12
King's Bench Walk

Next Talk: 16:00 – 16:40

OLA 1957

How not to trip up in litigation....

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What we will cover

- Background – claims in negligence vs OLA 1957
- Occupiers & their duty to visitors
- Modified duty
  - Children
  - Contractors
- Defences
  - Warnings
  - Independent contractors
  - Volenti

Negligence & or OLA 1957?

- Activity or state of the premises?
- Dangers due to the state of the premises will engage OLA.
- Where a danger arises from activities on land, such as shooting or driving vehicles, rather than from the state of the land itself, any duty arising is governed by negligence.
- So injuries due to the occupier failing properly to supervise a firework display, shooting a person on his land, inadequately controlling thugs in a nightclub, failing to teach a visitor to use sports equipment, or failing to ensure safe working conditions for a contractor, have been held to fall outside the occupier's liability regime and within that of general negligence.

Concurrent Duties

- Duties under OLA 1957 can coexist with duties owed in some other capacity, for example as a school, hospital authority, employer, or event organiser; in such a case the claimant can rely on whichever cause of action is more advantageous to him. “Occupation of premises is a ground of liability and is not a ground of exemption from liability.”
- The fact that the claimant would fail were he to bring an action under the Act is no reason to deny liability if he sues in some other capacity, or indeed for ordinary negligence at common law.
- Claims against employers / landlords - think about other statutory & common law duties

The Legal Framework

- Section 2 OLA 1957 provides:

  (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.***

  *(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*

  *(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.*

Section 2 OLA 1957 Cont'd

(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; and*

(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.***

(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).*

(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.***

The 4 Elements of a Claim

As helpfully summarisedd by Dan Squires QC sitting as a Deputy High Court Judge in Mathewson v Crump & Anor [2020] EWHC 3167 (QB)

- In order to succeed in a claim for breach of the OLA 1957, a claimant must show:
  - (1) that they were at the material time a "visitor";
  - (2) that the defendant, or defendants, were "occupier(s)";
  - (3) that the defendant breached the "duty to take such care as in all the circumstances of the case [was] reasonable to see that [claimant would be] reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there"; and
  - (4) that the breach of duty caused the claimant an actionable injury.

Who is an "occupier"? (Law school 1.01)

S.2(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.

- Not defined under OLA 1957 but per s.1(1) and s.1((2) determined under the common law
- The question at common law is whether an individual has a "sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises" (Wheat v E Lacon & Co Ltd [1996] AC 552, 577G per Lord Denning – who also suggested a test which requires "the **immediate supervision and control and the power of permitting or prohibiting the entry of other persons**" in order to establish occupation **may be too narrow** (579A). He continued "There are other people who are 'occupiers,' even though they do not say 'come in.'" (ibid). As was also made clear in Wheat v E Lacon, **more than one person can be the occupier of the premises**, as different people can exercise control over premises in different ways.
- Bailey v Ames [1999] Lex Citation 2400 Bedlam LJ (with whom the other members of the Court of Appeal agreed) cited Salmond on the Law of Torts (10th ed.) at page 469:
- "In dealing with dangerous premises it is necessary to distinguish between the responsibilities of the owner and those of the occupier or possessor. **Generally speaking, liability in such cases is based on occupancy or control, not on ownership. The person responsible for the condition of the premises is he who is in actual possession of them for the time being, whether he is the owner or not, for it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons."**

Occupiers: *Mathewson v Crump & Anor* [2020] EWHC 3167

- Plasterer injured when fell through unsupported chipboard on a property that was being converted
- D1 owned the property but did not live in it and rarely visited. She did not have sufficient control over the premises while the property was being converted. She left the building work, and control of the premises, to professional builders. While they were in the process of undertaking the conversion of the property, she did not have sufficient control or supervision over the property to ensure that sub-contractors or other visitors were safe and could not reasonably be expected to ensure their safety. That responsibility lay with CK2 (D1 engaged CK2 to do the building work).
- D2 worked on the site and was D1's boyfriend / later spouse, he regularly visited the property in order to undertake building work and was present at the time of the accident.
- Responsibility for the management and supervision of the building work lay with CK2. CK2 liaised with the architects, arranged and paid for delivery of materials, had their builder's sign at the premises and engaged and paid sub-contractors.
- **CK2 had the keys to the property and control over who entered.** Ultimately, D2's role was that of a sub-contractor. He may have had a greater involvement in the project than other sub-contractors, given that the property was owned by his girlfriend and then wife, and there may have been times when he worked on the property on his own. I do not, however, consider that meant he became the "occupier" of the premises. He did not have sufficient control over the property to owe a duty to keep visitors safe.
- CK2 alone was found to be the occupier

