

In *Tomlinson v Congleton* [2004] 1 AC 46 Lord Hutton discussed the seriousness of injury being conflated with the seriousness of the risk. He stated:

> *"The third point is that this confusion leads to the erroneous conclusion that there was a significant risk of injury presented to the claimant when he went into the shallow water on the day in question. One cannot say that there was no risk of injury because we know now what happened. But, in my view, it was objectively so small a risk as not to trigger s.1(1) of the 1984 Act, otherwise every injury would suffice because it must imply the existence of some risk. However, and probably more importantly, 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.

Rochester Cathedral v Debell [2016] EWCA Civ 1094 is a useful authority where you are presented with a minor defect that the local authority did not take any steps to guard. The litigation risk lays in the Judge's assessment of risk and danger. The case concerns a small piece of concrete protruding from a bollard. It was proud by approximately 1 inch. The trial judge found that there was a foreseeable risk of injury and the Defendant liable pursuant to the OLA 1957. The Defendant successfully appealed the decision. The Court of Appeal concluded that the trial judge had misdirected himself on the issue of foreseeability.

> *"25. However, I do accept Mr Walker's submission that the judge did not apply the foreseeability test in the appropriate way and that this amounts to a isdirection. There is no recognition in the judgment that not all foreseeable risks give rise to the duty to take remedial action. The judge had to apply the concept of reasonable foreseeability taking a practical and realistic approach to the kind of dangers which the Cathedral were obliged to remedy. Had he done that, I do not think that he could have reached the decision he did.....*
>
> *26. The question for the judge was whether the piece of concrete created a danger of a kind which the Cathedral authorities were required to address. Was it something more than the everyday risk which pedestrians inevitably face from normal blemishes?"*

Edwards v LB of Sutton [2016] EWCA Civ 1005 also looks at the concept of risk. The Defendant was successful on appeal (represented by Andrew Warnock QC and Jack Harding, 1 Chancery Lane). The case involved an ornamental bridge with low parapet walls, with a steam running below. The Claimant fell from the bridge when walking across it with his bicycle. The Court of Appeal accepted that the judge had erred in failing to adequately consider what danger the bridge posed, before considering whether there was a duty to take steps to guard against it. Further, as seen in other cases, the seriousness of the injury had been conflated with the seriousness of the risk. Other issues arose, including risk assessments and warnings (see below).

When defending these claims the evidence needs to be directed so as to put the risk into context. On a practical level you need to evidence:

The type of visitors using the premises;

- How long it has been in the same condition;
- The number of users;
- Any previous accidents or complaints;
- Any changes or modifications to the premises any why;
- Any risk assessments – if not, why not? What would they say and what difference (if any) would they make;
- Where you have a generic particulars of claim which does not particularise precisely what the danger is said to be and/or what modification / precautions the Defendant unreasonably failed to take, ask a part 18 question to clarify their case. It
- will help you to focus your evidence and try to minimise surprise points being made at trial (this issue often rears its head in fast track trials);
- Some allegations to reduce / eliminate the danger are so expensive and onerous that they are relatively easy to deal with; it just goes beyond that which is reasonable (or even achievable). Don't take this for granted that it is obvious; evidence it.

NB:

Keep an eye on the outstanding appeal in *James v White Lion Hotel* [2020] 1 WLUK 39. Tragically, that case concerned a fall from a hotel window which had fatal consequences. HHJ Cotter QC carefully considers the assessment of danger in his first instance decision and found for the Claimant. An appeal is outstanding, so watch this space.

Warnings:

Warnings seem to crop up in every Particulars of Claim and feature, to some extent, in every trial (probably because they are usually cheap and easy to erect in most cases). But just because you can erect a warning, it does not mean that there is a duty to do so.

