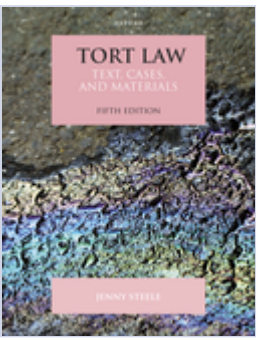

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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13. Occupiers' Liability

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter examines damage which arises out of dangers encountered on premises. The duties in question are owed to parties who are present on the premises, rather than to neighbouring occupiers or (for example) users of the highway, and governed by two pieces of legislation: the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984. The discussion begins by considering the criteria used to determine when the occupiers' liability acts are engaged, whose responsibility is it to guard against the risks, and the duty owed to visitors and non-visitors. The chapter then turns to defences and exclusion of liability.

Keywords: damage, dangers, premises, duties, occupiers, liability, visitors, non-visitors

Central Issues

i) This chapter concerns damage which arises out of dangers encountered on premises. The duties we consider here are different from the duties in private and public nuisance (Chapter 11) and under the rule in *Rylands v Fletcher* (Chapter 12), in that they are owed to parties who are present on the premises, and not to neighbouring occupiers or (for example) users of the highway.

ii) The duties in question concern dangers encountered on the premises. Historically, different duties were owed at common law, depending on the classification of the person who brought the claim. The relevant duties and liabilities have now been codified by two pieces of legislation. The first, the Occupiers' Liability Act 1957 ('the 1957 Act') applies to 'visitors'. Visitors are (very broadly speaking) parties who have a right or a permission to be present. The second, the Occupiers' Liability Act 1984 ('the 1984 Act'), applies to most other entrants on to the premises, including trespassers.

iii) In their content, the duties under the 1957 and 1984 Acts are similar to negligence duties. Indeed the occupier's duties to visitors and licensees were among the examples of duties to take care mentioned by Lord Atkin in *Donoghue v Stevenson* (Chapter 4). On the other hand, it is unusually clear in the case of the occupier's liabilities that some positive duties (for example, to repair fences or to provide appropriate warnings) are intended.

1 Occupiers' Liability Under Statute

1.1 Preliminaries

When are the Occupiers' Liability Acts Engaged?

Does the Injury or Damage Occur on Premises Occupied by the Defendant?

In order to decide whether a particular set of facts gives rise to an 'occupiers' liability claim, the first question is whether this is a case where personal injury or property damage is suffered *while the claimant or the*
p. 751 *claimant's property is on premises occupied by the* ↵ *defendant*.[1] If the only injury or damage done is suffered *outside* those premises, then the case is not one of occupiers' liability. On such facts, there may of course be an action in negligence; in nuisance if there is an unreasonable interference with the claimant's interests in land (Chapter 11); or in *Rylands v Fletcher* if damage is done by escape of a dangerous thing (Chapter 12).

Does the Damage Arise from the State of the Premises?

If the injury or damage is suffered on the premises, we must ask whether the injury or damage arises from a danger associated with the state of the premises.

The duties set out in the Occupiers' Liability Acts have been understood as 'occupancy duties' (concerned solely with the state of the premises), to be contrasted with 'activity duties' (concerned with conduct or activities carried out on the premises). Despite the broad wording of both Occupiers' Liability Acts (1957 Act, section 1(1); 1984 Act, section 1 (1) (b), 'dangers due to the state of the premises or to things done or omitted to be done on them'), the Court of Appeal has held in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 WLR 1052, at [113]–[131],[2] and in *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, at [31], that only dangers

associated with the state of the premises are within the scope of the Acts. This distinction has been used to exclude liability under the Acts (rather than in negligence at common law) in recent cases such as *Poppleton v Trustees of Portsmouth Youth Activities Committee* [2008] EWCA Civ 646. Here the claimant was engaged in an inherently risky activity (use of a climbing wall) and he attempted a very dangerous manoeuvre which was beyond his level of competence. The severe injuries he sustained were not attributable to the state of the premises.[3] Similarly, in *Yates v National Trust* [2014] EWHC 222 (QB), [2014] PIQR P6, the claimant was seriously injured while hired by independent contractors to work as a tree surgeon on the defendants' land. He alleged that the defendants had taken no steps to ensure that their contractors' working methods were competent and safe. Nicol J held that no duty under the Occupiers' Liability Act 1957 was owed, as the dangers were due to the activities carried out, and not to the state of the premises.