Mathewson – No liability to C

- C was a plasterer (& LIP in the proceedings) with 40 years experience in the profession. 16 Fallowfield Close was a bungalow that was to be converted into a two-storey house.
- It was found that “the **Claimant was made aware of the potential risk** of accessing the first floor, and that **that risk**, in any event, would have been **obvious** to him. He decided to take the risk as he did not want to have to return to give a quote on another occasion. He believed he would be "fine", and indeed that would have been the case if he had not placed his weight on the chipboard. The fact he placed his weight on the unsupported chipboard when descending, in my view, was not the result of a failure to warn him or because the danger was somehow a hidden one. It occurred because, for whatever reason, he was not sufficiently careful, or was not concentrating sufficiently, when he attempted to come down the ladder.
- C knew that part of the joists had been removed – they had previously been there on the site and then on the day of the accident they were not there.

Premises: Fixed or movable structures

- Following the recommendations of the Law Reform Committee, s.1(3) of the Act provides that the rules it lays down apply to regulate "the obligations of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft".
- Fixed or movable structures are undefined but there is little difficulty with substantial things such as ships, aircraft or vehicles.
- Less substantial things, such as fairground attractions or even ladders, may give rise to occupier's liability. But the owner **by letting someone else use them may well have relinquished possession and thus not be an occupier at all.** Hence in *Wheeler v Copas* a bricklayer injured when a farmer lent him a defective ladder was held to have no claim.

Visitors

- **Express or implicit permission**, e.g., the public part of a shop or pub, or roads on a new housing estate not yet dedicated to the public, or places of public resort such as courts or public libraries.
- Persons entering premises to communicate with people in them, or for other lawful purposes, are lawful visitors as long as they confine themselves to that part of the premises which provides the usual access to them, unless they have been forbidden to enter either by an express prohibition or a general notice. If they stray from the usual access, they become trespassers.
- Difficulties may arise when the claimant is **permitted to enter, not by the occupier himself, but by his employees.** If the employee is acting within the scope of the actual authority which his employer has given him, then clearly the entrant is a visitor and not a trespasser. But what if the employee is disobeying instructions? In *Stone v Taffe*, the Court of Appeal held that in such a case the entrant, if bona fide, was a visitor rather than a trespasser where the employee, though breaking his instructions, was still "in the course of his employment" according to the usual rules of vicarious liability.
- The situation is similar where the invitation comes from an independent contractor who is himself an occupier, though here there is a further twist. Suppose A invites B (for example, a building contractor) on to his land, and B, having apparent control of the land, then invites C on to it without A's permission. If B has A's ostensible authority to do this, C will be a lawful visitor vis-à-vis both A and B. If he has not, C will be a lawful visitor vis-à-vis B, but a trespasser vis-à-vis A (cf. Welsh).
- Permission is often limited by time, place, purpose. I.e. if you stay in a pub after closing without permission you will be a trespasser, if you enter a 'do not enter area' (although if you get lost making a reasonable search e.g. of the loo, not a trespasser), also limited by purpose, i.e. a licence to enter for lawful purposes, for instance, does not imply a licence to enter in order to steal.

Visitors and Rights of way - *McGeown*

- In ***McGeown v Northern Ireland Housing Executive*** [1995] 1AC 233, HL had to consider whether the old decision in *Gautret v Egerton* (1867) LR2CP 371 was still good law. Namely: **is a duty owed to those who are on land by virtue of a (public or private) right of way?** (Although applying the N.Ire equivalent of the OLA'57- it was identical in all material respects.)
- Mrs McGeown was injured using a path owned and laid out by the Defendant housing authority on their housing estate, which ultimately gave access to her husband's tenanted flat. There was a dangerous hole on the path and she fell breaking her leg. The public had acquired a right of way over the path.
- Lord Keith analysed a series of cases dealing with ambit of such duties and concluded that no duty was owed under OLA'57 because:
  - " ***persons using rights of way do so not with the permission of the owner of the soil, but in the exercise of a right****. There is no room for the view that such persons might have been licensees or invitees of the landowner.."*[243E]
- There was no duty owed at common law, because the danger resulted from a failure to act (nonfeasance). Conversely if D had *created* the danger (misfeasance), then a duty in negligence/nuisance would have arisen. There was no common law occupier duty, the OLA having expressly replaced the CL 'occupancy' duties. If the RoW had not come into being, D would have been liable under the OLA'57.