Adult visitors do not require warnings of obvious risks except where they did not have a genuine and informed choice. In *Tomlinson v Congleton Borough Council [2003] UKHL 47, [2004] 1 AC 46* at para 46, Lord Hoffmann said that there is no legal duty on occupiers of land to safeguard irresponsible visitors against dangers which are "perfectly obvious". A duty to protect against obvious risks exists only in cases where there is no genuine and informed choice. In the earlier case of *Staples v West Dorset District Council [1995] PIQR P442* , Kennedy LJ said much the same:

> *"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 warning the visitor in question would 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."*

You should note the case of *English Heritage v Taylor* [2016] EWCA Civ 448. In that case the Claimant suffered a serious head injury when he was visiting a castle. He stumbled when walking down a steeply sloped informal grass pathway. At the bottom of the grass slope was a formal grass pathway which then met a sheer drop into a dry moat. Upon stumbling, it appeared he was propelled such that he fell into the dry moat. The recorder hearing the trial visited the site personally. He found that the sheer drop into the dry moat was not obvious. The recorder found the existence of a breach on a very specific basis, namely the failure to provide a sign warning of a sheer drop which was not obvious. The Defendant was liable and the Claimant was 50% contributory negligence. The Court of Appeal upheld that decision. At paragraph 30, the Master of the Rolls said:

> *"I accept that questions of whether a danger is obvious may not always be easy to resolve. In some cases, this may present an occupier of land with a difficulty. But there are many areas of life in which difficult borderline judgments have to be made. This is well understood by the courts and is taken into account in deciding whether negligence or a breach of section 2 of the Act has been established. In this context, it is highly relevant that the common duty of care is to take such care "as in all the circumstances is reasonable" to see that the visitor is "reasonably" safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there. The court is,*

therefore, required to consider all the circumstances. These will include how obvious the danger is and, in an appropriate case, aesthetic matters. If an occupier is in doubt as to whether a danger is obvious, it may be well advised to take reasonable measures to reduce or eliminate the danger. But the steps need be no more than reasonable steps. That is why the decision in this case should not be interpreted as requiring occupiers like English Heritage to place unsightly warning signs in prominent positions all over sensitive historic sites".

Practical Tips:

- Gather evidence as to others using the premises safely without such a sign, how long the premises has been in that condition for and use in the way the Claimant was using it;
- Be mindful of evidence in the Claimant's case that they were aware of the danger;
- Have the best quality site photographs to show whether the risk is obvious. A site visit is often helpful and some situations will call for a locus report;
- But nothing quite trumps the occasions when you are able to elicit evidence in cross examination that the Claimant was perfectly aware of the danger and they had in the forefront of their minds when accessing the premises.

Risk Assessments:

Risk assessments are often key to the assessment of danger. If the facts call for a risk assessment and you don't have one, then it may make life more difficult. But the Claimant still has the burden of establishing that the risk assessment would have identified the risk and altered the outcome. It has to have some causative value.

See again *Edwards v Sutton LBC* , where the Court of Appeal held that a formal risk assessment relating to the ornamental bridge would not have produced anything other than a statement of the obvious, namely that it was a bridge with low parapets over water, which persons not exercising reasonable care might fall off. Crucially, such an assessment would not have led to steps being taken that would have prevented the accident or lessened the possibility (see paragraphs 55-57).

The Independent contractor and the modified duty of care:

Section 2(4)(b) of the OLA contains what is often referred to as the independent contractor defence. I prefer to refer to it as the 'modified duty'. Section 2(4)(b) states as follows:

"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."

Clerk and Lindsell on Torts summarises that "*'Faulty execution' for these purposes comprises culpable omissions to maintain or repair as well as negligent acts, and "construction, maintenance or repair" covers almost all conceivable works on land or structures, including demolition. Even if it were possible to conceive of some negligence by an independent contractor that was not directly covered by these words, it is suggested that the courts would read the section expansively, as clearly intended to oust any occupier's liability for independent contractors, and deny a remedy accordingly.*"

On a practical level you need to evidence the Defendant's compliance with the 'modified duty'. Show that the Defendant has:

a) acted reasonably in selecting and entrusting work to the independent contractor concerned (if the Defendant has a history of working with a reputable company where there have been no concerns or complaints, this is good evidence);
b) taken reasonable steps (if possible) to supervise the carrying out of the work. This does not require day to day supervision, but some way of knowing they are performing the works they are contracted to perform (tick sheet, spot checks, periodic reviews etc); and
c) used reasonable care to check that the work has been properly done.

Summary:

There are any number of issues that can arise in OLA cases, some of which have inherent litigation risk because it will come down to an assessment at trial of what is reasonable in the circumstances. Follow the practical tips to assist when deciding what defences/ points you need to take and how best to evidence them.