The same distinction between activity and occupancy duties was observed by the Court of Appeal in the case of a trespasser (in that particular instance, a burglar) in *Revill v Newbery* [1996] QB 567. Since that case involved an activity (shooting a shotgun through the closed door of a shed) rather than a state or condition of the premises, it was dealt with as a case in negligence.

However, it is significant that in *Revill v Newbery* the provisions of the 1984 Act were still treated as relevant to the court's understanding of the negligence duty. A similar move was made in the more recent decision of *Everett v Comojo* [2011] EWCA Civ 13, in relation to visitors rather than trespassers. Here, guests at a members-only night club were stabbed by another guest. Since the attacker could not be found, a claim was brought against the nightclub itself. The Court of Appeal pointed out that this was a case of an alleged *positive* duty, to
p. 752 prevent ↵ deliberate acts of a third party. Common law has only reluctantly admitted such duties, as we saw in Chapter 4. However, the Court found it relevant that the defendant was recognized to owe certain positive duties to the claimants as its visitors. Similarly, occupiers of premises may owe duties *at common law* to protect visitors against the deliberate acts of third parties on the premises. Not only the existence, but also the content and extent of such duties, would be influenced by—even modelled upon—the 'common duty of care' set out in the 1957 Act, which is a duty to take such steps as are reasonable to ensure that the visitor is reasonably safe.

Smith LJ, *Everett v Comojo*
[2011] EWCA Civ 13; [2012] 1 WLR 150

> 35 Lord Faulks urged the court to say that any such duty (including the standard of care) should be narrowly drawn. I think that he had in mind the kind of definition which the court applied in the *Dorset Yacht* case where a high degree of foreseeability of the kind of harm in question was to be required before there could be liability. I am not prepared to say that, as between the managers of a nightclub and guests, there should be a higher degree of foreseeability than is required under the common duty of care in the Occupiers' Liability Act 1957. The degree of proximity (including the economic relationship) between the two is so close that I do not think any special rule of foreseeability is required in the interests of fairness, justice and reasonableness. I think that that was the kind of duty which the Australian judge had in mind in the passage from *Chordas's* case 91 ALR 149 quoted earlier. That is also the clear intention of the Canadian Occupiers Liability Act. It follows that I do not think that the judge misdirected himself when he adopted the *Chordas* decision as the basis of the duty.
>
> 36 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. I do not think it possible to define the circumstances in which there will be liability. Circumstances will vary so widely. However, I think it will be a rare nightclub that does not need some security arrangements which can be activated as and when the need arises. What they need to be will vary. One can think of obvious examples where liability will attach. In a nightclub where experience has shown that entrants quite often try to bring in offensive weapons it may be necessary to arrange for everyone to be searched on entry. In a nightclub where outbreaks of violence are not uncommon, liability might well attach if a guest is injured in an outbreak of violence among guests and there is no one on hand to control the outbreak. It may be necessary for the management of some establishments to arrange for security personnel to be present at all times within areas where people congregate. On the other hand, in a respectable members-only club where violence is virtually unheard of no such arrangements would be necessary. The duty on management may be no higher than that staff be trained to look out for any sign of trouble and to alert security staff.

In the present case, there had been no breach of the relevant duty. However, the very recognition of such a duty in this case is significant. The 'common duty of care' here is interpreted as having a far wider application than the content of the statutory provisions themselves. Perhaps then statutory duties have come to influence
p. 753 the common law in relation to duties ↵ between occupier and visitor (or in *Revill v Newbery*, trespasser). Another interpretation is that the statutory language has been too restrictively interpreted in earlier cases, so that the statutory duty itself should be interpreted as applicable to all cases where the duty owed arises out of the relationship between an occupier, and an entrant onto land or premises,[4] irrespective of whether the harm

is caused by the state of premises, or something done on those premises. The Court of Appeal appears at times to have spoken in terms of the *same* duty—the common duty of care—in these different contexts; but the more general run of authority suggests that the duties at common law and under statute are better seen as analogous, rather than one and the same.

Whose Responsibility to Guard against the Risks?

It is true that some fairly technical questions arise in interpreting the statutory liabilities. But the underlying question of whose obligation it is to take precautions in respect of dangers is of great social importance. For many years, the obvious need in this area was for a greater awareness of the duties of occupiers, particularly in respect of children. Under *Addie v Dumbreck* [1929] AC 358, the only duty owed to a trespasser (even a child) was the duty not deliberately or recklessly to *cause* harm. In that case, a 4-year-old child was killed when he fell through the unprotected cover of a mill wheel. Despite knowledge on the part of the defendants that young children trespassed on their premises, no duty was owed in respect of this glaring hazard. The 1984 Act was a response to the House of Lords' later inconclusive efforts to set out the contents of a more humane duty towards trespassers in another case involving a child: *British Railways Board v Herrington* [1972] AC 877. Although the members of the House were agreed that a duty was owed to the child in that case, there was considerable variation in the formulation of the duty itself and of the circumstances in which it arose. The Law Commission proposed clarifying legislation which became the 1984 Act (Law Com No 75, Cmnd 6428, 1976).