Can you ever be an 'invitee' on a Right of Way?

- HL in *McGeown* touched on whether a duty re: the state of repair might be owed to **a person coming onto a right of way, but as an invitee** (see *Brackley v Midland Railway* [1916] 85LJKB 1596) – C injured using a railway bridge giving access to train platform, over which right of way formed). But CA in *Greenhalgh v British Railway Board* [1969] 2QB 286 seemed to suggest (246A) that existence of the RoW extinguishes the possibility of permission being granted, because permission to be there cannot be given or withdrawn.
- The rationale for the decision seems sound – someone cannot be an invitee on land if they cannot be prevented from being there. But the results this could produce might seem odd – and Browne-Wilkinson *obiter* [248] reserved the position where a landowner expressly invites people (usually for gain) onto his premises e.g. train stations, shopping centres etc – where albeit a RoW has come into being, such people are nevertheless *present because of the invitation*. He thought being an invitee (hence OLA) on RoW in such circumstances was not necessarily incompatible.
- Principally a Highways Act case, but relevant to McGeown arguments - see also ***Barlow v Wigan MBC (CA) [2021] Qb 229 –*** dealing with local authority duties on unadopted public paths (and where OLA was perhaps unnecessarily left out in pleading). Path in public park in disrepair causing injury. Public RoW inferred by common law dedication from 1930s, ie. **prior to** coming into force of *National Parks and Access to Countryside Act 1949* – ss.47;49 thus rendering such path repairable by 'inhabitants at large' and as such 'maintainable at public expense' after the Highways Acts of 1959 and 1980 s.36(1) – hence Highways Act duty to maintain was owed. (see also ***Gulliksen v Pembrokeshire CC*** *[2002] EWCA civ 968* - if highway constructed by LA using Housing Act powers = maintainable. and ***Rachel Young v Merthyr CBC*** *(unrep*. 7.7.09 HHJ Curran QC) for an analysis of highway dedication)
- Bean LJ in *Barlow* also critical (*obiter)* of *McGeown* – *"the proposition that a Local Authority can owe a greater duty to park users walking on the grass than those walking on a path is to my mind absurd"* - unclear whether this might be used to try and limit future *McGeown* defences (?)

S.2(2) The Duty

- The common duty of care is more than a duty to avoid negligent acts but extends to negligent omissions as well. Not only must the occupier avoid creating dangers himself: **he must also take reasonable steps to protect his visitors from dangers which he did not himself create**, as where he fails to warn of a hazard not otherwise apparent, or to take steps to remove a danger that materialises without his negligence.
  - i.e. if a customer spilled a liquid on a supermarket floor – a claim under OLA could be brought by the member of the public
- There must be some danger arising from the state of the premises. The mere fact that they lack some given amenity will not do, even if injury may be foreseeable as a result. It should also be noted that even if the defendant is at fault in providing unsafe premises, he will be liable only for injuries likely to result from the particular unsafe feature.

Cockerill v CXK Ltd & Anor [2018] EWHC 1155 (QB)

- C tripped on a step in a converted Victorian primary school. Claim brought against employer and also occupier of the school. The premises were use for community activities / work with the Prince's Trust
- Rownena Rice-Collins (Sitting as a Deputy High Court Judge) addressed the key issue thus: why, in the circumstances and course of events that happened, did the claimant fall down the step? The answers C suggested were (a) because the connecting door between the lobby and the kitchen area was propped open at the time and (b) because, from her direction of travel, the step was insufficiently clearly identified or identifiable.
- The doorsteps were all marked with yellow and black tape. Footfall tended to erode the black stripes printed on the yellow tape, leaving just the yellow. There was also nonslip matting.

  "I am satisfied that the step in question was visibly marked at the time of the accident with yellow and black hazard warning tape, that the whole of the step was visible as so marked, and that any moderate wear would not substantially have reduced its visual impact. Any wear would have mainly affected the right-hand side of the step as approached, the side away from the hinge and from the window, and left the left-hand side of the step largely unaffected."
- The claimant's own clear and consistent evidence was that she approached the step and entered the kitchen looking straight ahead and not down at the floor. The final reason she gave for that was that there was no visible signage warning of the step. The signage on the door itself was not visible because of the angle at which it stood open. She did not remember any other signage.

