Law of tort

Sociology, Empowerment

4. 0 INTRODUCTION Occupiers' liability generally refers to the duty owed by land owners to those who come onto their land. However, the duty imposed on land owners can extend beyond simple land ownership and in some instances the landowners may transfer the duty to others, hence the term occupier rather than owner. The term occupier itself is misleading since physical occupation is not necessary for liability to arise. Occupiers' liability is perhaps a distinct form of negligence in that there must be aduty of careand breach of duty, causing damage.

The rules of remoteness apply to occupiers liability in the exact same way that they apply to negligence claims. Liability can arise on occupiers for omissions since their relationship gives rise to duty to take action to ensure the reasonable safety of visitors. The law relating to occupiers' liability originated in common law but is now contained in two major pieces of legislation: Occupiers Liability Act 1957 - which imposes an obligation on occupiers with regard to 'lawful visitors' Occupiers Liability Act1984- which imposes liability on occupiers with regard to persons other than 'his visitors'.

Different levels of protection are expected under the two pieces of legislation with a higher level of protection afforded to lawful visitors. NB: Lawful visitors are owed the duty set out in the 1957 Act; non-lawful visitors are owed the duty set out in the 1984 Act. It is for the claimant to prove that he is a lawful visitor and therefore entitled to the more favorable duties in the earlier Act 4. 1 Occupiers(who is an occupier) At common law (and under the statute occupation is based on control and not necessarily on any title to or property interest in the land.

Both the Occupiers Liability Acts of 1957 and 1984 impose an obligation on occupiers rather than land owners. The question of whether a particular person is an occupier is a question of fact and depends on the degree of control exercised. The test applied is one of 'occupational control' and there may be more than one occupier of the same premises: In Wheat v E Lacon & Co Ltd [1966] AC 522- House of Lords The claimant and herfamilystayed at a public house, The Golfer’s Arms in Great Yarmouth, for a holiday. Unfortunately her husband died when he fell down the stairs and hit his head.

The stairs were steep and narrow. The handrail stopped two steps from the bottom of the stairs and there was no bulb in the light. The claimant brought an action under the Occupiers Liability Act 1957 against the Brewery company, Lacon, which owned the freehold of The Golfer’s Arms and against the Managers of the Pub, Mr. & Mrs. Richardson, who occupied the pub as a licensee. Held: Both the Richardson’s and Lacon were occupiers for the purposes of the Occupiers Liability Act 1957 and therefore both owed the common duty of care. It is possible to have more than one occupier.

The question of whether a particular person is an occupier under the Act is whether they have occupational control. Lacon had only granted a license to the Richardson’s and had retained the right to repair which gave them a sufficient degree of control. There is no requirement of physical occupation. However, it was found that Lacon was not in breach of duty since the provision of light bulbs would have been part of the day to day management duties of the Richardson’s. Since the Richardson’s were not party to the appeal the claimant’s action failed.

Lord Denning: “ wherever a person has a sufficient degree of control over premises that he ought to realize that anyfailureon 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. ” Physical occupation is not a requirement: Harris v Birkenhead Corp [1976] 1 WLR 279 The claimant Julie Harris was 4 years old when she wandered off from a children’s play park with her friend. They entered a derelict house which was due for demolition. The house had not been secured and the door was open.

They went upstairs and Julie sustained serious injury when she fell from a window. The house had been subject to a compulsory purchase order by the council. The house had been owned by a private landlord and the tenant was offered alternative accommodation by the council. The tenant informed the council that she did not want to take up the offer of accommodation and made her own arrangements and left the property. The council served 14 days notice on the owner of their intention to take possession of the

property, but never actually took physical possession at the expiry of the 14 days.

Held: The Council had the legal right to take possession to secure the property, actual physical occupation was not required to incur liability as an occupier. The council were therefore liable. 4. 1. 1 Occupiers Liability Act 1957 The Occupiers Liability Act 1957 imposes a common duty of care on occupiers to lawful visitors. By virtue of s. 1 (3) (a), the Act applies not only to land and buildings but also extends to fixed and movable structures, including any vessel, vehicle or aircraft. The protected damage under the Occupiers Liability Act 1957 includes death, personal injury and damage to property. . 1. 1. 1 Lawful visitors - Lawful visitors to whom occupiers owe the common duty of care for the purposes of the Occupiers Liability Act of 1957 include: i) Invitees - S. 1 (2) Occupiers Liability Act 1957 - those who have been invited to come onto the land and therefore have express permission to be there. ii) Licensees - S. 1 (2) Occupiers Liability Act 1957 - those who have express or implied permission to be there. According to S. 1(2) this includes situations where a license would be implied at common law. (See below) iii) Those who enter pursuant to a contract - s. (1) Occupiers Liability Act 1957 - For example paying guests at a hotel or paying visitors to a theatre performance or to see a film at a cinema. iv) Those entering in exercising a right conferred by law - s. 2(6) Occupiers Liability Act 1957 - For example a person entering to read the gas or electricity meters, a police executing warrants of arrest or search) 4. 1. 1. 2 Implied license at common law In the absence of express permission to be on the land, a license may be

implied at common law where there exists repeated trespass and no action taken by the occupier to prevent people coming on to the land.