PITFALLS AND PERILS: THE UNSTABLE GROUND OF TENANTS' PERSONAL INJURY CLAIMS AGAINST LANDLORDS

THOMAS YARROW

When a person trips over loose tiling, slips on polished laminate flooring, falls down an uneven staircase or otherwise injures themselves in a property in which they are a tenant, it may seem like they have an array of potential causes of action against their landlord. After all, the tenancy will be governed by contract and will surely provide contractual remedies? They're inside premises owned by the landlord so the landlord will presumably have statutory liability under the Occupiers' Liability Act 1957? There's an issue with the safety of the property which must bring the Defective Premises Act 1972 into play? And if all else fails the landlord must owe a common law duty of care to ensure they should be reasonably safe in the demised property?

You might well think, and all too frequently each and every of these causes of action are pleaded in cases of trips and slips by tenants against their landlords but, as ever, the actual legal position is much more complex.

Contractual Claims

Beginning with contract, it would be very unusual for there to be an express term in a Tenancy Agreement making the landlord liable for the safety of the tenant. Instead, the route into a contractual claim will be via the landlord's obligations of maintenance and repair. These may be express in the contract, but if not, section 11 of the Landlord and Tenant Act 1985 will imply in a term obliging the landlord to "*keep in repair the structure and exterior of the property*".

For claims alleging breach of contract the landlord will have a bullet-proof defence to a personal injury claim. A pleading may read: "*L had an obligation to maintain and repair the kitchen floor; L has breached that obligation and the tiles have subsequently come loose; T has slipped on the loose tiles and claims for damages on the breach*". Normal common law principles of contract, however, mean that the landlord will not be liable for breaches of obligations of maintenance and repair unless he is on notice of the disrepair. The Supreme Court (Lord Neuberger) reaffirmed this common law rule in *Edwards v Kusmarasamy* [2016] UKSC 40, "*until he has notice of disrepair, a landlord should not normally be liable for disrepair of property in so far as it is in the possession of the tenant. I can see no basis as a matter of principle for departing from the rule when it comes to covenants implied by section 11*".

In some cases a tenant may have given their landlord notice of the dodgy flooring before the injury and in those cases a breach of contract claim may potentially succeed; but without such notice, the cause of action is not worth pleading.

Occupiers' Liability Act

It is not uncommon to see Particulars of Claim pleading something along the lines of: "*L was the owner and occupier of the premises and T was his lawful visitor within the meaning of the Occupiers' Liability Act 1957 (OLA)*". The question is are claimants right to rely on this provision? The OLA imposes a well known duty of care on an occupier for visitors to his/her premises. Although practitioners may be familiar with claims where 'occupiers' and 'visitors' are fairly broadly interpreted such that physical presence on the premises or is not always necessary to establish occupation or a court might conclude there is more than one occupier, these cases do not assist in these circumstances. In a typical landlord-tenant relationship the premises, in property language, are *demised* to the tenant, such that the tenant, not the landlord, becomes the occupier for the purposes of the Act, and his/hers will be the liability under the OLA if others visiting the property slip on the kitchen floor.

Nevertheless, despite this being firmly established law, claims under the OLA still seem to be advanced against landlords of demised premises. In the recent case of *Essex CC v Davies* [2019] EWHC 3443 (QB), the Council

as landlords had been sued in the County Court and were indeed found by the judge of first instance to be occupiers – he distinguished the established line of case law by reference to the Council's various factual elements of control, such as access rights for maintenance and repair, as well as the fact that the premises in question were a large commercial site. Mr Justice Saini on appeal, however, restated the legal position in unequivocal terms: "*it is established (and binding) law that a landlord (acting qua landlord) does not owe a duty of care at common law or under the 1957 Act to its tenant or visitors of its tenant (in short, he is not an occupier owing duties when acting qua landlord). Those results follow from the rule in Cavalier v Pope [1906] AC 428 HL at 430 and 431.*"

With the exception of cases with injuries arising in areas in a demised property which remain under a landlord's control (e.g. common areas), a pleading under the OLA is likely to fail.