  "The facts as I find them, therefore, were that the step was visible through the open door by reason of being within the good ambient light of the kitchen area, standing out in contrast to the non-slip mats, and being marked with hazard warning tape. The signage on the door was not visible to the claimant, and there was no additional visible signage drawing attention to the existence of the step."
- "The claimant has not established that either of the defendants breached the duty of care it owed to her. As Lord Hoffman observed in Tomlinson (paragraph 4), "the law does not provide for compensation simply on the basis that an accidental injury was disproportionately severe in relation to one's own fault, or even not one's own fault at all". The law provides for compensation only where the accident was someone else's negligent fault. The claimant in this case candidly accepted that when she fell she was not looking where her feet were going; she was looking 'straight ahead', in what she thought was a normal enough kind of way. **She did not see the step, even though it was in plain sight before her, and marked with hazard tape.**"

Cook v Swansea City Council [2017] EWCA Civ 2142

- C, 78, slipped and fell on black ice when walking to the ticket machine in a car park owned and operated by the D.
- The Car Park is a small unmanned 24 hour pay and display car park (with spaces for 40 cars) which is open to the elements.
- D operated 46 car parks. In bad weather the manned car parks will be gritted. The unmanned car parks do not get gritted.
- Defendant operated a reactive system of gritting in its unmanned car parks, gritting when it receives a report from a member of the public about a dangerous area.
- Claimed dismissed @ first instance
- D had received warnings that the temperature would drop below freezing between midnight on the night of 7 December and 09.00 on 8 December. It had accordingly sent out gritting lorries in the early hours of 8 December to grit highways, but not footpaths or car parks. Gritting could not begin until midnight because of rain, which would have washed away any earlier grit.

Cook v Swansea cont'd

- LJ Hamblen accepted the D's submissions (Tim Petts)
- In the present case the Defendant identified the following matters as being particularly relevant to the assessment required to be carried out:
- (1) The likelihood that someone may be injured;

  The risk of ice in cold weather is an obvious danger. People out and about in cold weather can be reasonably expected to watch out for ice and to take care. The Car Park did not pose a particular risk compared to any other of the Defendant's car parks. There had been no previous reports of dangerous ice conditions at the Car Park, nor any previous accidents due to ice.
- (2) The seriousness of the injury which may occur;

  Injury due to slipping on ice may be trivial or serious.
- (3) The social value of the activity which gives rise to the risk;

  The Defendant's car parks provide the useful facility of 24 hour parking. If gritting of unmanned car parks, such as the Car Park, is required whenever there is a report of icy conditions the Defendant is likely to have to prohibit their use in all its unmanned car parks in periods of adverse weather, to the considerable inconvenience of local residents and visitors.
- (4) The cost of preventative measures.

  The alternative to closing the car parks would be manning them or arranging regular gritting. Such gritting would have to be by hand and would involve significant use of staff and material resources. This would be a disproportionate and costly reaction to the risk and would have diverted such resources from situations where attention was more urgently required.

Causation in *Cook v Swansea*

- (1) In light of the judge's findings at [19] that **gritting could not begin until midnight on 7 December because of rain** and at [52] that the ice formed after midnight, **the judge's conclusion that a reporting system would not have prevented the accident at 10.30 on 8 December would appear to be unassailable**, regardless of on whom the burden of proof rested.
- In order for the accident to be prevented an employee would have had to attend the Car Park early on 8 December and to have considered conditions to be sufficiently hazardous for a report to be made; the Defendant would then have had to decide to act on the report and to arrange for manual gritting to be carried out, and that gritting would have had to be completed before 10.30. That is inherently implausible.

- (2) The Claimant contends that this was a case in which there was an evidential burden on the Defendant to establish that the accident would have occurred in any event. Reliance is placed on *Ward v Tesco* and similar cases in which it has been found that the circumstances of the accident establish a prima facie case of negligence (in the case of Ward v Tesco it was spillage of yoghurt on a supermarket floor). There are, however, a number of factual distinctions to be drawn from such cases. In particular, **this was a small 24 hour car park, not a busy location like a supermarket**; it was **unmanned; it was not under supervision or close control; ice is to be expected in a car park exposed to the elements; there was no unnatural substance on the ground that could not be expected to be there; there can have been no expectation that ice would be dealt with as soon as it developed.**
- As the judge observed at [53], this is not a case "where proof of the circumstances leads to the conclusion that something has gone wrong…it cannot seriously be said that something must have gone wrong to explain the presence of ice on the ground in December".

