BRIEFING

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CONTRIBUTORS

Andrew Spencer

Robert Parkin

INTRODUCTION

LAURA JOHNSON

Head of the 1 Chancery Lane Personal Injury Group

In May of this year Robert Parkin and Henk Soede authored an extremely popular briefing on the Occupiers Liability Act 1957. In this companion briefing Andrew Spencer considers the question of who is an occupier and Robert Parkin provides a useful analysis of the scope of an occupier's obligations to those he has not invited onto his land, often referred to for convenience as trespassers. The Occupiers Liability Act 1984 is an important piece of legislation for personal injury practitioners to understand. It contains some fairly stringent hurdles a claimant must overcome in order to bring a successful claim against an occupier of land from whom he had no permission to be there.

You can read the previous briefing on Occupier's Liability here and view the webinar Occupier's Liability – Reminder of the Basics.

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.

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OCCUPIERS' LIABILITY ACT 1984

ROBERT PARKIN

Said one of the learned Lord Justices: "Has your client never heard of the maxim, 'Volenti non fit injuria'?"—to which came the immediate reply in lovely Irish tones: "My Lord, in the small village in Antrim from which my client comes, it forms the sole topic of conversation."

Lord Mischon, speaking in support of the Occupiers' Liability Bill 1983, Hansard, 12 July 1983[1].

The Occupiers' Liability Act 1957 opposes on occupiers of land a duty *only* to "visitors" to the land, that is, those who are permitted or invited by the occupier to be there. This is as explained in s.2(2) of the 1957 Act:

(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 position in respect of trespassers in common law was harsh; no liability would arise from acts of the occupier which did not intentionally or recklessly cause injury to the trespasser, no matter the relative innocence of the trespasser or the gravity of the negligence leading to the injury. This was exemplified in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] UKHL 3[2], no common law liability to the family of a child crushed to death in an unguarded wheel-pit of a colliery on open ground regularly used as a playground.

On the other hand, Parliament was understandably reluctant to impose liability on innocent landowners for injuries to foolhardy, or, worse, criminally malicious trespassers; nor to impose liability for accidents that they could not have foreseen or taken steps to prevent.

The Occupier's Liability Act 1984 arose out of the desire to counterbalance these policy concerns. For that reason, the Act deliberately sets out to create a more limited form of protection for certain categories of trespasser.

Who is a Trespasser?

In general, a person who does not have the occupier's express or implied permission to be on the land is a trespasser.

However, there can be exceptions. For example, a person permitted by law to enter the land has never been treated as a trespasser and is treated as permitted to be there by the occupier under s.2(6) Occupiers' Liability Act 1957:

(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. Such a person has always fallen within the greater duties under the 1957 Act and not under the restrictions of the 1984 Act.

However, it is possible for a visitor to exceed the permission granted to them in respect of the land to such a degree that they cease to count as such. Such was the case in *Kolasa v Ealing Hospital NHS Trust* [2015] EWHC 289 (QB), where the Claimant had been taken to the Defendant's hospital for treatment while drunk and decided to discharge himself by clambering over a wall as if to flee the hospital. Found, at [42], that:

I also make the finding of fact that, although when the Claimant was brought to the hospital and was put to wait in A&E he was a visitor to the hospital and was owed the common duty of care under section 2(2) of the 1957 Act, his act of climbing over the wall was not an act covered by his general permission to be on the site as a patient nor was it part of the permission given by the Defendant to patients leaving the site after, or even without, treatment. He was, therefore, no longer an invitee or visitor but a trespasser.

It was, therefore, the 1984 Act which was engaged,

although in practice no liability was found.

However, that principle must be approached with some caution – at least in the healthcare context. In *Spearman v Royal United Bath Hospitals NHS Foundation Trust* [2017] EWHC 3027, a similar injury at a hospital was considered. The Claimant, a diabetic, was suffering from a hypoglycaemic attack, and the agreed evidence was that "diabetic patients who have hypoglycaemic attacks can behave unpredictably, irrationally and out of character." The Claimant suffered from a historic brain injury and a fear of hospitals, and injured himself severely in attempting to leave via a flat roof he had accessed. The court concluded that an assessment of the Claimant's state of mind was necessary. In those extreme circumstances, the Claimant was considered not to be a trespasser.

This is perhaps a troubling conclusion. Status as visitor or trespasser depends on the extent of that person's invitation or permission – express or implied – and not on the claimant's mind. There is a category of "innocent trespassers" who are unaware that they are trespassing, and courts have found even young children to be trespassers on appropriate facts. This approach might prevent an intoxicated person from being a trespasser - as in *Kolosa*. And the Defendant is most unlikely to have actual knowledge of the Claimant's state of mind.