In more recent years, the chief concern has changed. There is perceived to be a risk of over-protection and (therefore) of over-deterrence. In a number of recent cases, the House of Lords and Court of Appeal have emphasized that not all hazards are the responsibility of occupiers. Occupiers of land, including especially those whose land provides important public amenity, should not be compelled to over-prioritize safety in the face of obvious hazards. Safety is of course important, but as Lord Scott of Foscote has put it, this 'is no reason for imposing a grey and dull safety regime on everyone' (*Tomlinson v Congleton BC* [2003] UKHL 47, at [94]). The common thread of these cases is rejection of the idea that competent adults must be, in effect, prevented from running risks that they can easily appreciate for themselves.[5]

These developments are at least in tune with the sentiments behind the Social Action, Responsibility and
p. 754 Heroism Act, discussed in Chapter 3. It is quite possible that this statute ↵ will be relevant in an occupiers' liability case, section 2 stating that '[a] court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members'. Given the emphasis already placed on social utility and the responsibility of claimants in the occupiers' liability context, the best guess is that this will, or would, make little difference to the approach already taken by the courts, particularly when assessing whether the risk was one against which protection should have been offered.

1.2 Who Is an Occupier?

Under both statutes, the duties are owed by an 'occupier'. There is no statutory definition of 'occupier', and the meaning of the term is to be deduced from case law (1957 Act, section 2(1)). 'Occupation' is a matter not of ownership but of effective control. There may be more than one occupier of premises, as the next case illustrates.

Wheat v Lacon [1966] AC 552

The defendant brewers were the owners of a public house. The running of the business was entrusted to a manager, employed under a service agreement. The manager and his wife lived on the first floor of the premises.

The plaintiff and her husband were staying on the first floor as paying guests of the manager's wife. The plaintiff's husband suffered a fatal fall while on his way downstairs to buy drinks from the bar. It was found that the accident was caused by a handrail which was too short, in combination with absence of proper lighting on the stairs. Were the defendant brewers liable as 'occupiers'?

The House of Lords found that the defendants were 'occupiers' of the first floor of the premises, and owed the common duty of care under the 1957 Act. However, they had not breached this duty. The defendant brewers, and their manager, could both be occupiers of the premises simultaneously. Although they might be in occupation of different parts of the premises, in this case *both* parties were occupiers of the first floor. The relevant duties owed under the Act would depend upon the 'circumstances' of the occupation:

> **Lord Denning, at 580–1**
>
> In the light of these cases, I ask myself whether the brewery company had a sufficient degree of control over the premises to put them under a duty to a visitor. Obviously they had complete control over the ground floor and were 'occupiers' of it. But I think that they had also sufficient control over the private portion. They had not let it out to Mr Richardson by a demise. They had only granted him a licence to occupy it, having a right themselves to do repairs. That left them with a residuary degree of control which was equivalent to that retained by the Chelsea Corporation in *Greene's* case [1954] 2 Q.B. 127. They were in my opinion 'an occupier' within the Act of 1957. Mr Richardson, who had a licence to occupy, had also a considerable degree of control. So had Mrs Richardson, who catered for summer guests. All three of them were, in my opinion, 'occupiers' of the private portion of the 'Golfer's Arms.' There is no difficulty in having more than one occupier at one and the same time, each of whom is under a duty of care to visitors...
>
> p. 755 ↵ What did the common duty of care demand of each of these occupiers towards their visitors? Each was under 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. So far as the brewery company are concerned, the circumstances demanded that on the ground floor they should, by their servants, take care not only of the structure of the building, but also the furniture, the state of the floors and lighting, and so forth, at all hours of day or night when the premises were open. But in regard to the private portion, the circumstances did not demand so much of the brewery company. They ought to see that the structure was reasonably safe, including the handrail, and that the system of lighting was efficient. But I doubt whether they were bound to see that the lights were properly switched on or the rugs laid safely on the floor. The brewery company were entitled to leave those day-to-day matters to Mr and Mrs Richardson. They, too, were occupiers. The circumstances of the case demanded that Mr and Mrs Richardson should take care of those matters in the private portion of the house. And of other matters, too.
>
> ... So far as the handrail was concerned, the evidence was overwhelming that no one had any reason before this accident to suppose that it was in the least dangerous. So far as the light was concerned, the proper inference was that it was removed by some stranger shortly before Mr Wheat went down the staircase. Neither the brewery company nor Mr and Mrs Richardson could be blamed for the act of a stranger.