This requires an awareness of the trespass and the danger: Lowery v Walker [1911] AC 10 House of Lords The Claimant was injured by a horse when using a short cut across the defendant's field. The land had been habitually used as a short cut by members of the public for many years and the defendant had taken no steps to prevent people coming on to the land. The defendant was aware that the horse was dangerous. Held: The defendant was liable. Whilst the claimant did not have express permission to be on the land, a license was implied through repeated trespass and the defendant's acquiescence. NB: Repeated trespass alone insufficient:

Edward v Railway Executive [1952] AC 737 A particular spot on a railway was used as a short cut on a regular basis. The fencewas repaired on several occasions and whenever it was reported to have been interfered with. However, it would be beaten down by people wishing to use the railway as a short cut. Witness testimony was to the effect that the fence was in good repair the morning of the incident. Held: No license was implied. The Defendant had taken reasonable steps to prevent people coming onto the railway. Lord Goddard: " Repeated trespass of itself confers no license" 4. 1. 1. 3 Allurement principle

The courts are more likely to imply a license if there is something on the land which is particularly attractive and acts as an allurement to draw people on to the land. Taylor v Glasgow Corporation [1922] 1 AC 448 House of Lords The defendants owned the Botanic Gardens of Glasgow, a park which was open to the public. On the park various botanic plants and shrubs grew. A

boy of seven years ate some berries from one of the shrubs. The berries were poisonous and the boy died. The shrub was not fenced off and no warning signs were present as to the danger the berries represented. Held: Glasgow Corporation was liable.

Children were entitled to go onto the land. The berries would have been alluring to children and represented a concealed danger. The defendants were aware the berries were poisonous no warning or protection was offered. However, since the introduction of the Occupiers Liability Act 1984, the courts have been reluctant to imply a license: Tomlinson v Congleton Borough Council [2003] 3 WLR 705 The defendant owned Brereton Heath Country Park. It had previously been a sand quarry and they transformed it in to a country park and opened it up for public use. The defendants had created a lake on the park which was surrounded by sandy banks.

In the hot weather many visitors came to the park. Swimmingwas not permitted in the lake and notices were posted at the entrance saying " Dangerous water. No swimming". However despite this, many people did use the lake for swimming. Rangers were employed and on occasions sought to prevent swimming but some of the visitors would be rude to the rangers' attempts to prevent them and many continued to swim. The claimant was injured when he dived into shallow water and broke his neck. At the Court of Appeal it was held that he was a trespasser despite the repeated trespass and inadequate steps to prevent him swimming.

They also stated that the warning signs may have acted as an allurement to macho young men. The Court of Appeal was of the opinion that since the introduction of the Occupiers Liability Act 1984, the courts should not strain

to imply a license. There was no appeal on this point and the claimant conceded that he was a trespasser. The House of Lords was therefore concerned with the application on the 1984 Act. The Court of Appeal had held that the council were liable but reduced the damages by 2/3 under the Law Reform (Contributory Negligence) Act 1945.

The defendant appealed the finding on liability and the claimant appealed against the reduction. House of Lords held: The Council was not liable. No risk arose from the state of the premises as required under s. 1 (1) (a) Occupiers Liability Act 1984. The risk arose from the claimant's own action. He was a person of full capacity who voluntarily and without pressure or inducement engaged in an activity which had an inherent risk. Even if there was a risk form the state of the premises, the risk was not one against which the council would reasonably be expected to offer the claimant some protection under s. (3) (C). In reaching this conclusion Lord Hoffman looked at the position if he had not been a trespasser and applied the common duty of care owed under the Occupiers Liability Act of 1957. He was of the opinion that there was no duty to warn or take steps to prevent the claimant from diving as the dangers were perfectly obvious. This was based on the principle of free will and that to hold otherwise would deny the social benefit to the majority of the users of the park from using the park and lakes in a safe and responsible manner.

To impose liability in this situation would mean closing of many such venues up and down the country for fear of litigation. He noted that 25-30 such fractures occurred each year nationwide, despite increased safety measures the numbers had remained constant. 4. 1. 1. 4 Non lawful visitors The 1957

Act does not extend protection to: ? trespassers ? Invitees who exceed their permission ? Persons on the land exercising a public right of way: McGeown v Northern Ireland Housing Executive [1994] 3 All ER 53 House of Lords The claimant was injured when she tripped in a hole on land owned by the defendant.

The land was a public right of way. It was held that the defendant was not liable as the claimant was not a lawful visitor under the Occupiers Liability Act 1957 because she was exercising a public right of way. • Persons on the land exercising a private right of way: Holden v White [1982] 2 All ER 328 Court of Appeal The claimant, a milkman, was injured on the defendant's land by a manhole cover which broke when he stepped on it. At the time he was delivering milk to the house of a third party who had a right of way across the defendant's land.

It was held that he was not entitled to claim against the defendant since he was exercising a right of way and was not therefore a lawful visitor of the defendant. 4. 1. 1. 5 The common duty of care The common duty of care is set out in s. 2 (2) Occupiers Liability Act 1957: S. 2(2) - 'The common duty of care is 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. ' Thus the standard of care varies according to the circumstances.