Defective Premises Act

And this is where the **Defective Premises Act 1972 (DPA)** comes into play. The preamble to the DPA gives its purpose: "*An Act to impose duties in connection with the provision of dwellings and otherwise to amend the law of England and Wales as to liability for injury or damage caused to persons through defects in the state of the premises*". With respect to the Act's relationship with the OLA, as noted in *Drysdale v Hedges* [2012] EWHC 4131 (QB) "*Section 4 of the 1957 Act has been replaced by Section 4 of the Defective Premises Act 1972 which is in similar, although not identical, terms to Section 4 of the 1957 Act. I consider therefore that it is to Section 4 of the 1972 Act that one has to look, in the first place, to find the extent of the landlord's duty in tort.*"

How does section 4 of the DPA work? Section 4(1) sets out the relevant duty:

> "*Where premises are let under a* ***tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises****, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises* ***a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury*** *or from damage to their property caused by a relevant defect*" (emphasis added).

A landlord owes such a duty under subsection (2) where:

> *"the landlord knows (whether as the result of being notified by the tenant or otherwise)* ***or if he ought in all the circumstances to have known*** *of the relevant defect"* (emphasis added)

A 'relevant defect' is defined in subsection (3), and means:

> *"a defect in the state of the premises [...] arising from, or continuing because of, an act or omission by the landlord, which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises"*

(Subsection (4) is discussed further below).

In order to establish a landlord's liability under the 1972 Act three questions, therefore, need to be answered in the affirmative: (i) Did the landlord have an obligation to the tenant for the maintenance and repair of the part of the premises relevant to the injury? (ii) Was the injury caused by a defect in the premises which arose from or continued by virtue of a failure in the landlord's obligations of maintenance and repair? (iii) Did the landlord have actual or constructive knowledge of the defect?

Cases will of course turn on their facts. **Question (i)** brings us back to section 11 of the Landlord and Tenant Act and the implied duty of landlords to maintain and repair the exterior and structure of the property. Injuries caused by a section of ceiling collapsing, or a crumbling outdoor step will clearly activate the obligation; but there are plenty of grey areas. In the case of *Hannon v Hillingdon Homes Limited [2012] EWHC 1437 (QB)*, the judge quoted with approval a passage from the legal textbooks providing that "*Structural' is that which appertains to the basic fabric of the house as distinguished from its decorations and fittings*" and "*the structure of a dwelling-house consists of those elements which give it its essential appearance, stability and shape*". What is and is not 'basic fabric' leaves substantial room for argument. In *Hannon* for instance, the judge determined a staircase was part of the structure and that a bannister as an extension of the staircase was also therefore included

but this has been doubted in subsequent judgments (for instance *Dodd v Raebarn Estates Ltd* [2017] EWCA Civ 439).

For **question (ii),** the area where claimants can often come a-cropper, having established the landlord's obligations of maintenance and repair, is in proving that this constituted a 'defect' such that the maintenance and repair obligation was engaged. An obligation to maintain and repair is *not the same* as an obligation to make premises safe. Two cases which make this abundantly clear are *Alker v Collingwood Housing Association* [2007] 1 WLR 2230 and *Sternbaum v Dhesi [2016] EWCA Civ 155*). In the former case, the claimant fell through a single-glazed pane of glass in a floor-length window. The window had complied with Building Regulations at the time at which it was built, and although it had since become out-dated, it was in good condition. In the latter case, the claimant fell down a steep flight of stairs with no handrail; the court found that the lack of handrail, although clearly unsafe, was likewise not in a state of disrepair. As per the County Court judgment, "*a landlord can offer to let a wreck and a tenant can take it. The obligation to maintain and repair relates to the property in the state it is in at the beginning of the tenancy*". For a 'defect' to constitute a failure in maintenance in repair, it therefore must be tied to a deterioration in condition.

