



## OCCUPIERS' LIABILITY

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### The scope of the duty: what is 'occupiers' liability'?

1. An occupier of land owes duties (to visitors and trespassers):

*"in respect of dangers due to the state of the premises or to things done or omitted to be done on them."* (section 1(1) of the 1957 and 1984 Acts).

2. Thus, the risks against which occupiers must protect are those that relate not only to the state of the premises but also things done or omitted to be done on them. Does this extend the duty under the Act(s) to all failures by the occupier? Empathically not. In *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 WLR 1052 the CA considered the distinction between "occupancy duties" and "activity duties", only the former of which fell under the 1957 Act.
3. What is the distinction between the two types of duty? The case law gives no clear answer. In *Fairchild* the analysis of Lord Goff in *Ferguson v Welsh* [1987] 1 WLR 1553 was accepted. Lord Goff had quoted section 2(2) of the 1957 Act:

*"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."*

Thus, as the duty related to the visitor's use of the premises, that limited to the scope of the duty to matters relating to the premises themselves and not things done on them.

4. Lord Hoffman revisited the issue in *Tomlinson v Congleton B.C.* [2004] 1 AC 46. He held that the reference to *"things done or omitted to be done" on the premises related to "activities or the lack of precautions which cause risk"*. However, this does not serve to distinguish those activities that are caught by section(s) 1(1) and those that fall under common law negligence.
5. It can be difficult to predict the outcome. Contrast *Gwilliam v West Hertfordshire Hospitals NHS Trust* [2003] QB 443 and *Fowles v Bedfordshire County Council* [1995] PIQR P380. In the former case a "splat wall" was provided at a hospital fund-raising day. A visitor using it was injured. It was held that the relevant duty was under the OLA. In *Fowles* a drop-in youth centre had a gym with gym equipment provided. The Claimant, a regular user, was injured attempting a forward somersault. The crash mats had been placed too close to a wall. The CA held that there was negligence on the part of the Defendant but that the OLA did not apply as it was not in breach of any duty under the Act.

### The sub-contractor defence

6. Common law duties are, by and large, delegable. A person who delegates performance of a duty of care to another is generally entitled to do so and is not held liable if the person to whom responsibility is delegated is negligent. However, the extent to which an occupier can delegate a duty under the OLA 1957 is limited. Thus, this restriction represents one of the primary reasons why it matters whether an occupier owes a duty under the Act.
7. Section 2(4)(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."* (emphasis added).



8. Given that an occupier can owe duties to visitors that go well beyond the state of the fabric of the premises, can an occupier only avoid liability for delegating works of “Construction, maintenance or repair”? The editors of Clerk & Lindsell believe not (paragraph 12-56):

“‘Construction, maintenance or repair’ covers almost all conceivable works on land or structures, including demolition. Even if it were possible to conceive of some negligence by an independent contractor that was not directly covered by these words, it is suggested that the courts would apply the section expansively, as clearly intended to oust any occupier’s liability for independent contractors...”

9. It is not difficult to conceive of some negligence by an independent contractor that is not directly covered by these words. For example, the company that erected the “splat wall” in *Gwilliam*. So would the words of s. 2(4)(b) be stretched to cover such situations?
10. All the authorities suggest not. In *Stone v Taffe* [1974] 1 WLR 1575 the occupiers of a pub who had an independent manager, who let customers stay and drink “after hours”, were held (*obiter*) not to be able to rely on the sub-contractor defence as the manager’s actions did not fall within the subsection.
11. In *Ferguson v Welsh* [1987] 1 WLR 1553 the House of Lords were prepared to stretch the phrase “construction, maintenance or repair” to cover demolition work. They did so in terms that suggested that they thought the meaning of the words was being stretched to do so. If that is right, then works that are nothing to do with “building work” are unlikely to be covered.
12. Finally, in *Gwilliam* (the splat wall case), the CA refused to extend s. 2(4) to contractors who ran the “splat wall”.
13. Thus, perhaps contrary to widespread belief, the scope of the sub-contractor defence in s. 2(4) is of relatively narrow ambit.

### **The nature of the duty**

14. Closely allied to the issue of the scope of the duty is the nature of the duty owed. In *Tomlinson* Lord Hoffman emphasised that the premises that must be dangerous. If Claimant’s chose to do dangerous things on safe premises, they cannot expect to succeed. There are numerous “diving” cases that illustrate the point that the premises have to be shown to be unsafe. Thus:

*Ratcliff v McConnell* [1999] 1 WLR 670

A student diving into a college pool at a time when it was shut failed (under the 1984 Act) because the pool was not of an unsafe configuration.

*Tomlinson v Congleton*

A young man dived into a lake and struck his head on the shallow bottom of the lake, breaking his neck. Although swimming was prohibited (for reasons other than the risk of diving), the lake was not inherently dangerous or unusual. The claim failed (again under the 1984 Act).

*Baldacchino v West Wittering Estate PLC* EWHC 3386 (QB)

A 14-year-old boy dived from a navigation beacon into the sea and suffered serious injury. His claim (under the 1984 Act) failed because the beacon was not unsafe – the activity for diving into the sea from it was.

*Grimes v Hawkins* [2011] EWHC 2004 (QB)

An 18-year old girl at a house party dived into the family swimming pool and struck her head on the bottom of the shallow end. There were no warning signs against diving. However, the pool was not of an unusual configuration and was not dangerous. The claim failed.

15. Perhaps the case that most vividly demonstrates the principle is:  
*Geary v JD Wetherspoon PLC* [2011] EWHC 1506 (QB)



An historic building had been refurbished to become a pub. It had a long sweeping staircase with an original banister. The Claimant decided to slide down it. She fell off the bottom onto a marble floor and suffered injury. The Court held that it was the activity of sliding and not the banister itself that was unsafe (even though the Defendant had foreseen that customers might slide down it).

16. These cases all illustrate that the premises themselves must be shown to be unsafe and not merely that an unsafe activity has been undertaken on premises that are otherwise safe. The test for what is dangerous is relatively tolerant to the idiosyncrasies of the premises.
17. In many of the cases, the fact that the Claimant was guilty of some form of misconduct seems to have been persuasive, whether or not the Claimant was a trespasser and therefore claiming under the 1984 Act or a visitor, under the 1957 Act.

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**June 2013**