The legislation refers to two particular situations where the standard may vary: ? S. 2(3)(a) - an occupier must be prepared for children to be less careful than adults ? S. 2(3)(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 i) S. 2(3) (a) Child visitors The courts will take into account the age of the child and level of understanding a child of that age may be expected to have. They may be more adventurous and may not understand the nature of certain risks.

The occupier does not however have to guarantee that the house will be safe, but only has to take reasonable care. If the child's parents are present, they must share someresponsibility, and, even if they are not present, it may be relevant to the occupier's duty that they thought it prudent to allow their child to be where he was. Titchener v British Railways Board [1983] 1 WLR 1427 House of Lords The Claimant, a 15 year old girl, was out walking with her boyfriend who was 16. They took a short cut across a railway line and they were both hit by a train. He was killed and she was seriously injured.

There was a gap in the fence at the place where they crossed and there was a pathway leading to this gap which suggested that there was repeated trespass. Also it was accepted that either the Defendant was aware of the gap or would have been aware upon reasonable inspection. The Defendant raised the defense of volenti under s. 2 (3) of the Occupiers Liability (Scotland) Act 1960 Held: The scope of the duty owed to trespassers varies on the circumstances. On the facts of this case the Defendants did not owe a duty to a 15 year old trespasser who was fully aware of the risks.

Even if the Defendant did owe a duty of care the defense of volenti under s. 2 (3) would succeed. Lord Ross: " In my view, the pursuer's own evidence referred to above, along with the other evidence in the case, is, in my opinion, sufficient to establish the defense of volenti non fit injuria. Such

defense is open to the defenders under section 2 (3) of the Occupiers' Liability (Scotland) Act 1960, and no duty under section 2 (1) of the Act is imposed upon an occupier to a person entering on the premises inrespectof risks which that person has willingly accepted as his.

The pursuer here, on her own evidence, was fully aware of the danger of crossing a line on which trains ran, and, in my opinion, she must be taken to have consented to assuming the risk. There is a passage in her cross-examination which proceeded as follows: " Q. And you knew that it would be dangerous to cross the line because of the presence of these trains? A. Yes. Q. Well why did you do it if you knew it would be dangerous? A. Because it was shorter to get to the brickworks. Q. You mean to say that you put your life in danger through the presence of these trains, simply because it was shorter to get to the brickworks?

A. Well, before my accident I never ever thought that it would happen to me, that I would never get hit by a train, it was just a chance that I took. " “ A person who takes a chance necessarily consents to take what come” Jolley v Sutton [2000] 1 WLR 1082 Two 14 year old boys found an abandoned boat on land owned by the council and decided to do it up. The boat was in a thoroughly rotten condition and represented a danger. The council had stuck a notice on the boat warning not to touch the boat and that if the owner did not claim the boat within 7 days it would be taken away. The council never took it away.

The boys had been working on the boat for 6-7 weeks when one of them suffered severe spinal injuries, resulting in paraplegia, when the boat fell on top of him. The boys had jacked the boat up to work on the underside and

the jack went through the rotten wood. The claimant brought an action under the Occupiers Liability Act 1984. The trial judge found for the claimant. The Court of Appeal reversed the decision, holding that whilst it was foreseeable that younger children may play on the boat and suffer an injury by falling through the rotten wood, it was not foreseeable that older boys would try to do the boat up.

The claimant appealed. House of Lords held: The claimant's appeal was allowed. The risk was that children would " meddle with the boat at the risk of some physical injury" The actual injury fell within that description. Lord Steyn: " The scope of the two modifiers - the precise manner in which the injury came about and its extent - is not definitively answered by either The Wagon Mound (No. 1) or Hughes v. Lord Advocate. It requires determination in the context of an intense focus on the circumstances of each case. " Taylor v Glasgow Corporation [1922] 1 AC 448 House of Lords

The defendants owned the Botanic Gardens of Glasgow, a park which was open to the public. On the park various botanic plants and shrubs grew. A boy of seven years ate some berries from one of the shrubs. The berries were poisonous and the boy died. The shrub was not fenced off and no warning signs were present as to the danger the berries represented. Held: Glasgow Corporation was liable. Children were entitled to go onto the land. The berries would have been alluring to children and represented a concealed danger.

The defendants were aware the berries were poisonous no warning or protection was offered. Phipps v Rochester Corporation [1955] 1 QB 450 A 5 year old boy was walking across some open ground with his 7 year old sister.

He was not accompanied by an adult. He was injured when he fell into a trench. The Corporation were not held liable as an occupier is entitled to assume that prudent parents would not allow their children to go unaccompanied to places where it is unsafe. Devlin J on duty owed to children " The law recognizes a sharp difference between children and adults.

But there might well I think, be an equally marked distinction between ' big children' and ' little children'. …The occupier is not entitled to assume that all children will, unless they are allured, behave like adults; but he is entitled to assume that normally little children will be accompanied by a responsible person. …The responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe.