Reasonably safe – reasonable foreseeability of harm – *Rochester Cathedral v Debell [2016]*

- The CA in ***Dean & Chapter of Rochester Cathedral v Debell [2016] EWCA civ 1094*** considered the scope of occupier's duty, principally in the context of foreseeability of harm.
- Tripping claim involving OLA allegations. C injured in Cathedral precinct when tripping on small concrete lump protruding from base of traffic bollard. Damage caused by car impact. Failure to repair alleged. Succeeded at 1st instance.
- Elias LJ asked: when does inaction constitute breach? Identified Key factors:- likelihood of injury; whether system in place to identify (and remove) danger speedily; difficulty and cost of removing; ultimately having to answer: was the visitor reasonably safe? Also noting that falls are everyday occurrences, and some weathering and wear on roads etc to be expected. But highway authorities/occupiers are not automatically liable – the duty is 'reasonably safe'– not to guarantee safety.
- Found full analogy with Highways Act tripper principles and analysed the leading H'ways Act cases on dangerousness. Highwater mark being CA in ***Mills v Barnsley MBC [1992] PIQR 291*** *per* Steyn LJ*:*
  - No mechanical jurisprudence – each case turns on own facts;
  - Photographs can be helpful – do they reveal a typical (street) scene;
  - Public must expect minor obstructions and depressions on roads – significance of other tripping accidents and/or complaints pre or post accident;

Rochester Cathedral v Debell cont'd

- In drawing inference of dangerousness – caution not set standard imposing unreasonably onerous burden on minor defects which are a fact of life – obtain sensible balance between private and public interest (and/or presumably occupier's interest?)– is risk of a low order? and out of proportion with cost of remedy?
- *Per* Dillon LJ in *Mills*: duty = not to achieve perfection – Key question: would a reasonable person regard as a 'real source of danger'? (see also Lloyd LJ in *James v Preseli DC* [1993] PIQR 114)
- Elias LJ in *Debell*: "The risk is reasonably foreseeable only where there is **a real source of danger** which a reasonable person would recognise as obliging the occupier to take remedial action." ie. Can be reasonably safe even with minor foreseeable risks. 'normal blemishes…' etc
- Elias LJ considered that trial judge whilst reciting the foreseeability mantra, did not properly apply the foreseeability test. Failed to assess likelihood of accident and injury occurring and recognising that not all foreseeable risks = breach.

Usual or Obvious Dangers

- such as the fact that a sea wall covered with seaweed may be slippery, that a rustic path may cause a trip , that a concrete drive in front of a house may be uneven, that one can fall off an escalator, that car parks may be icy in winter, or that piping hot coffee may scald if spilt.
- Nor is there any duty to protect visitors in respect of the ordinary risks of activities which they elect to engage in on land: to say otherwise would elevate paternalism over ordinary freedom.
- *Evans v Kosmar Villa Holidays Limited* [2008] 1 WLR 297, the Court of Appeal held that the claimant, who was seriously injured when he dived into the shallow end of a swimming pool, did not need to be warned against the dangers of diving into a swimming pool when he did not know the depth of water he was diving into. The risk was obvious. It was held that Lord Hoffman's reasoning in Tomlinson also applied to persons to whom there is owed a duty of care under a contract (Richards L.J., paragraph 39):

  "....**people should accept responsibility for** the **risks they choose to run** and that there should be **no duty to protect them against obvious risks**, *subject to Lord Hoffmann's qualification a*s to cases where there is **no genuine and informed choice** or there is some **lack of capacity**."
- See also *Grimes v Hawkins* [2011] EWHC 2004 (QB) where Thirlwall J held (paragraph 96):

  "The claimant was an adult. She did something which carried an obvious risk. She chose, voluntarily, to dive when, how and where she did, knowing the risks involved, as she acknowledged on the first day of the trial."

Further Recent Cases of Interest

- *Harrison v Intuitive Business Consultants [2021] EWHC 2396* – 'Bear Grylls Survival Race' contestant – serious injuries falling from monkey bars – extent of instruction required and causative significance of instructions given.
- *Moreira v Moran [2021] EWHC 1800* – labourer falling from mezzanine where guard rail removed during works. Employer liable, but Occupier not, as despite danger being from static condition of premises, danger arose from workers removing barrier rail. Occupier unaware workers on unguarded level.
- *White Lion hotel v James [2021] EWCA civ 31* – wedding guest fell to death from upstairs window after sitting on sill to smoke. Lower sash window could be opened fully. Sill was half the height from floor of modern standard minimum. D pleaded guilty under H&SWAct '74 – thereby accepting low risk of fall which should have been addressed. 60% con neg.
  - CA dismissed D appeal. Full analysis of the 'obvious risk' cases *(Tomlinson, Edwards, Greary).* CA accepted relative obviousness of risk relevant, but outweighed by: injury risk being foreseeable in normal activities of a hotel guest; critical difference a risk assessment would've made; minimal cost of (position lock) prevention – and which wouldn't reduce social value of the window. Volenti (OLA s.2(5)) defence failed – but 60% con neg – perhaps out of kilter with *Tomlinson*? Tension between obvious risk defence and material risk acknowledged in criminal plea.
  - Guilty plea to HSE = persuasive not conclusive on OLA breach – fact specific question.