Nature of the 1984 Act Duty

The duty to trespassers is significantly more lenient than that owed to invited visitors. This is explained under s.1(3) Occupiers Liability Act 1984:

(3)An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if —
(a)he is aware of the danger or has reasonable grounds to believe that it exists;
(b)he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and
(c)the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

Thus, while an occupier must take all reasonable steps to ensure that a visitor is reasonably safe for the purposes for which they have been invited to use the land, where the user of the land is a trespasser, that duty is significantly more restricted:

1. The occupier has no duties in respect of unknown or unknowable dangers, it is only those which the occupier is aware of or has reasonable grounds to believe to exist.
2. The occupier need only take steps to prevent a danger where he or she is aware that the trespasser has or may come into contact with that danger.
3. There is a third catch-all provision, the occupier need only take steps which are reasonable to provide some protection; those need not be all steps which are reasonable to *ensure reasonable safety*.

A very helpful summary of the way that the concept of dangerousness works in practice is provided in *Edwards v London Borough of Sutton* [2016] EWCA Civ 1005. The following is self-explanatory:

42 One can see that an unfenced bridge or a bridge with low parapets will present more danger of a fall than would a bridge with high guard rails. There are, of course, many such unprotected bridges up and down the country in all sorts of locations. In argument, we discussed golf courses, where plank bridges, with no side rails, crossing over ditches are common and have to be negotiated by golfers with trolleys. Ornamental bridges with low walls, together with water features, are likely to be common features of decoration in public gardens. Any structure of this type presents the risk that the user may fall from it. Unlike natural land features, such as steep slopes or difficult terrain or cliffs close to coastal paths, which Lord Hobhouse in Tomlinson said could hardly be described as part of the "state of the premises", it seems to me that a bridge with no sides or only low ones may present a danger from the "state of the premises" such as to give rise to the common duty of care. However, while I am prepared to assume that there was objectively a "danger" arising from the state of the premises in this respect here, does this mean that, in order to discharge the common duty of care, arising from that objective possibility of danger, no such bridges must be left open to visitors or must not be left open to visitors without guard rails or express warnings? In

my judgment, the answer to this question is a clear "no".

However, if the duty exists, the nature of the duty is essentially the same as in the OLA 1957 under s.1(4):

(4)Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

So, had *Addie v Dumbreck* been decided in light of the 1984 Act, the fact that the Defendant knew, or ought to have known, of the danger from the wheel pit and knew, or ought to have known, of the presence of trespassers on the site, and (as found below) ought reasonably to have guarded against those dangers, a duty to do so would have existed, and that duty would apply as if the Claimant had been invited to the land.

Other Defences

The warning signs defence is stronger, it is sufficient for a warning sign to discourage entry, it does not need to keep the entrant reasonably safe- see s.1(5)

(5)Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

But equally there is no provision for exclusion of liability, as there is under the 1957 Act. This is presumably because of the absence of permission to enter the land which can be expressly qualified in this way.

So, one potential means of discharging that duty in *Addie v Dumbreck* would have been a simple "keep out" or "dangerous machinery" sign; though in fairness this might not have been sufficient, unless very clear indeed, in the case of a child trespasser.

Furthermore, in answer to Lord Mischon's point *supra*, the *defence of volenti* expressly applies under s.1(6), as it does to an extent under the 1957 Act.

(6)No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (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).

Certain forms of danger are excluded, mostly relating to ramblers. That is largely as a result of the various access rights provided under the Countryside and Rights of Way Act 2000 and strongly implies that the 1984 Act is intended to cover people using such rights. Though not strictly trespassers, such persons have, of course, not been invited. The restrictions are:

(6A) At any time when the right conferred by section 2(1) of the Countryside and Rights of Way Act 2000 is exercisable in relation to land which is access land for the purposes of Part I of that Act, an occupier of the land owes (subject to subsection (6C) below) no duty by virtue of this section to any person in respect of—
(a)a risk resulting from the existence of any natural feature of the landscape, or any river, stream, ditch or pond whether or not a natural feature, or
(b)a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile. (6AA)Where the land is coastal margin for the purposes of Part 1 of that Act (including any land treated as coastal margin by virtue of section 16 of that Act), subsection (6A) has effect as if for paragraphs (a) and (b) of that subsection there were substituted " a risk resulting from the existence of any physical feature (whether of the landscape or otherwise). "]
(6B)For the purposes of subsection (6A) above, any plant, shrub or tree, of whatever origin, is to be regarded as a natural feature of the landscape.
(6C)Subsection (6A) does not prevent an occupier from owing a duty by virtue of this section in respect of any risk where the danger concerned is due to anything done by the occupier—
(a)with the intention of creating that risk, or
(b)being reckless as to whether that risk is created.