It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those persons who happen to have accessible pieces of land. " ii) S. 2(3)(b) Common calling (Trade Visitors) This provision applies where an occupier employs an expert to come on to the premises to undertake work. The expert can be taken to know and safeguard themselves against any dangers that arise from the premises in relation to the calling of the expert. For example if an occupier engages an lectrician, the electrician would be expected to know the dangers inherent in the work they are employed to do. Roles v Nathan [1963] 1 WLR 1117 Court of Appeal Two brothers, Donald

and Joseph Roles were engaged by Mr. Nathan as chimney sweeps to clean the flues in a central heating system at Manchester Assembly Rooms. The flues had become dangerous due to carbon monoxide emissions. A heating engineer had warned them of the danger, however, the brothers told him they knew of the dangers and had been flue inspectors for many years.

The engineer monitored the situation throughout the day and at one point ordered everybody out of the building due to the levels of carbon monoxide. The brothers ignored this advice and continued with their work. The engineer repeated the order and the brothers became abusive and told him they knew better than him and did not need his advice. The engineer forcibly removed them from the building. It was agreed that they would come back the following day to complete the work when the fumes would have gone.

They were also told they should not do the work whilst the fires were lighted. However, the next day the brothers were found dead in the basement having returned the previous evening to complete the work when the fires were lit. Their widows brought an action under the Occupiers Liability Act 1957. Held: The defendant was not liable. The dangers were special risks ordinarily incident to their calling. The warnings issued were clear and the brothers would have been safe had they heeded the warnings. Salmon v Seafarer Restaurant [1983] 1 WLR 1264

The defendant owned a fish and chips shop. One night he left the chip fryer on and closed the shop for the night. This caused a fire and the fire services were called to put out the fire. The claimant was a fire man injured in an explosion whilst fighting the fire. He had been thrown to the ground whilst footing a ladder on a flat roof. The defendant sought to escape liability by

invoking s. 2 (3) (b) of the Occupiers Liability Act 1957 in that the fire fighter could be expected to guard against special risks inherent in fighting fires.

Held: The defendant was liable. Where it can be foreseen that the fire which is negligently started is of the type which could require firemen to attend to extinguish that fire, and where, because of the very nature of the fire, when they attend they will be at risk even if they exercise all the skill of their calling, there is no reason why a fireman should be at any disadvantage in claiming compensation. The duty owed to a fireman was not limited to the exceptional risks associated with fighting fire but extended to ordinary risks.

Ogwo v Taylor [1987] 3 WLR 1145 House of Lords The Defendant attempted to burn off paint from the fascia boards beneath the eaves of his house with a blow lamp and in so doing set fire to the premises. The fire brigade were called and the Claimant, an acting leading fireman, and a colleague entered the house wearing breathing apparatus and the usual fireman's protective clothing and armed with a hose. The two firemen were able, with the aid of a step- ladder, to squeeze through a small hatch to get into the roof space. The heat within the roof space was intense.

The Claimant suffered serious burn injuries to his upper body and face from scalding steam which must have penetrated his protective clothing. Held: A duty of care was owed to a professional fireman. There was no requirement that the risk be exceptional. The defense of volenti had no application. Lord Bridge: " The duty of professional firemen is to use their best endeavors to extinguish fires and it is obvious that, even making full use of all their skills, training and specialist equipment, they will sometimes be exposed to unavoidable risks of injury, whether the fire is described as " ordinary" or "

exceptional. If they are not to be met by the doctrine of volenti, which would be utterly repugnant to our contemporary notions of justice, I can see no reason whatever why they should be held at a disadvantage as compared to the layman entitled to invoke the principle of the so-called " rescue" cases. " iii) Warnings and warning signs It may be possible for an occupier to discharge their duty by giving a warning some danger on the premises(‘ Loose carpet’; ‘ slippery floor’) - See Roles v Nathan [1963] 1 WLR 1117 above) However, S. (4)(a) Occupiers Liability Act 1957 provides that a warning given to the visitor will not be treated as absolving the occupier of liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe. The occupier i. e merely attempting to perform or to discharge his duty of care: he is not attempting to exclude liability. Is something slippery has been spilt on the floor of a shop, the occupier can (a) close the shop, (b) clean up the spillage or (c) give a warning so that the visitor can avoid the spot or step gingerly.

The warning must cover the danger that in fact arises: White v Blackmore [1972] 3 WLR 296 Mr. White was killed at a Jalopy car race due negligence in the way the safety ropes were set up. A car crashed into the ropes about 1/3 of a mile from the place where Mr. White was standing. Consequently he was catapulted 20 foot in the air and died from the injuries received. Mr. White was a driver in the race but at the time of the incident he was between races and standing close to his family. He had signed a competitors list which contained an exclusion clause.

There was also a warning sign at the entrance to the grounds which stated that Jalopy racing is dangerous and the organizers accept no liability for any

injury including death howsoever caused. The programme also contained a similar clause. His widow brought an action against the organizer of the event who defended on the grounds of volenti and that they had effectively excluded liability. Held: The defence of volenti was unsuccessful. Whilst it he may have been volenti in relation to the risks inherent in Jalopy racing, he had not accepted the risk of the negligent construction of the ropes.