Children

- Section 2(3)(a) states that an occupier must be prepared for children to be less careful than adults
- Something which would not be a danger to an adult may very well be one to a child, and a warning sufficient for the former may be inadequate for the latter.
- *Moloney v Lambeth LBC* an occupier was held liable to a four-year-old boy who fell through the bars of a balustrade. If a person the size of the claimant lost his balance he was liable to go through the gap.
- A reasonable degree of parental supervision and control can be expected. As Devlin J. put it in Phipps v Rochester Corp:

  "But the responsibility for the safety of little children must rest primarily on the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at the least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. 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 of persons who happen to have accessible bits of land. Different considerations may well apply to public parks or to recognised playing grounds where parents allow their children to go unaccompanied in the reasonable belief that they are safe."

Visitors undertaking construction, maintenance, repair etc.

- Section 2(3)(b) provides "(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"
- A window-cleaner's job, for instance, is inherently dangerous, and questions as to the adequacy of hand-holds and the like are for him and not the occupier to determine.
- An occupier of a building site was not liable to experienced roofers for failing to urge them to use crawling boards. On the other hand, the risk must be one specifically associated with the visitor's calling. Were a window-cleaner to trip on a defective staircase, there is no reason why the occupier should not be liable.
- Similarly, a joiner fitting a door is not saddled with the risk of a collapsing lintel, nor a telephone engineer with that of weak hardboard roofing: these risks relate not to the job being done but to the premises themselves.

Determining breach of duty

- In determining whether what was done or not done by the occupier was in fact reasonable, and whether in the particular circumstances of the case the visitor was reasonably safe, the court is free to consider all the circumstances, including:
  - the foreseeability of injury;
  - how obvious the danger is;
  - The age or infirmity of the visitor & the purpose of the visit
  - the conduct to be expected of the visitor
  - the state of knowledge of the occupier;
  - the difficulty and expense of removing the danger
  - the time in which a reasonable occupier may be expected to spot and deal with a hazard;
  - the practice of occupiers generally and any relevant official or semi-official safety rules.
  - The presence of a reasonable system for dealing with possible dangers

Duty of a Landlord – not to be discussed today but important to be aware of

- *Essex County Council and others v Davies* [2019] EWHC 3443 (QB)
- Confirmed that a damages claim against a landlord for failure to maintain does not arise under the Occupiers Liability Act 1957 (OLA 1957). The duty of a landlord was previously contained in OLA 1957, s 4, but that section was repealed and replaced by the Defective Premises Act 1972 (DPA 1972). Cavalier v Pope is not capable of being distinguished if the landlord does nothing more than act in the capacity of landlord.
- 9 Claimants all exposed to carbon monoxide at Havering College. @ first instance the claims were successful against all 3 Ds, the College (D1), the Governing body (D2) and the local council (D3)
- What did the court decide as to the liability of the landlords?
- The appeal of the landlords on liability was allowed on the basis that the judge below had been wrong to distinguish Cavalier v Pope. It was noted that the sole cause of action was based on the OLA 1957 (not DPA 1972) and it was found to be 'established (and binding) law that a landlord (acting qua landlord) does not owe a duty of care at common law or under the OLA 1957 to its tenant or visitors of its tenant (in short, he is not an occupier owing duties when acting qua landlord)'.