Question (iii) is what places clear water between a claim under the DPA from a claim for breach of contract. As above, in a breach of contract claim, a landlord must be on notice of the disrepair – i.e. have actual knowledge; in a claim under the DPA, knowledge can be imputed to the landlord. Constructive knowledge is most typically argued by reference to a landlord's inspection of the property: if a landlord visits the property and fails to notice disrepair which ought to have been reasonably apparent on inspection and the defect later causes injury, the landlord is deemed to have constructive knowledge for the purposes of subsection (2). In R*ogerson v Bolsover DC [2019] EWCA Civ 226* a tenant had been mowing her lawn when she stepped on one of two inspection covers in the garden. The cover gave way, resulting in her falling into a void used for water sewage purposes. The judge at first instance found for the claimant, this was overturned on appeal, but reversed again by the Court of Appeal. The Court of Appeal determined "*the deputy district judge's findings meant that there was a clear and obvious danger, that a reasonable landlord would have ensured a system of proper inspection, that this would have involved a pressure test, and that such a test would have revealed the defect.*"

Which brings me, as promised, to section 4(4) of the DPA. Subsection (4) reads:

> *"Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises"*

Claimants have attempted to argue that this subsection creates a form of strict liability which effectively fixes knowledge of defects to any landlord who has the right to enter and repair the relevant part of the property. This argument, however, has been advanced before the courts and repeatedly failed, most notably in the High Court in the appeal in *Lafferty v Newark & Sherwood District Council* [2016] EWHC 320 (QB). In this case, a fractured underground pipe had caused the ground in the claimant's garden to erode and it gave way beneath her causing her to sustain injury. The appeal determined that subsection (4) was concerned with imputing an obligation on a landlord who had a right to inspect and was not thereby to impute knowledge to him of all defects; the obligation was still subject to the qualification of subsection (2) that for there to be a duty, he "*ought in all the circumstances to have known*" about the defect. This will therefore bring into scrutiny the landlord's system for inspection, and will beg the question whether if that inspection were carried out reasonably, the defect would have been discovered.

Unlike *Rogerson*, on the facts of *Lafferty*, there was no possibility that a reasonable inspection would have found the defect (the damage to the underground pipe was completely hidden) and therefore knowledge could not be imputed to the landlord. This judgment was a mirror of the County Court's earlier decision in the appeal in *Pritchard v Caerphilly CBC* [2013] WL 6980728, where the claimant leant on a handrail to a staircase

which gave way beneath her weight causing her to fall down the stairs. In that case, the Deputy District Judge at first instance found that the defect was "*a latent defect that was not ascertainable or knowable prior to the giving way on the Claimant*".

Common Law

Finally, the common law duty rarely comes to the rescue for a claimant who is unable to establish any of the causes of action above (or indeed to work in parallel). As referenced above, the common law position from *Cavalier v Pope* is that a landlord who lets premises in a dangerous condition owes no common law duty to remedy the defect and no duty of care to a third party injured as a result of the defect.

Nevertheless, and akin to the distinction between misfeasance and nonfeasance claims in other areas of common law negligence, liability will arise where a claimant can show that a defendant actually created the source of the danger. In *Drysdale* referenced above, as well as considering the claim under the Occupiers' Liability Act, the court considered a parallel claim at common law. The breaches of duty in that case concerned a sheer drop which the landlord had failed to make safe, and the painting of a stone step which the claimant contended had become slippery. The judge found there was no common law duty to make the drop safe in line with *Cavalier v Pope*, but with respect to the painted step he found that this was a positive act which the defendant *did have* a duty to take reasonable care should not create an unnecessary risk of injury. On the facts of the case, however, there was no breach. In cases of poor building work, poor installations etc. relating to the structure of the property, claimants will need to understand therefore whether the landlord can reasonably be said to be responsible for having created the danger.

Conclusion

Although at first glance there are four possible lines of attack for claimant tenants against landlords, there are many figurative as well as literal pitfalls for claimants claiming against their landlords for personal injury. This is an area where it is crucial to know and understand the legal matrix underpinning the landlord's obligations whether pleading a claim for a claimant, or looking for the many possible avenues to defend such a claim.

IS THE LAW RELATING TO AN IMPOSITION OF A DUTY OF CARE "IN FLUX"? ICE, THE HIGHWAYS ACT 1980, AND DUTIES TO WARN

FRANCESCA O'NEILL

Valerie Tindall, Valerie Tindall (as Administrator of the Estate of the late Malcolm Tindall) v Chief Constable of Thames Valley Police, Buckinghamshire County Council [2020] EWHC 837 (QB)

As we all know, s.41 of the Highways Act 1980 imposes a duty on the highway authority to maintain a highway maintainable at the public expense.