However the defendant had successfully excluded liability (Lord Denning MR dissenting) Lord Denning MR: " The Act preserves the doctrine of volenti non fit injuria. It says in Section 2(5) that: " 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". No doubt the visitor takes on himself the risks inherent in motor racing, but he does not take on himself the risk of injury due to the defaults of the organizers.

People go to race meetings to enjoy the sport. They like to see the competitors taking risks, but they do not like to take risks on themselves, even though it is a dangerous sport, they expect, and rightly expect, the organizers to erect proper barriers, to provide proper enclosures, and to do all that is reasonable to ensure their safety. If the organizers do everything that is reasonable, they are not liable if a racing car leaps the barriers and crashes into the crowd - see Hall v. Brooklands (1933) 1 K. B. 206.

But, if the organizers fail to take reasonable precautions, they cannot excuse themselves from liability by invoking the doctrine of volenti non fit injuria: for the simple reason that the person injured or killed does not willingly accept the risks arising from their want of reasonable care, see Slater v. Clay Cross Co. (1956) 2 Q. B. 20B; Wooldridge v. Summers (1963) 2 Q. B. at page 69;

Nettleship v. Weston (1971) 2 Q. B. at page 201. " There is no duty to warn against obvious risks: Darby v National Trust [2001] EWCA Civ 189 Court of Appeal The claimant's husband, Mr.

Darby, drowned in a pond owned by the National Trust (NT). The pond was one of five ponds in Hardwick Hall near Chesterfield. Two of the ponds were used for fishing and NT had taken steps to prevent the use of those ponds for swimming or paddling. However, with regards to the pond in which the fatality occurred, NT had done nothing to prevent visitors using the pond and it was common for visitors to use the pond for paddling and swimming during the warm summer months. On the day in question Mr. Darby had been paddling with his children around the edge of the pond.

He then swam to the middle to play a game he had often played whereby he would go under water and then bob up to the surface. However, he got into difficulty and drowned. The claimant argued that because of NT's inactivity in preventing swimmers using the pond, both she and her husband had assumed the pond was safe for swimming. Held: NT was not liable. The risk to swimmers in the pond was perfectly obvious. There was no duty to warn of an obvious risk Cotton v Derbyshire Dales District Council [1994] EWCA Civ 17 Court of Appeal

The claimant, a 26 year old man, had gone out for the day with a group of friends and his fiance over the Easter bank holiday. They had visited 3 pubs where the claimant had drunk about 4 pints. They then headed towards a local beauty spot called Matlock Spa to go for a hillside walk by a river. The parties were in high spirits and became separated. The claimant and his fiance drifted from the pathway and he was seriously injured when he fell off

a cliff. There was a sign at one entrance to Matlock stating " For your own enjoyment and safety please keep to the footpath.

The cliffs can be very dangerous, and children must be kept under close supervision. " However, there was no such sign at the entrance used by the claimant. The claimant brought an action based on the Occupiers Liability Act 1957 for the failure to adequately warn him of the risk. Held: There was no obligation to warn of an obvious risk. The claimant would have been aware of the existence of the cliff so such a warning would not have affected events. Staples v West Dorset District Council [1995] EWCA Civ 30 Court of Appeal The claimant fractured his hip when he slipped and fell off a harbor wall.

The harbor wall was known as The Cobb and was a well-known tourist attraction commonly used as a promenade. The edge of The Cobb was covered with algae and extremely slippery when wet. The claimant had crouched in the area affected by the algae to take aphotoof his friends, when he slipped and fell off a 20 foot drop landing on rocks below. He brought an action based on the Occupiers Liability Act 1957 arguing that no warning signs were present as to the dangers of slipping. Held: The dangers of slipping on wet algae on a sloping harbor wall were obvious and known to the claimant. Therefore there was no duty to warn. v) Dangers arising from actions undertaken by independent contractors- S. 2(4)(b) Occupiers Liability Act 1957 An occupier is not liable for dangers created by independent contractors if the occupier acted reasonably in all the circumstances in entrusting the work to the independent contractor and took reasonable steps to satisfy himself that the work carried out was properly

done and the contractor was competent. Ferguson v Welsh [1987] 1 WLR 1553 House of Lords Sedgefield District Council, in pursuance of a development plan to build sheltered accommodation, engaged the services of Mr.

Spence to demolish a building. It was a term of the contract that the work was not to be sub-contracted out. In breach of this term, Mr. Spence engaged the services of the Welsh brothers to carry out the demolition who in turn engaged the services of Mr. Ferguson to assist. Mr. Ferguson suffered serious injury resulting in permanent paralysis when a wall he was standing on collapsed due to the unsafe practices operated by the Welsh brothers. He brought an action against the Council, Mr. Spence and the Welsh brothers. The trial judge held that the Welsh Brothers were liable but that Mr.

Spence and the Council were not liable. Mr. Ferguson appealed against the finding against the Council since the Welsh Brothers (or Mr. Spence) had the funds or insurance to meet liability. Held: The appeal was dismissed. Mr. Ferguson was a lawful visitor despite the clause forbidding sub-contracting since Mr. Spence would have apparent or ostensible authority to invite him on to the land. However, the danger arose from the unsafe system of work adopted by the Welsh Brothers not the state of the premises. Whilst there was evidence that Mr.