This does not apply to use of the highway under s.1(7) OLA 1984

(7)No duty is owed by virtue of this section to persons using the highway, and this section does not affect any duty owed to such persons.

This is because there is a wholly different type of claim which arises under the Highways Act 1980.

Practical Example

Donoghue v Folkestone Properties Ltd [2003] EWCA Civ 231[3].

1. The Claimant was severely injured while diving into a harbour owned by the Defendant.
2. The accident happened at just before midnight in midwinter, around Christmas.
3. The Defendant knew that the harbour was too shallow to allow diving and had stationed security guards to prevent this during daylight hours in summer, but had not anticipated diving outside those hours and so had taken no precautions against this.

Held- no liability:

1. The Claimant was not invited to be at the harbour and so was a trespasser or even if he had been permitted to be there to walk (for example) he had exceeded that permission by jumping into the harbour to so great an extent that he had ceased to be a visitor.
2. The Defendant was aware of the danger posed by diving into the harbour and had foreseen that people might do so, *but only on certain times and dates*. It had not foreseen, and had no particular reason to foresee, diving outside that period.
3. The Defendant had taken reasonable steps to prevent diving in hours when that had been anticipated and it was not reasonable to expect 24 hour security throughout the year.
4. As such, no duty had arisen. If it had, that duty could probably have been discharged with sufficient warning signs. The court would also have had to consider if the Claimant himself foresaw the risk and accepted it.

[1]https://hansard.parliament.uk/Lords/1983-07-12/debates/3a205b55-8983-4286-9be2-7b55f49463d4/OccupiersLiabilityBillHl
[2]https://www.bailii.org/uk/cases/UKHL/1929/1929_SC_HL_51.html
[3]https://www.bailii.org/ew/cases/EWCA/Civ/2003/231.html

WHO IS THE OCCUPIER?

ANDREW SPENCER

The Occupiers' Liability Acts do not define who the 'occupier' is. The 1957 Act specifically provides that the common law rules as to who the occupier is remain unchanged (Section 1(2)). The common law test is set out in *Wheat v Lacon* [1966] AC 552, where Lord Denning explained at 578 that where 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'". To determine whether a person is an occupier, the court must ask whether that person has sufficient control for it to be reasonable to impose a duty on him/her. This is a question of fact and degree (*Bailey v Ames* [1999] E.G. 21 (C.S.)). There may be more than one person with sufficient control to be an occupier: in which case each is under a duty to the extent of his/her control.

The question "who is the occupier" often arises in cases where work is being undertaken to a property. In such cases, the owner may be the occupier. But the builder may be occupier – either in addition, or instead of, the owner. This will depend on the extent of control the potential occupiers have of the premises.

So, by way of example, the property owner in *Mathewson v Crump* [2020] EWHC 3167 (QB) had bought the property intending for it to be renovated before she moved in. She had never lived at the property by the time of the accident, and rarely visited during the material time. When she did visit, it was to take 'client' decisions about the building project, such as the layout and decoration. The building project was of a large scale and the judge found that the owner had left the building work, and control of the premises, to professional builders: during this time, the judge found that the owner did not have sufficient control over the property to reasonably be expected to ensure the safety of sub-contractors or visitors.

Disputes about who the occupier is may also arise where property is leased or where occupied under a licence. Landlords are treated as parting with control of the leased property so are not occupiers for the purposes of the Acts. That does not apply, however, to any parts of the premises that are outwith the demise, such as communal areas. The position is different in the case of licenses, where one, other or both of licensor and licensee may be occupiers, depending on the facts of the case.

Occupiers may well owe other duties in addition to those under the Occupiers' Liability Acts – e.g. as employer. And conversely, a person who is not an occupier may still be liable for related breaches of duty – for example, a landlord may be liable under the Defective Premises Act 1972. "Occupation of premises is a ground of liability and is not a ground of exemption from liability." (Commissioner for Railways v McDermott [1967] 1 A.C. 169 at 186.)

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1 Chancery Lane, London, WC2A 1LF
Tel: +44 (0)20 7092 2900
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