# Occupiers Liability: Reminder of the basics

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# Contents

# Occupiers Liability: “Occupation”

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# Occupation: the provisions

S. 2 of the OLA 1957, so far as relevant:

*"1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.*

*2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."*

# Occupation: pre-OLA 1957 cases

At the outset, it should be noted that cases on occupation pre-dating the OLA 1957 are still relevant to the analysis of "occupation".

See 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].*

# Occupation: Wheat v E. Lacon

The leading case on "occupation": Wheat v E. Lacon & Co Ltd [1966] A.C. 552.

Facts: The defendant in Wheat was a brewing company and owner of a 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. Their Lordships considered that the defendant and (*obiter*) the Richardsons were occupiers under the OLA 1957 but that the defendant had not breached its duty under section 2.

# Occupation: the touchstone

At 577, Lord Denning set out 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)*

# Occupation: the four propositions

At 579 in Wheat, Lord Denning analysis older case law on "occupation" and identified four basic propositions. I have summarised these (crudely!) as follows: -

1. Where a landlord lets premises by demise to a tenant, he will be generally be regarded as having parted 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 do not amount to demise, the owner still having the right to do repairs, the owner will generally be regarded as being sufficiently in control of the structure.

4. When an owner employs an independent contractor to do work on premised, the owner was usually still regarded as sufficiently in control of the place. In some cases, though, that duty might be fulfilled by entrusting the work to the independent contractor: s. 2(4) OLA 1957.

# Occupation: *Wheat* findings

## Lord Denning at 580-81:

”… I ask myself whether the brewery company had a sufficient degree of control over the premises to put them under a duty to a visitor. Obviously they had complete control over the ground floor and were "occupiers" of it. But I think that they had also sufficient control over the private portion. They had not let it out to Mr. Richardson by a demise. They had only granted him a licence to occupy it, having a right themselves to do repairs. That left them with a residuary degree of control which was equivalent to that retained by the Chelsea Corporation in *Greene's* case. They were in my opinion "an occupier" within the Act of 1957, Mr. Richardson, who had a licence to occupy, had also a considerable degree of control. So had Mrs. Richardson, who catered for summer guests. All three of them were, in my opinion, "occupiers" of the private portion of the "Golfer's Arms." There is no difficulty in having more than one occupier at one and the same time, each of whom is under a duty of care to visitors.”

# Occupation: *Wheat* findings

## Lord Pearson at 590-1:

"It seems to me clear that Mr. and Mrs. Richardson had at least some occupational control of the upper part of the premises to which the appeal relates. They lived there. They provided the furniture. They for their own benefit took in paying guests and received them and looked after them. The paying guests would have been their invitees at common law, and were their visitors under the Act of 1957. Moreover, Mr. and Mrs Richardson were present and able to see the state of the premises and what was being done or omitted therein. If anything was wrong, they could take steps to rectify it or have it rectified. If there were any danger, they could protect the paying guests by erecting a barrier or giving a warning or otherwise. Mr. and Mrs. Richardson were the appropriate persons for bearing and fulfilling the common duty of care…

But I think Lacons also had some occupational control of the upper part of the premises. The lower part, the licensed part, was occupied by Lacons through their servant Mr. Richardson and their agent Mrs. Richardson for the purpose of the liquor-selling business of Lacons. The agreement applied to the whole of the premises without distinguishing between the two parts. Mr. Richardson as manager for Lacons was required as well as entitled to occupy the whole of the premises on their behalf. He was required to live in the upper part for the better performance of his duties as manager of the business of Lacons. His right to live there, and the permission to take in paying guests, were perquisites of the employment. The paying guests, though invited by the Richardsons, had Lacons' permission to come and were therefore visitors of Lacons as well as of the Richardsons. The fact that Lacons gave permission for the Richardsons to take in paying guests is important as showing that Lacons had some control over the admission of persons to the upper part of the premises. Lacons did not themselves say "Come in," but they authorised the Richardsons to say "Come in." Lacons had, under clause 5 of the agreement, an express right to enter the premises for viewing the state of repair, and, as was conceded (correctly in my opinion), an implied right to do the repairs found to be necessary. It is fair to attribute to Lacons some responsibility for the safety of the premises for those who would, in pursuance of the authority given by Lacons, be invited to enter as paying guests the upper part of the premises. In matters relating to the design and condition of the structure they would be in a position to perform the common duty of care.

# Occupation: pitfalls

Proposition 1: Where a landlord lets premises by demise to a tenant, he will be generally be regarded as having parted with all control over them, even where he has undertaken to repair the structure (579B) (see, also, Cavalier v Pope [1906] A.C. 428).