Spence had sub-contracted demolition work to those executing unsafe practices on previous occasions, there was no evidence that the Council were aware of this. Gwilliam v West Hertfordshire Hospital NHS Trust [2002] EWCA Civ 1041 Court of Appeal The claimant, a 63 year old woman, was injured at a summer fair hosted by West Hertfordshire Hospital. She was

injured whilst using a ‘ splat wall’ whereby participants would bounce off a trampette against a wall and become attached to the wall by means of Velcro material. The injury occurred as a result of negligent set up of the equipment.

The equipment was provided by a business called ‘ Club Entertainments’ who were an independent contractor engaged by the Hospital. Club Entertainment’s public liability insurance had expired four days before the incidence and thus they had no cover for the injury. They agreed to settle her claim for ? 5, 000. Mrs. Gwilliam brought an action against the hospital based on their failure to ensure that the entertainment arranged was covered by public liability insurance. She claimed the difference between the ? 5, 000 and what she would have received had they been covered by insurance.

Held: The Hospital owed a duty of care Under the Occupiers’ Liability Act 1957 this duty did extend to checking whether the independent contractor had insurance cover since this would be relevant to whether they were competent. However, there was no breach of duty since the Hospital had enquired and had been told by Club Entertainment that they had insurance cover. There was no duty to inspect the insurance documents to ensure that cover was adequate. 4. 1. 3 Defenses applicable to Occupiers Liability Act 1957 Volenti non fit injuria - s. (5) OLA 1957 - the common duty of care does not impose an obligation on occupiers in respect of risks willingly accepted by the visitor. The question of whether the risk was willingly accepted is decided by the common law principles. Contributory negligence - Damages may be reduced under the Law Reform (Contributory Negligence) Act 1945

where the visitor fails to take reasonable care for their own safety. Exclusion of Liability - s. 2(1) OLA 1957 allows an occupier to extend, restrict, exclude or modify his duty to visitors in so far as he is free to do so.

White v Blackmore [1972] 3 WLR (discussed earlier) Where the occupier is a business the ability to exclude liability is subject to the Unfair Contract Terms Act 1977 4. 1. 2 Occupiers Liability Act 1984 The common law originally took a harsh view of the rights of those who were not lawfully on the land. (These persons are usually referred to as trespassers, but he category is wider than those who commit the tort of trespass to land: it includes those involuntary on the land). The Occupiers Liability Act 1984 imposes a duty on occupiers in relation to persons 'other than his visitors' (S. 1 (1) (a) OLA 1984).

This includes trespassers and those who exceed their permission. Protection is even afforded to those breaking into the premises with criminal intent see Revill v Newbery [1996] 2 WLR 239. Whilst it may at first appear harsh to impose a duty on occupiers for those that have come on to their land uninvited and without permission, liability was originally recognized at common law for child trespassers where the occupier was aware of the danger and aware that trespassers, including children would encounter the danger. British Railway Board v Herrington [1972] AC 877 overruling Addie v. Dumbreck [1929] AC 358.

Addie v Dumbreck [1929] AC 358 House of Lords the defendant owned View Park Colliery which was situated in a field adjacent to a road. There was a fence around the perimeter of the field although there were large gaps in the fence. The field was frequently used as a short cut to a railway station and children would use it as a playground. The defendant would often warn

people off the land but the attempts were not effective and no real attempt was made to ensure that people did not come onto the land. A child came on to the land and was killed when he climbed onto a piece of haulage apparatus.

Held: No duty of care was owed to trespassers to ensure that they were safe when coming onto the land. The only duty was not to inflict harm willfully. Viscount Dunedin: " In the present case, had the child been a licensee, I would have held the defenders liable; secus if the complainer had been an adult. But, if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him; he may not shoot him; he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot.

Other illustrations of what he may not do might be found, but they all come under the same head—injury either directly malicious or an acting so reckless as to be tantamount to malicious acting. " 'Occupier' is given the same meaning as under the 1957 Act (S. 1 (2) OLA 1984). Since the Occupiers Liability Act 1984 applies to trespassers, a lower level of protection is offered. Hence the fact that death and personal injury are the only protected forms of damage and occupiers have no duty in relation to the property of trespassers. (S. 1 (8) OLA 1984). Also the duty only arises when certain risk factors are present. . 1. 2. 1 The circumstances giving rise to a duty of care S. 1 (3) Occupiers Liability Act 1984 an occupier owes a duty to another (not being his visitor) if: (a) He is aware of a the danger or has reasonable grounds to believe that it exists (b) He knows or has reasonable grounds to believe the other is in the vicinity of the danger or

may come into the vicinity of the danger (c) The risk is one in which in all the circumstances of the case, he may reasonably be expected to offer the other some protection If all three of these are present the occupier owes a duty of care to the non-lawful visitor.

