

# NEGLIGENCE AND OCCUPIERS' LIABILITY

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# Negligence v OLA: does it matter?

1. Whether any duty is owed.
2. Scope of the duty: definitions and limitations:
  - Expertise of visitor(s.2(3)(b))
  - Role of warnings
  - Duty re sub-contractors: supervision
  - Lesser duty to trespasser

# 1957 and 1984 Acts

Distinction:

1957:

- Visitors
- Standard of care:

*“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”*

# 1957 and 1984 Acts

Distinction:

1984:

- Persons other than visitors (aka trespassers)
- Scope of duty:
  - (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...*
  - (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.*

# 1957 and 1984 Acts

- Standard of care:

*“take such care as is reasonable in all the circumstances of the case...”*

*...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.”*

# 1957 and 1984 Acts

1957: s.2(4)(b) – not in 1984

*...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.*

# 1957 and 1984 Acts

*Gwilliam v West Hertfordshire Hospitals NHS Trust*  
[2003] QB 443 Lord Woolf:

*"...section 2(4)(b) is only an example of the circumstances which can indicate that the duty has been discharged. In addition, the language of section 2(4)(b) cannot be directly applied to the present situation because here we are not concerned with any "work of construction, maintenance or repair". The statutory example is only capable of having an application by analogy.*

# 1957 and 1984 Acts

## Common features

- dangers due to the state of the premises or to things done or omitted to be done on them.

# Common duty of care: occupancy v activity

*Fairchild v Glenhaven* [2002] 1WLR 1052 (CA)

Brooke LJ

*“...the phrase “care ... to see that the visitor will be reasonably safe in using the premises for the [invited or permitted] purposes” is a fairly strong indication that Parliament intended the Act to be concerned with what used to be described as “occupancy liability”.*

# Common duty of care: occupancy v activity

- Occupier employs a builder who, whilst working at height, drops a brick which lands on a visitor's head.  
*Ferguson v Welsh* [1987] 1WLR 1553: occupier liable
- Occupier owns a lake and a swimmer is injured by a speed boat due to lack of segregation.

*Tomlinson v Congleton BC* [2004] 1 AC 46

Lord Hoffman:

*In my opinion "things done or omitted to be done" means activities or the lack of precautions which cause risk, like allowing speedboats among the swimmers.*

# Common duty of care: occupancy v activity

- What is the distinction?
- Where C injured whilst performing activity – not caught:
- Swimmer who bangs his head on the bottom of the lake (*Tomlinson*)
- Builder injured whilst using unsafe system of work (*Ferguson*)

# Common duty of care: occupancy v activity

- Where C injured by acts of others making the premises unsafe, duty is engaged.

*Lear v Hickstead Ltd* [2016] EWHC 528 (QB)

*“Unless the activity which has given rise to a claimant's damage is an activity carried out by the claimant, the liability of the occupier to the claimant is in respect of an activity carried out on the occupier's premises by a third party and as such is an 'occupancy' type of liability.”*

# Common duty of care: occupancy v activity

- Fact that hazard is temporary not relevant:  
*Hufton v Somerset* [2011] EWCA Civ 789

# Common duty of care: occupancy v activity

*Everett v Comojo (UK) Ltd* Smith LJ stated:

*“The common duty of care is an extremely flexible concept, adaptable to the very wide range of circumstances to which it has to be applied. It can be applied to the static condition of the premises and to activities on the premises. It can give rise to vicarious liability for the actions of an employee of the occupier who, for example, might have created a temporary tripping or slipping hazard. I think that it is appropriate (fair, just and reasonable) that it should govern the relationship between the managers of an hotel or nightclub and their guests in relation to the actions of third parties on the premises.”*

# Negligence: scope of foreseeability

- Reasonable foreseeability has 2 roles: defining the duty of care and limiting recoverable damage.
- Here looking at the first: defining the duty of care.
- Only owe a duty in respect of damage that is reasonably foreseeable.

# Negligence: scope of foreseeability

1. Is it the nature of the accident or the type of damage that has to be foreseeable?
2. How likely does something have to be in order to be reasonable foreseeable?
3. Does it matter that the actual event that occurred was not foreseeable?
4. Does it matter that the event could not occur without third party intervention?

# Negligence: scope of foreseeability

Is it the nature of the accident or the type of damage that has to be foreseeable?

Lord Hoffman in *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082:

*“It is also agreed that what must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to the particulars but the genus. And the description is formulated by reference to the nature of the risk which ought to have been foreseen.”*

# Negligence: scope of foreseeability

Is it the nature of the accident or the type of damage that has to be foreseeable?

- Look at nature of risk
- “Children meddling with a boat”
- Not focus on type of damage: *Hughes v Lord Advocate*
- Risk must be of same genus: c.f.
  - *Darby v National Trust* [2001] EWCA Civ 189
  - *Clare v Perry* [2005] EWCA Civ 39

# Negligence: scope of foreseeability

How likely does something have to be in order to be reasonable foreseeable?

*“a real risk and not a mere possibility which would never influence the mind of a reasonable man”. (The Wagon Mound (2)).*

But hurdle may be low: *Bolton v Stone* [1951] AC 850

Cricket ball hit onto road 6 times in 28 years – nobody ever hurt but held reasonably foreseeable that they might be.

# Negligence: scope of foreseeability

Does it matter that the actual event that occurred was not foreseeable?

No – as long as the same genus of risk: *Hughes v Lord Advocate*: immaterial that injury by burning from a lamp foreseeable but injury by explosion not as the source of foreseeable danger was the lamp

# Negligence: scope of foreseeability

Does it matter that the event could not occur without third party intervention?

*The Attorney General v Hartwell* [2004] UKPC 12:

*“As with the likelihood that loss will occur, so with the likelihood of wrongful third party intervention causing loss, the degree of likelihood needed to give rise to a duty of care depends on the circumstances. In some circumstances the need for the high degree of likelihood of harm mentioned by Lord Reid may be an appropriate limiting factor in cases involving deliberate wrongful human actions. In other cases foresight of a lesser risk of harm flowing from a third party's intervention will suffice to give rise to a duty of care. The law of negligence is not an area where fixed absolutes of universal application are appropriate.”*

# *Lear v Hickstead*

- C injured when horsebox ramp fell on him because hydraulics failed after a.n. other had closed it.
- Foreseeable that another would close it.
- Hydraulic failure not foreseeable.
- Injury whilst lifting foreseeable.
- Injury of same genus, therefore C's accident within scope of D's duty.