This is a common pitfall!

Example 1: Drysdale v Hedges [2012] EWHC 4131

Example 2: Dodd v Raebarn Estates Ltd & Ors [2016] EWHC 262 (QB)

# Occupation: non-owners/lessees

An example of a case where a non-owner of land has been deemed to be an occupier: Collier v Anglian Water Authority [1983] 1 WLUK 90.

The enquiry is fact sensitive – save for "proposition 1", very few hard and fast rules! The factual analysis must focus on the question of "*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*" (per Lord Denning, Wheat).

See also: AMF International Ltd v Magnet Bowling Ltd [1968] 1 W.L.R. 2018 and Fisher v CHT Ltd [1966] 2 Q.B. 475.

# Occupiers Liability: “Visitors”

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# Visitors: starting point

a visitor under the OLA 1957 is a person that at common law would be regarded as an invitee or licensee or, in other words, a person who enters / used premises by express or implied permission of the occupier: Greenhalgh v British Railways Board [1969] 2 Q.B. 286, 292-3.

Where a) the occupier has 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 is a "visitor" is unlikely to be contentious.

# Visitors: implied permission

More difficult where the occupier has not granted express permission but has, from the eyes of the purported visitor, impliedly granted permission to use the premises.

Example 1: Lowery v Walker [1911] A.C. 10

Example 2: Edwards v Railway Executive [1952] A.C. 737, see Lord Oaksey at 748: *"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)*

# Visitors: scope of license to use

Important question – has C used the premises in the permitted way and/or for the permitted purpose? Relevance of this question can be seen from s. 2(2) OLA 1957:

"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).

Example: Harvey v Plymouth City Council [2010] EWCA Civ 860.

# Visitors: 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.

Example: Greenhalgh v British Railways Board [1969] 2 Q.B. 286. C was walking over an old railway bridge in Lancashire and was injured after she tripped over a pot hole. D 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". See 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).

## Visitors: the carve out at section 2(6)

S. 2(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.”

But, see Lord Denning in Greenhalgh at 293: 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).

# Occupiers Liability
# Extent of the Duty

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# Introduction

- Duty under the Occupiers Liability Act 1957
- Exclusion of Liability
- Special Cases
- Statutory Defenses
- Unusual Categories of Visitors
- Non-Visitors under the Occupiers Liability Act 1984
- Questions

# Occupier's Liability Act 1957

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.*

# Geary v JD Wetherspoon Plc [2011] EWHC 1506 (QB)

This authority gives a good idea of the limits of the duty.

The Claimant had been drinking at a Wetherspoons and attempted to slide down an ornamental banister; but fell off and suffered a fracture to her spine, resulting in tetraplegia. Wetherspoons had foreseen that drinkers might attempt to do this and took no steps to prevent it.

However:

*59 It must be remembered that this is a case about the potential liability of the occupier. But there was nothing unsafe about these premises, and no danger attributable to their structure. There could therefore be no liability under the 1957 or 1984 Acts, and thus no liability at common law.*

# Geary v JD Wetherspoon Plc [2011] EWHC 1506 (QB)

*60 In addition, this was not a case, such as Uren v Corporate Leisure [2011] EWCA Civ 86, in which the defendant was taking responsibility by, say, organising activities (in that case, competitive games) which ran a risk of causing injury. As Mr Norris rightly submitted, if the defendant had been organising banister-sliding competitions, there may well have been an assumption of responsibility. But in the circumstances of this case, there was no such assumption.*

*61 Mr Hunter unsurprisingly made much of the fact that the risk to the claimant was not only foreseeable but foreseen (see paragraphs 15-22 above). But it is trite law that the mere fact that there is a foreseeable (and indeed foreseen) risk of injury does not of itself create a duty of care (see paragraph 56 above, and Millett LJ in Fowles), particularly in circumstances where that duty is said to arise in order to protect the claimant from his own foolish conduct. It is foreseeable that a man walking towards a cliff will cause himself serious injury, but there is no liability in law on the passer-by who does not point that out.*

# Exclusion of Liability

Liability can sometimes be excluded under s.2(1) OLA 1957:

*(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.*

# Exclusion of Liability

For a successful example, see *White v Blackmore* [1972] EWCA Civ 11, where the claimant ignored a liability exclusion notice and entered a dangerous area of a motor racing track, resulting in him being "thrown like a stone from a catapult" by a negligently laid out set of ropes.

But bear in mind that liability to a consumer for personal injury cannot generally be excluded under s.2(1) Unfair Contract Terms Act 1977 as preserved by s.65(1) Consumer Rights Act 2015. It's unlikely *White v Blackmore* would be decided in the same way today.