The criteria in s. 1 (3) must be determined having regard to the circumstances prevailing at the time the alleged breach of duty resulted in injury to the claimant: Donoghue v Folkestone Properties [2003] EWCA Civ 231 Court of Appeal Mr. Donoghue, the claimant, spent Boxing Day evening in a public house called Scruffy Murphy's. It was his intention, with some of his friends, to go for a midnight swim in the sea. Unfortunately in his haste to get into the water he dived from a slipway in Folkestone harbor owned by the defendant and struck his head on an underwater obstruction, breaking his neck.

At his trial evidence was adduced to the affect that the slipway had often been used by others during the summer months to dive from. Security guards employed by the defendant had stopped people from diving although there were no warning signs put out. The obstruction that had injured the claimant was a permanent feature of a grid-pile which was submerged under the water. In high tide this would not have posed a risk but when the tide went out it was a danger. The claimant's action was based on the Occupiers Liability Act 1984. Mr. Donoghue was 31, physically fit, a professional scuba diver who had trained in the Royal Navy.

It was part of his basic knowledge as a diver that he should check water levels and obstructions before diving. The trial judge found for the claimant but reduced the damages by 75% to reflect the extent to which he had failed

to take care of his own safety under the Law Reform (Contributory Negligence) Act 1945. The defendant appealed contending that in assessing whether a duty of care arises under s. 1(3) each of the criteria must be assessed by reference to the individual characteristics and attributes of the particular claimant and on the particular occasion when the incident in fact occurred i. . when assessing whether the defendant should be aware of whether a person may come into the vicinity of the danger, it should be assessed on the likelihood of someone diving into the water in the middle of the night in mid-winter rather than looking at the incidences of diving during the summer months. Held: Appeal allowed. The test of whether a duty of care exists under s. 1(3) Occupiers Liability Act 1984 must be determined having regard to the circumstances prevailing at the time of the alleged breach resulted in injury to the claimant. At the time Mr.

Donoghue sustained his injury, Folkestone Properties had no reason to believe that he or anyone else would be swimming from the slipway. Consequently, the criteria set out in s. 1 (3) (b) was not satisfied and no duty of care arose. 4. 1. 2. 2 Standard of care S. 1 (4) OLA 1984 - the duty is to take such care as is reasonable in all the circumstances of the case to see that the other does not suffer injury on the premises by reason of the danger concerned. Revill v Newbery [1996] 2 WLR 239 Court of Appeal Mr. Newbery was a 76 year old man. He owned an allotment which had a shed in which he kept various valuable items.

The shed was subject to frequent breaking and vandalism. Mr. Newbery had taken to sleeping in his shed armed with a 12 bore shot gun. Mr. Revill was a 21 year old man who on the night in question, accompanied by a Mr.

Grainger, and went to the shed at 2. 00 am in order to break in. Mr. Newbery awoke, picked up the shot gun and fired it through a small hole in the door to the shed. The shot hit Mr. Revill in the arm. It passed right through the arm and entered his chest. Both parties were prosecuted for the criminal offences committed. Mr. Revill pleaded guilty and was sentenced. Mr. Newbery was acquitted of wounding. Mr.

Revill brought a civil action against Mr. Newbery for the injuries he suffered. Mr. Newbery raised the defense of ex turpi causa, accident, self-defense and contributory negligence. Held: The Claimants action was successful but his damages were reduced by 2/3 under the Law Reform (Contributory Negligence) Act 1945 to reflect his responsibility for his own injuries. On the application of ex turpi causa Neill LJ: " For the purposes of the present judgment I do not find it necessary to consider further the joint criminal enterprise cases or the application of the doctrine of ex turpi causa in other areas of the law of tort.

It is sufficient for me to confine my attention to the liability of someone in the position of Mr. Newbery towards an intruding burglar. It seems to me to be clear that, by enacting section 1 of the 1984 Act, Parliament has decided that an occupier cannot treat a burglar as an outlaw and has defined the scope of the duty owed to him. As I have already indicated, a person other than an occupier owes a similar duty to an intruder such as Mr. Revill. In paragraph 32 of their 1976 Report the Law Commission rejected the suggestion that there should be no duty at all owed to a trespasser who was engaged in a serious criminal enterprise. Ratcliff v McConnell and Harper Adams College [1997] EWCA Civ 2679 Court of Appeal The claimant was a

student at Harper Adams College. One night he had been out drinking with friends on campus and they decided they would go for a swim in the college pool which was 100 yards from the student bar. They climbed over a locked gate into the open air swimming pool. The pool had a notice at the entrance which stated the pool would be locked and its use prohibited between the hours of 10pm -6. 30am.

There was a notice at the shallow end in red on a White background stating ‘ Shallow end’ and a notice at the deep end stating ‘ Deep end, shallow dive’. However, the boys did not see the signs because there was no light. The three boys undressed. The claimant put his toe in the water to test the temperature and then the three of them lined up along the side of the pool and dived in. Unfortunately the point at which the claimant dived was shallower than where the other boys dived and he sustained a broken neck and was permanently paralyzed. The claimant brought an action in the law of negligence and under the Occupiers

Liability Acts 1957 and 1984. The trial judge held that the claimant was a trespasser since he was not permitted to go into the pool and that the College owed a duty of care under the 1984 Act since the pool had often been used by students in the prohibited hours so the College should have been aware that the claimant was within a class of persons who may come into the danger. The breach was in not taking more preventative action to prevent use of the pool. The claimant’s damages were, however, reduced by 60% under the Law Reform (Contributory Negligence) Act 1945.