Essex v Davies

- The 1957 Act did not alter the rules of the common law as to the persons 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 owed by an occupier towards different classes of visitor with a uniform "common duty of care" owed to all lawful visitors: see Shtern v Cummings [2014] UKPC 18, per Lord Toulson at [17]. Further, as explained in Clerk and Lindsell (22nd Edition) at para. 12-09, it is established that a landlord who lets premises to a tenant is treated as parting with all control and is not an occupier under the 1957 Act.
- In my judgment, the rule operates even when a landlord undertakes to maintain the demised premises (and indeed if he makes regular use of his rights to enter and maintain a property). Although it is controversial, Cavalier v Pope is a decision of the House of Lords that binds me and bound the Judge. Further, the Court of Appeal in Boldack v East Lindsey DC (1999) 31 HLR 41 noted that Cavalier v Pope was entrenched and remained binding on that court (as it binds me and was binding on the Judge).
- A landlord's duty in tort was previously contained in s.4 of the 1957 Act, long since repealed. It is now to be found in the Defective Premises Act 1972. It is not covered by s.2 of the 1957 Act. See Drysdale v Hedges [2012] EWHC 4131 at paragraphs 74 and 77.
- The Judge was wrong to distinguish Cavalier v Pope: the fact that case concerned residential rather than commercial premises is not a good or recognised reason to distinguish the case. The fact that Essex CC and the Governing Body were jointly represented, insured, and had joint expert and lay witnesses in the proceeding are not relevant to the question of whether they controlled the demised premises so as to be an occupier for the purposes of the 1957 Act. Unsurprisingly, it also formed no part of the Respondents' pleaded claim that these Appellants should be classed as occupiers on that basis.
- The Judge found that Essex CC was a Local Education Authority and thereby 'assumed a duty to maintain the premises'. This formed no part of the pleaded claim. The reasons for finding that a Local Education Authority assumes a duty to maintain premises demised by school governors, running a grant maintained school, to a commercial third party are not identified by the Judge. No provision, be it statutory or otherwise, is cited in support of such a bold proposition. Nor was any such provision cited to me on appeal.
- (d) The Judge found that caretakers working at the school were always employees of Essex CC based on evidence they gave in cross examination (and found that Essex CC had been wholly misleading in this respect as the case advanced at trial was that the caretakers were employed by the Governing Body prior to 31 August 2012). The Appellants do not appeal that finding of fact (which was open to the Judge given the answers from the caretakers when cross-examined). However, in my view, **the question of who employed the caretakers is not relevant to the question of occupation under the 1957 Act.**
- (e) That fact that the caretakers undertook maintenance and repairs across the entire site did not give rise to control rendering Essex CC and the Governing Body occupiers of the Premises. As I have already identified above, **the rule in Cavalier v Pope expressly applies where a landlord has access to premises for the purposes of maintenance and repair.**
- In my judgment, the claim against Essex CC and the Governing Body should have been dismissed. Any claim under the 1957 Act lay solely against the College.

Defective Premises Act 1972, ss.3 & 4

- Liability under the Defective Premises Act 1972 Paralleling the developments at common law, ss.3 and 4 of the Defective Premises Act 1972 provide a statutory remedy against the landlord in certain cases. **Section 3 deals with defects existing at the time the lease is entered into**, and provides:

  "Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty."

- Clerk & Lindsell suggest that: "premises" means simply the land subject to the demise in question, and is not limited to buildings or structures. E.g. an undeveloped field which to his knowledge had been sprayed with some poisonous chemical. Covers not only active operations such as structural repairs or extensions, but also culpable failure to carry out maintenance. The works need not have been carried out by the landlord or anyone connected with him. Thus the section would catch a landlord who let a house knowing that contractors acting for a previous owner had carried out repairs badly, so as to leave the building dangerously defective.
- S.4 deals with defects arising during the currency of the lease. The landlord's duty under s.4 is simply to take such care as is reasonable in the circumstances to see that those likely to be affected by the defect are reasonably safe.
- Applies where the landlord is under a duty to repair under the lease, or (even where he is under no duty to repair) the premises are let under a tenancy giving him "the right to enter the premises to carry out any description of maintenance or repair of the premises" except where it's the tenant's duty to undertake those repairs.
- Liability is not dependent on actual knowledge, but merely the means of knowledge. Thus the landlord can be liable for general failure to repair or maintain even if not given actual notice of the defect. On the other hand, s.4 is based on the duty of the landlord to keep premises in repair, which means that it does not cover defects, even dangerous ones, that are inherent in the building and cannot be categorised as "disrepair".
- In practice a highly important duty in the context of council and housing association lettings, since the duty to repair in such cases will very often be on the landlord.