Premises that are empty are not necessarily 'unoccupied' for these purposes. In *Harris v Birkenhead Corporation* [1976] 1 All ER 341, the local authority made a compulsory purchase order and served notices on the tenant and owner of a house requiring them to surrender occupation of the premises. The local authority was treated as 'occupier' of the premises from the time that they were vacated, even though they had taken no further positive steps and had no physical 'presence' on the property. It was through their lawful actions that the property had become vacant, and they therefore exercised control over the premises.

Contractors who are engaged in carrying out work on premises may attain sufficient control over the site to be treated as 'occupiers'. This may lead to a situation of dual occupation: *Ferguson v Welsh* [1987] 1 WLR 1553, below. On the other hand, in some circumstances contractors may have sole control, to the exclusion of the

owner of the property who has employed them. This was the case in *Matthewson v Crump* [2020] EWHC 3167, where the property owner had spent very little time at the house after purchase, while it was being renovated. A contractor who was injured due to the state of the premises had no action against the owner, who could not be described as an occupier.

An important question about occupancy duties relates to the position of landlords during the time of a tenancy. In *Essex CC v Davies* [2019] EWHC 3443 (QB), the Court affirmed that it was bound by the controversial decision of the House of Lords in *Cavalier v Pope* [1906] A.C. 428 (which it had been held at first instance was inapplicable on the facts): a landlord who lets premises in a dangerous state is not liable for personal injury to the tenant's customers or guests for accidents happening during the period of the tenancy. In *Essex*, it was concluded that the rule applies irrespective of whether the landlord assumes duties of repair during the tenancy. The landlord's duties will be found instead in s.4 Defective Premises Act 1972, which imposes a duty of care in relation to defects of which it knew or should have known.

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1.3 The Duty Owed to 'Visitors' Under the Occupiers' Liability Act 1957

Occupiers' Liability Act 1957

Preliminary

1—(1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

(a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and

(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

(4) A person entering any premises in exercise of rights conferred by virtue of—

(a) section 2(1) of the Countryside and Rights of Way Act 2000, or

(b) an access agreement or order under the National Parks and Access to the Countryside Act 1949,

is not, for the purposes of this Act, a visitor of the occupier of the premises.

Extent of occupier's ordinary duty

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.

(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.

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(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. ...

Implied Term in Contracts

5.—(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

...

To Whom is the Duty Owed?

The 1957 Act replaces the various duties owed by occupiers at common law with a single statutory duty, the common duty of care (section 2(1)). The duty is owed to all those who would have been classed either as invitees, or as licensees, at common law.

Lord Denning, *Roles v Nathan*
[1963] 1 WLR 1117, at 1122

> [The 1957 Act] has been very beneficial. It has rid us of those two unpleasant characters, the invitee and the licensee, who haunted the courts for years, and it has replaced them by the attractive character of the visitor, who has so far given no trouble at all.

p. 758 ↵ An **invitee** was a person who has been invited on to the premises. A **licensee** was someone who merely had permission to enter the premises. This permission did not need to be express. Whether an individual had an 'implied' licence to be present was a question of fact.

In addition to those counting as invitees or licensees, section 1(6) adds to the category of 'visitors' all those who enter premises **in the exercise of a right conferred by law**. Section 5 provides that where a person enters premises **under the terms of a contract**, a term will (if necessary) be implied into the contract that the common duty of care is owed.

There have been some uncertainties in the relevant classification of visitors to whom the common duty of care is owed, and we now consider some of these uncertainties.

Implied Licences

When is it to be *implied* that a party has permission to enter on to the premises? This has become much less of an issue since the introduction of clear duties to non-visitors under the 1984 Act. However, before the decision in *Herrington* (earlier), when very few duties were owed to trespassers, courts were perhaps over-eager to think of reasons why permission to enter could be implied. Children became the main beneficiaries of implied licences (though see *Lowery v Walker* [1911] AC 10 for a case where adults were treated as implied licensees, since the occupier had done nothing over a period of many years to deter people from walking across his land). In *Cook v Midland Great Western Railway Co of Ireland* [1909] AC 229, the House of Lords was prepared to accept that children who entered on to the defendant's land without permission and played on a railway turntable might be treated as doing so with the 'leave and licence' of the defendants, given their knowledge that children often came on to the land, and given that the turntable was likely to be very attractive to children. This case was later described by Devlin J as the 'classic case' of an *allurement to children* (*Phipps v Rochester* [1955] 1 QB 450, at 462). As we will see in Section 1.4 below, it is in respect of children that a duty to provide protection to non-visitors is now most likely to be established under the 1984 Act. That being so, implied licences are not regularly discussed in recent case law.