The defendants appealed contending the evidence relied on by the claimant in terms of repeated trespass all took place before 1990 before they started

locking the gates. Held: The appeal was allowed. The claimant was not entitled to compensation. The defendant had taken greater steps to reduce trespass by students since 1990. The only incidence of trespass to the pool in the four years prior to the claimant's injury, related to students from a visiting college and therefore there was no reason for the college to suspect the students had come into the danger so no duty of care arose under s. (3) (b) Occupiers Liability Act 1984. Also the trial judge had incorrectly identified the danger. The pool itself was not dangerous it was the activity of diving into it which was unsafe. This was an obvious danger to which there was no duty to warn. By surrounding the pool with a 7 foot high fence, a locked gate and a prohibition on use of the pool in the stated hours the College had offered a reasonable level of protection. The duty may be discharged by giving a warning or discouraging others from taking the risk S. (5) Occupiers Liability Act 1984 - note there is no obligation in relation to the warning to enable the visitor to be reasonably safe - contrast the provision under the 1957 Act. Tomlinson v. Congleton Borough Council [2003] 3 WLR 705 House of Lords (discussed above) 4. 1. 2. 3 Defenses Volenti non fit Injuria - s. 1 (6) OLA 1984 - no duty of care is owed in respect of risks willingly accepted by the visitor. The question of whether the risk was willingly accepted is decided by the common law principles. Contributory negligence - Damages may be reduced under the Law Reform Contributory Negligence) Act 1945 where the visitor fails to take reasonable care for their own safety. Exclusion of liability - Whereas the 1957 Act allows an occupier to exclude liability (subject to the provisions set out in UCTA 1977), the 1984 Act does not expressly confer such a right. This may be an oversight by the legislature and it may be

possible to exclude liability since it is not expressly forbidden or it may be that the legislature was of the opinion that it should not be possible to exclude liability for the basic level of protection afforded to trespassers. . 2 Liability for Manufacturers The narrow rule in Donoghue v Stevenson [1932] AC 562 recognizes that manufacturers owed a duty of care to ultimate consumers of the manufactured products. Over the years this duty was extended and refined and took on in practice some of the characteristics of strict liability. Parliament has now imposed such a strict liability on manufacturers under the Consumer Protection Act 1997.

Although this act does not expressly have effect in place of the rules of common law(in the way that the Occupiers' Liability Act do, in practice it affords more satisfactory remedies , and the narrow rule in Donoghue v Stevenson need no longer be studied in detail. 4. 3 Liability for employers An employee injured at work has three possible actions against the employer. i) An action in negligence for breach of the employer's duty of care. This is the concern this chapter ii) An action for breach of statutory duties imposed by parliament on the employer. The principles of the tort of breach of statutory duty will be explained later.

The content of the various regulations prescribing safety equipments, clothing, procedures and so forth fall outside the syllabus and are part of a specialist course in employment law. iii) The employer may be vicariously liable for the torts committed by another employee. The principle of and the justifications for vicarious liability will be explained in detail later. For the present if is enough to note that an employer (even if not personally at fault) is in law answerable for the torts committed by employees in the course of

their employment. The inter- relation between these actions is of some interest.

Before 1948 an action based on vicarious liability was not available because of the doctrine of ‘ common employment’. If A, an employee of X Ltd, tortuously injured B, another employee of X ltd, then X Ltd would be liable to C, but not to B, because A and B were in the ‘ common employment’ of X ltd. This doctrine provided protection for the employer against possible expensive tort claims. To offset this however the courts (a) modified the common law negligence action in a way that favored the employee and (b) permitted civil action for damages to be brought for breaches of safety regulations.

The doctrine of common employment was abolished by statutes in 1948(Law Reform (Personal Injuries) Act 1948. So employees now have a vicarious liability claim and also the benefit of the modified common law action and actions for breach of statutory duty. The Nature of the Common Law Action The employer’s common law duty of care differs from the ordinary duty of care. It is said to be ‘ non-delegable’. This is most clearly explained by Lord Hailsham of St Maryleborne in McDermid v Nash Dredging[1987] AC 906 as follows this special sense does not involve the proposition that the duty cannot be delegated in the sense that it is incapable of being the subject of delegation, but only that the employer cannot escape liability if the duty has been delegated and then not properly performed’. The facts of the case were that M was employed as a deckhand, by the defendants, but was sent by them to work on a ship operated by a different company (in fact the parent company of the defendants). He was seriously injured when the captain of

the ship (not an employee of the defendants) carelessly operated the safety systems.

The defendants were liable because their duty had been delegated to the employees of the parent company and not properly performed. Details of this area would be discussed when looking at vicarious liability. But in summary it is worth noting that employers owe a duty of care to their employees, but this duty is different in nature from the normal duty of care, being described as non-delegable. Court are now developing principles under which employees can also recover for the effects of work relatedstress. ==========

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