The duty to maintain the highway is an absolute duty, see *Griffiths v Liverpool Corp* [1967] 1 Q.B. 374, per Diplock LJ:

The duty at common law to maintain, which includes a duty to repair a highway, was not based in negligence but in nuisance. It was an absolute duty to maintain, not merely a duty to take reasonable care to maintain, and the statutory duty which replaced it was also absolute.

The duty has been found to relate only to the fabric of the highway only, and not substances such as ice that form temporarily on the surface of the highway (*Goodes v East Sussex CC* [2000] 1 W.L.R. 1356). However, subsequent to the decision in *Goodes*, new legislation has been added to the Highways Act in the form of HA s.41(1A) which states:

... in particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along the highway is not endangered by snow or ice.

Subsequent to *Goodes*, the Court of Appeal have given a view that s.41(1A) reverses the finding in *Goodes* that there is no s.41 duty to remove snow or ice (albeit obiter in both cases) (see *Sandhar v Department of Transport, Environment and the Regions* [2004]; and *Thompson v Hampshire CC* [2004] EWCA Civ 1016; [2005] B.L.G.R. 467)

So what happens where the the obligations imposed on highways authorities in respect of ice on the highway

collide with the imposition of a duty of care on public authorities more generally, especially when we take into consideration the recent spate of interesting decisions from the Supreme Court on these very points?

This was recently the subject of a strike out application in *Tindall v Chief Constable Thames Valley Police*. The police attended the scene of an accident which had occurred on a fast stretch of country road. A local water leak and flooding had led to an accumulation of black ice on the road. A driver, hitting the ice, had spun out of control. The driver had escaped serious injury, and returned to the road to warn oncoming traffic, having called the emergency services. The Defendant police force attended, arranged for the driver to be taken to hospital, and cleared away the wreckage. They then departed. An hour later, the Claimant's husband drove along the same stretch. Another driver approaching him lost control on the ice and there was a head-on collision, in which both drivers sadly lost their lives.

The question before the court was whether there were grounds for founding a claim in negligence as against the police force.

Master McCloud refused to strike out the claim, on the basis that the law relating the imposition of a duty of care was "in flux", fact-dependant, and that it could only be properly determined at a trial. That decision is now the subject of an appeal. Master McCloud said that the question of whether a duty of care could be imposed was:

"*a fact-dependant decision if there are issues as to whether the case concerns the issue of 'making matters worse' or 'not making things better' as illustrated for example in CC Essex Police v Transport Arendonk BVBA [2020] 1 WLUK 192, to strike this case out without trial would be incorrect.*"

The Claimant asserted that, by removing the original driver from the scene and not leaving the scene safe, they undertook a "positive step" and made matters worse than if they had not attended. Master McCloud said:

"*There is,generally, no positive duty to protect individuals from harm. Yet if a public authority takes steps which create or make worse a source of danger they may be held to come under a duty of care towards those foreseeably affected. Recent important decisions are* Michael v Chief Constable of South Wales Police & others *(Supreme Court)*, Robinson v Chief Constable of West Yorkshire Police *(Supreme Court)*, Poole Borough Council v GN *(Supreme Court)*"

The question of whether a "negative" act can lead to the imposition of a duty of care on the highway was previously examined in *Gorringe v Calderdale MBC* [2004] UKHL 15. A highway authority's failure to place a marking or to install a road sign warning motorists that they were approaching a dangerous part of the road did not constitute a breach of its duty under the Highways Act 1980 s.41. The word "slow" had previously been marked on the road but was no longer visible at the time of the accident. Specifically, it was difficult to imagine a case in which a common law duty could be founded simply on a failure, however irrational, to provide some benefit which a public authority had a duty or power to provide.

Although the law of public authority liability has clearly moved on since *Gorringe*, it will be interesting to see if, on appeal, the appellate Court takes a radically expansionist view.

1 Chancery Lane, London, WC2A 1LF
Tel: +44 (0)20 7092 2900
Email: clerks@1chancerylane.com
DX: 364 London/Chancery Lane

www.1chancerylane.com

@1ChanceryLane @1chancerylane