Purpose of the Visit

A person may have permission to enter premises for one reason, yet cease to be classed as a visitor if he or she exceeds the terms of that permission. This was confirmed by the House of Lords in the case of *Tomlinson v Congleton* [2003] UKHL 47; [2004] 1 AC 46, in which the claimant suffered catastrophic injuries through diving in shallow water in a lake where swimming was not permitted. His head had struck the sandy bottom of the lake, and he had broken his neck. The claimant's advisers conceded that he was, at the time of his injury, a trespasser. There was some controversy in the House of Lords over whether that concession was correctly made, partly because the claimant's argument was precisely that more steps should have been taken to *prevent him* from swimming. It was accepted by the majority of judges (with the disagreement of Lord Scott, at [91]) that he was indeed a trespasser. But it was also accepted that this would not be the decisive factor in this case, which was treated as involving an obvious hazard. Neither visitors nor trespassers need to be warned of obvious hazards (see, for example, *Darby v National Trust*, below, and *Poppleton v Trustees of Portsmouth Youth Activities Committee*, earlier). The absence of duty to warn of obvious hazards may also be relevant in respect of children, as we will see.

p. 759 **Lord Hoffmann, *Tomlinson v Congleton***
[2003] UKHL 47; [2004] 1 AC 46

> 7 … The council … said that once he entered the lake to swim, [the claimant] was no longer a 'visitor' at all. He became a trespasser, to whom no duty under the 1957 Act is owed. The council cited a famous bon mot of Scrutton LJ in *The Carlgarth* [1927] P 93, 110: 'When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters'. This quip was used by Lord Atkin in *Hillen v ICI (Alkali) Ltd* [1936] AC 65, 69 to explain why stevedores who were lawfully on a barge for the purpose of discharging it nevertheless became trespassers when they went on to an inadequately supported hatch cover in order to unload some of the cargo. They knew, said Lord Atkin, at pp 69–70, that they ought not to use the covered hatch for this purpose; 'for them for such a purpose it was out of bounds; they were trespassers'. So the stevedores could not complain that the barge owners should have warned them that the hatch cover was not adequately supported. Similarly, says the council, Mr Tomlinson became a trespasser and took himself outside the 1957 Act when he entered the water to swim.
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> 8 Mr Tomlinson's advisers, having reflected on the matter, decided to concede that he was indeed a trespasser when he went into the water. Although that took him outside the 1957 Act, it did not necessarily mean that the council owed him no duty.
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> …
>
> 13 … I have … come to the conclusion that the concession was rightly made. The duty under the 1984 Act was intended to be a lesser duty, as to both incidence and scope, than the duty to a lawful visitor under the 1957 Act. That was because Parliament recognised that it would often be unduly burdensome to require landowners to take steps to protect the safety of people who came upon their land without invitation or permission. They should not ordinarily be able to force duties upon unwilling hosts. In the application of that principle, I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do. In both cases, the entrant would be imposing upon the landowner a duty of care which he has not expressly or impliedly accepted. The 1984 Act provides that even in such cases a duty may exist, based simply upon occupation of land and knowledge or foresight that unauthorised persons may come upon the land or authorised persons may use it for unauthorised purposes. But that duty is rarer and different in quality from the duty which arises from express or implied invitation or permission to come upon the land and use it.
>
> 14 In addition, I think that the concession is supported by the high authority of Lord Atkin in *Hillen v ICI (Alkali) Ltd* [1936] AC 65. There too, it could be said that the stevedores' complaint was that they should have been warned not to go upon the hatch cover and that logically this duty was owed to them, if at all, when they were lawfully on the barge.
>
> …

The categorization of the claimant as a trespasser in *Tomlinson v Congleton* influenced another appellant to make a similar concession in *Rhind v Astbury Water Park* [2004] EWCA Civ 756. This was another case of catastrophic injuries suffered in shallow water, though this time there was a concealed hazard. The appellant accepted on the basis of *Tomlinson v Congleton* that when he had entered the water contrary to express
p. 760 prohibition, he had ↵ become a trespasser and any duty owed would be under the 1984 Act. This was eventually decisive, since a 1984 Act duty is owed only if the occupier has knowledge which ought to alert him to the existence of the danger. That was not the case in *Rhind*, where there was a concealed hazard of which the occupier was not aware.