Section 2(4) OLA 1957: Warnings

- *Lewis v Wandsworth London Borough Council* [2020] EWHC 3205 (QB)
- C hit by a cricket in the eye when walking along a path near the boundary of one of the cricket pitches in Battersea park
- @ first instance Recorder Riza QC found for the C – he was unimpressed by the fact that there was no signage "In my judgment signage is extremely important. People take note of it. That is why it is put there and in my judgment it is fool hardy by a council to adopt the stance that it would make no difference. … In my judgment it beholds (sic) the council to take precautions so that persons using the pathway are aware that it is close to the boundary where cricket is being played using a hard ball.
- He also distinguished Bolton v Stone saying: "That was a case that involved the highway. Whereas this case is, in my judgment, wholly different because what we have got here is a park, a pitch in the park, cricket pitch, with a boundary next to a path with no protection whatsoever and no warning signs whatsoever to provide some sort of warning to pedestrians about the cricket matches that were taking place involving the use of hard balls, notwithstanding that the trajectory of those balls was likely to be towards the vicinity of the pathway.
- On appeal that decision was overturned & claim dismissed

Bolton v Stone

- In *Bolton v Stone* the C was on a side road of residential houses was hit by a ball struck by a batsman on the cricket ground which abutted the highway. The ground was enclosed at the material point by a fence which stood 17 feet above the level of the pitch. From where the ball was hit to where the injuries took place was some 100 yards. In his speech, Lord Porter at page 858 said that the question was "what degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field?" Later on that page is the citation which the Recorder in this case incorporated into his judgment. Lord Porter then continued:
- "...it is not enough that the event should be such as can be reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken
- The following principles were distilled from *Bolton v Stone*:

  i) Reasonable foreseeability of an accident is not sufficient to found liability.

  ii) The Court has to consider the chances of an accident happening, the potential seriousness of an accident and the measures which could be taken to minimise or avoid accident.

  iii) Bolton v Stone is not a case which provides authority for a proposition that there is no liability for hitting a person with a cricket ball which has been struck out of the ground or over the boundary. It is clear from the decision that there needs to be careful analysis of the facts.

  iv) On appeal a Court has to consider the two-stage test referred to by Lord Porter.

Compensation Act 2006

Section 1 of the Compensation Act 2006 provides:

1 Deterrent effect of potential liability

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

Independent Contractor Defence

- “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.”
- “Faulty execution” for these purposes comprises culpable omissions to maintain or repair as well as negligent acts, and “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 read the section expansively, as clearly intended to oust any occupier’s liability for independent contractors, and deny a remedy accordingly.
- It follows from this that, where the occupier has: (1) **acted reasonably in selecting and entrusting work to the independent contractor** concerned; (2) taken **reasonable steps (if possible) to supervise the carrying out of the work**; and (3) used **reasonable care to check that the work has been properly done**, he will be held to have discharged his common duty of care.

Volenti Defence – section 2(5)

- The section 2(5) / *volenti* defence will operate if it can be shown that a visitor was aware of a particular risk in advance and voluntarily accepted that risk. They then cannot hold the occupier liable for the harm they suffer if the risk materialises.
- In Mathewson it was held that "I also consider that the Defendants have a defence pursuant to OLA 1957 s 2(5) on the basis that the Claimant willingly accepted the risks inherent in ascending the ladder to the first floor. I consider that when he ascended the ladder the Claimant was aware of the risk if he were to place his weight on the chipboard in the stairwell area. He wished to give the quote for plastering and did not want to have to return at some later time. He chose to take the risk believing he would be able to avoid it. As set out above, he did successfully avoid it when he ascended the ladder, but unfortunately he did not do so when he came to descend. That was a risk that he voluntarily assumed and cannot therefore hold the Defendants liable for it."

Volenti Cont'd

- Lord Hoffman's observations in the case of Tomlinson v Congleton BC [2004] 1 AC 46, (at paragraphs 45, 46 & 34):
- "[45] I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely chose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair."
- " [46] I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ, ante, p 62 para 45, that it is "only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability". A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (Herrington v British Railways Board [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves: Reeves v Comr of Police of the Metropolis [2000] 1 AC 360 "
- "[34] ...the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only **the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other**."

Top Tips!

Determining liability under OLA 1957 will always be fact specific – but you need to know the law!

- What did the visitor know?
- Was the hazard in any way concealed, or should it have been obvious?
- Where did the accident happen? What is reasonable in a busy supermarket vs a small suburb's car park will be different. Footfall is relevant to the likelihood of risk.
- What could have been done to make the premises reasonably safe for the Claimant
- Better lighting? Warning tape / cordoned off area
- How long had the hazard been present – were there inspections?
- Any prior incidents involving the hazard in question?
- When did the accident happen? If the C does not have permission to be there (i.e. after hours, then OLA 84 will apply)
- Evidence: "if there had been a sign I would have taken notice of it"

Thanks for listening! Any questions (time permitting)