# Children

Special care has to be taken in respect of children under s.2(3)(a) OLA 1957:

*(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*

# Children

Essentially that involves assuming children will act very foolishly.

In *Taylor v Glasgow City Council* [1921] UKHL 2, liability was found where the Claimant had eaten poisonous berries growing on the land.

But, again, it must relate to the condition of the land, not things kept upon it: in *Jolley v Sutton London Borough Council* [2000] UKHL 31, no liability to a child crushed while tampering with a derelict boat.

## Skilled Visitors

Conversely, an occupier is entitled to assume competence on the part of skilled visitors under s.2(3)(b) OLA 1957:

*(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.*

## Skilled Visitors

This means that the occupier will only be liable to a professional visitor if the state of the land caused them injury despite the professional taking all reasonable precautions:

No liability by an occupier to chimney sweeps who knowingly, avoidably, and ineptly exposed themselves to carbon monoxide poisoning *Roles v Nathan* [1963] EWCA Civ 6.

Liability by an occupier to fireman putting out a fire on the land and injured despite taking all reasonable precautions to prevent the injury *Ogwo v Taylor* [1987] UKHL 7.

# Warning Signs

Section 2(4) OLA 1957 creates two statutory defences. The first of these is the use of warning signs.

*(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;*

# Warning Signs

Note that a warning sign must be sufficient to keep the visitor reasonably safe, so an obvious risk will not require a warning sign.

So, for example: *English Heritage v Taylor* [2016] EWCA Civ 448: 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.

What is reasonable is subjective, so, for example, reluctance to place unsightly warning signs at a beauty spot is reasonable: *Tomlinson v Congleton Borough Council & Ors* [2003] UKHL 47.

# Skilled Contractor

The other defence, under s.2(4)(b) is where management of the risk has been outsourced to a skilled contractor:

*(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.*

## Skilled Contractor

It is reasonable to assume a professional is competent unless there is good reason to think otherwise and the defendant knew that: *Ferguson v Welsh* [1987] UKHL 14.

But in a sufficiently extreme case there is likely to be a duty to take further steps. In *Gwilliam v West Hertfordshire Hospital NHS Trust & Ors* [2002] EWCA Civ 1041; the Claimant was injured using a negligently installed "splat wall" (a wall made from Velcro to which people can stick themselves). The Defendant had invited the operators to attend its premises, but given the nature of the activity, should have (and failed) to check that they had insurance.

# Volenti Non Fit Injuria

There is no duty in respect of risks willingly accepted by the injured party, as set out in s.2(5) OLA 1957:

*(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).*

# Volenti Non Fit Injuria

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.

Thus, there was no liability 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

# Lawfully Permitted Entrants

Persons permitted by law to enter the premises are treated as visitors- irrespective of actual permission. This is as set out in s.2(6) OLA 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.

# Liability to Non-Visitors

There is a more limited duty to persons who were *not* invited to the land 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*

# Liability to Non-Visitors

*(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.*

*Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231 provides a good example- the Claimant was injured jumping into a harbour to swim at midnight in winter. 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. This was a reasonable belief and so no liability.

# Extent of Duty

If the duty exists, the nature of the duty is essentially the same as in the OLA 1957 under s.1(4) OLA 1984:

*(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.*

## Warning Signs

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) OLA 1984:

*(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.

# Volenti Non Fit Injuria

The defence of *volenti* applies under s.1(6) OLA 1984:

*(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).*

Contributory negligence also applies.

# Specific Exclusions

Certain forms of danger are excluded, mostly relating to ramblers, under s.1(6A)-(6C). There is no liability under the act for a risk arising from:

- A natural feature of the landscape (s.1(6A)), which includes a tree, shrub, or bush (s.1(6B)).
- A river, stream, ditch, or pond, whether natural or not (s.1(6A)(a)).
- Injury caused when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile (s.1(6A)(b)).
- Any physical feature of coastal margin land (s.1(6AA)).
- Unless the occupier intentionally or recklessly created the risk (s.(6C)).

## Specific Exclusions

The duty does not apply to highways, largely because this is covered under ss.41-58 Highways Act 1980:

*s.1(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.*

The OLA 1984 duty applies, generally, only to personal injury and not to property damage:

*(8)Where a person owes a duty by virtue of this section, he does not, by reason of any breach of the duty, incur any liability in respect of any loss of or damage to property.*

If you're not sure, just ask…

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Next webinar…

# Next webinar on 24 June:

*Dealing with Deaths Abroad*

*24th June, 12pm*

*Sarah Prager and Dominique Smith*