In *Spearman v Royal United Bath Hospital* [2017] EWHC 3027 (QB), the Court declined to treat a vulnerable and confused patient as a trespasser, when he ventured into an area which was prohibited. The nature of his condition was such that he did not comprehend that access to the roof space—from which he fell—was not permitted, and not enough had been done to keep him safe from this danger. The hospital needed to foresee the dangers to ill and confused patients such as the claimant. In *Ovu v London Underground* [2021] EWHC 2733 (QB), however, the role of intentionality in cases where visitors exceed the terms of their permission was qualified. Here, the deceased had fallen to his death from a fire escape—which was itself found not to be defective—after entering a non-public area of an underground station. He had been intoxicated, and had passed clear warnings that he was entering a prohibited area. In order to enter the area, he passed through gates which opened in one direction only, meaning that he could not return. It was held that even if he had in fact changed his mind about his actions, he was and remained a non-visitor at the time of his death. This implied the more qualified duty to be found under the OLA 1984 (Section 1.4), which relates only to dangers of which the occupier was or should be aware.

It should also be noted that the duty owed under the 1957 Act is only a duty to keep the visitor safe *for the purposes for which he is invited or permitted by the occupier to be there* (section 2(1)). This will often reinforce the effect of the above cases, since the duty will not extend to prohibited activities unless (for example) the prohibition is not sufficiently clear.

Users of Rights of Way

Persons who are using a right of way are not owed a duty under the 1957 Act, since they do not come within any of the categories above: *Holden v White* [1982] QB 679 (private rights of way); *Greenhalgh v BRB* [1969] 2 QB 286 (public rights of way). Users of **private** rights of way are expressly included within the provisions of the 1984 Act (below). Users of **public** rights of way, however, seem to enjoy no protection under either statute.

Those who enter premises under the 'right to roam' provisions of the Countryside and Rights of Way Act 2000, or via an access agreement under the National Parks and Access to the Countryside Act 1949, are excluded from the 1957 Act (sections 1(4)(a) and (b) respectively). We consider duties owed to non-visitors when we turn to the 1984 Act, below.

The Content of the 'Common Duty of Care' under the 1957 Act

The duty owed by the occupier 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 …' (section 2(2)).

This is clearly a negligence-type duty, since it turns on acting reasonably. However, it is also clearly a duty to *take steps*, and this is obviously capable of including positive elements in the form of obligations to repair, fence, warn, and so on. Equally, it is an 'objective' duty, focused on whether the premises are 'reasonably safe'. The existence of some reasonably foreseeable risk of harm does not show that the premises were not reasonably safe. In *Rochester Cathedral v Debell* [2016] EWCA Civ 1094, the claimant was injured after tripping over a small lump of concrete 'protruding from the base of a traffic bollard' in a cathedral precinct. A first
p. 761 instance judge awarded damages; but the Court of Appeal emphasized that ↵ 'not all foreseeable risks give rise to the duty to take remedial action' (para [25]). The question was not simply whether there was a foreseeable danger, but 'whether the piece of concrete created a danger of a kind which the Cathedral authorities were required to address' (para [26]). Applying this test, there was no such duty in this case.

Warnings

The occupier may be able to discharge the common duty of care by issuing an appropriate warning. However, it is important to note that a warning does not discharge the duty *unless* it is sufficient to keep the visitor reasonably safe (section 2(4)(a)). For example, a sign may warn of a dangerous bridge, but does the sign also make clear where a safe crossing point may be found? (*Roles v Nathan* [1963] 1 WLR 1117, at 1124.) In *Intruder Detection & Surveillance v Fulton* [2008] EWCA Civ 1009, a householder had not discharged his duty to contractors who came to his house to set up a burglar alarm system, though he had clearly warned them that there were no banisters on the first floor landing. These had been temporarily removed by other contractors in the process of renovation. No amount of warning could make the task safe, because the risk of falling through momentary error was so great.[6] Notably these were not 'experts' in respect of the particular danger concerned.

It should also be emphasized that the duty is to ensure that *the visitor* is safe, not that the *premises* are safe. Thus, an effective warning must be sufficient for the particular claimant to be made reasonably safe. In the case of children (unless perhaps there is a reasonable expectation that they will be accompanied), a warning may need to be much clearer. Conversely, in *Roles v Nathan*, the particular visitors in question were specialists and, given this (particularly in the light of section 2(3)(b)), the warning that was given sufficed.

Importantly, recent cases have emphasized that there is no duty to warn adults, at least,[7] of dangers that are obvious—a point that was also central to the decision in *Tomlinson v Congleton* (above). In *Staples v West Dorset District Council* [1995] PIQR 439, the claimant fell on 'the Cobb' at Lyme Regis. The Cobb is an obviously slippery algae-covered surface (which is frequently drenched with seawater). The Court of Appeal rejected an argument that the claimant should have been warned of the danger.

A further illustration is *Lewis v Wandsworth LBC* [2020] EWHC 3205 (QB), where there was no duty to warn a pedestrian using a footpath through a park of the dangers of cricket balls being hit beyond the boundary of a pitch located very close to the park. The fact that the cricket match was being played was clearly evident, as

was the danger of the hard ball being hit towards the path. It was also important that the path had been located close to the pitch for many years, without any injuries occurring. In general, courts are responsive to the disproportionate and frankly unhelpful proposition that parks, amenities and historic locations should be full of warnings of inherent and obvious dangers.

In *English Heritage v Taylor* [2016] EWCA Civ 448 on the other hand, the Court of Appeal concluded that a judge had been entitled to find that the danger posed by a steep drop below an 'informal path' taken by the claimant
p. 762 was *not* obvious, so that the duty to take reasonable ↵ steps was owed. The Court found it necessary to add the following comments, to avoid any broader interpretation of the case, and to seek to meet the argument that a duty to warn of such dangers at heritage sites, principally ancient castles, would be both onerous and undesirable. It may be wondered, however, whether the insistence that steps taken need only be those that are 'reasonable'—including on aesthetic grounds—will offer much guidance:

The Master of the Rolls, *English Heritage v Taylor*
[2016] EWCA Civ 448; [2016] PIQR P14

Conclusion

28 Mr O'Sullivan says that the Recorder's finding against the defendant is extremely important. He says that, as with many public organisations which have large areas of land and premises open to the public, it has acted (as an occupier) in a way consistent with the principle that adult visitors do not require warnings of obvious risks except in cases where they do not have a genuine and informed choice. He also says that, if we dismiss this appeal, organisations like English Heritage will be under pressure to adopt an unduly defensive approach to their guardianship of historic sites which are part of our precious heritage and this will lead to an unwelcome proliferation of unsightly warning signs. This is contrary to the public interest. The courts should be astute to avoid such a consequence. Moreover, a decision in favour of the claimant in the present case will fuel the popular conception that this country is in the grip of a compensation culture.

29 I do not accept these *in terrorem* arguments. First, the decision that I have reached in this case is a straightforward application of the principle to which I have referred at [28] above. There is no basis for interfering with the Recorder's finding that the sheer drop from the grass pathway into the moat was not an obvious danger.

30 Secondly, I accept that questions of whether a danger is obvious may not always be easy to resolve. In some cases, this may present an occupier of land with a difficulty. But there are many areas of life in which difficult borderline judgments have to be made. This is well understood by the courts and is taken into account in deciding whether negligence or a breach of s.2 of the Act has been established. In this context, it is highly relevant that the common duty of care is to take such care 'as in all the circumstances is reasonable' to see that the visitor is 'reasonably' safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there. The court is, therefore, required to consider all the circumstances. These will include how obvious the danger is and, in an appropriate case, aesthetic matters. If an occupier is in doubt as to whether a danger is obvious, it may be well advised to take reasonable measures to reduce or eliminate the danger. But the steps need be no more than reasonable steps. That is why the decision in this case should not be interpreted as requiring occupiers like English Heritage to place unsightly warning signs in prominent positions all over sensitive historic sites. They are required to do no more than take reasonable steps. The Recorder found the existence of a breach of the common duty of care on a very specific basis, namely the failure to provide a sign warning of a sheer drop which was not obvious.

31 I have added these concluding comments because it is important that the significance of this decision should not be misunderstood. But for the reasons that I have given, I would dismiss this appeal.

p. 763 **'Specialists'**

To paraphrase section 2(3)(b), an occupier can expect a specialist (a 'person in the exercise of his calling') to guard against risks ordinarily associated with his job. This is provided the occupier 'leaves him free to do so'. In *Roles v Nathan* [1963] 1 WLR 1117, two chimney sweeps were given appropriate information about a defective boiler. The occupier was not liable for their deaths because, had they heeded the warnings given and acted with due care, they could have made themselves safe. It does not follow from section 2(3)(b) that *no duty at all* is owed in respect of 'ordinary' risks of specialized work. In *Salmon v Seafarer Restaurants* [1983] 1 WLR 1264, a fireman was injured when attending a fire started through the negligence of the occupier's employees. Woolf J (giving judgment for the Court of Appeal) pointed out that 'when [the firefighters] attend they will be at risk even though they exercise all the skill of their calling'. Section 2(3)(b) only provides that the occupier may expect the specialist to exercise a level of care appropriate to his or her calling. If the visitor exercises such skill and care and the risk nevertheless remains, then this subsection gives no reason to deny compensation to the injured party. This case can be clearly contrasted with *Roles v Nathan*, where the evidence was that the sweeps did not act with appropriate regard for their own safety, and did not heed clear warnings.

Children

Section 2(3)(a) states the converse rule, that occupiers must be prepared for children to be *less* careful than adults when it comes to their own safety. Pre-1957 Act case law is often referred to in interpreting this section, but this case law is inconsistent.

In *Glasgow Corporation v Taylor* [1922] 1 AC 44, the defendants were occupiers of a Botanical Garden to which children (including unaccompanied children) had free access. The plaintiff's son, who was 7 years old, went to the garden unaccompanied and died when he ate the berries of a poisonous shrub. Since the child was entitled to be present in the relevant part of the gardens, which was much frequented by children, and since there was ready access to the tree, the House of Lords held on a preliminary issue that there was a good cause for trial. The berries could constitute a hidden danger as against a child. This case indicates that the idea of an 'allurement' or 'trap' for children may have some use where children are present with permission, and is not limited to cases of 'implied licence'.

A continuing puzzle, mentioned but not resolved in *Glasgow Corporation v Taylor*, concerns the degree to which occupiers are obliged to make their premises safe for *unaccompanied* children. Smaller children are of course expected to be less careful than older ones; but by the same token adults are expected to supervise those small children to a greater extent. The degree of parental supervision that is considered appropriate may well be expected to change over time, although it is also not surprising that in the days when (it appears) children as young as 4 were left to wander public parks alone,[8] the courts refused to impose on occupiers the duties that parents did not (or could not)[9] fulfil.

p. 764 ↵ Devlin J attempted to set out a workable approach to such cases in *Phipps v Rochester Corporation* [1955] 1 QB 450 (a pre-1957 Act case in which he treated a 5-year-old child wandering on to an unfenced 'building site' near to his home as an implied licensee). His approach to the content of the duty owed requires an interpretation of where 'prudent people' will allow their children to go unaccompanied:

> **At 471**
>
> [The occupier's] duty is to consider with reasonable care whether there are on his premises, so far as he knows their condition, any dangers that would not be obvious to the persons whom he has permitted to use them; and if there are, to give warning of them or to remove them. If he rightly determines a danger to be obvious, he will not be liable because some individual licensee, albeit without negligence in the special circumstances of his case, fails to perceive it …
>
> I think that it would be an unjustifiable restriction of the principle if one were to say that although the licensor may in determining the extent of his duty have regard to the fact that it is the habit, and also the duty, of prudent people to look after themselves, he may not in that determination have a similar regard to the fact that it is the habit, and also the duty, of prudent people to look after their little children. If he is entitled, in the absence of evidence to the contrary, to assume that parents will not normally allow their little children to go out unaccompanied, he can decide what he should do and consider what warnings are necessary on that basis. He cannot then be made liable for the exceptional child that strays, nor will he be required to prove that any particular parent has been negligent.

The result of this was that if the child was so young that a degree of supervision by an adult ought to be expected, then the only required warnings are those that would be needed to alert a guardian to the danger. The relevant danger in *Phipps* (a trench in the ground) being obvious to an adult, there was no breach of the occupier's duty. This was not a case where fencing the entire area was regarded as feasible or necessary, and this distinguishes it from cases where children wander onto the railway, for example.

Duty of Visitors in General to be Careful

Apart from the specific references in section 2(3) to children and experts, there is also a general reference to 'the degree of care, and of want of care, which would ordinarily be looked for in such a visitor'. In *Tacagni v Cornwall* [2013] EWCA Civ 702, a claim failed where a pedestrian had been 'out late at night, having had a few drinks, on an unlit road, without a torch and in new and uncomfortable flip flops'. In finding the council partly to blame for injury to the claimant, the judge had 'left out of account, in considering whether Penwith were in breach of duty, a highly material factor, namely what degree of care could be expected of an ordinary visitor' (Lewison LJ, [4]). However, in *AB v Pro-Nation Ltd* [2016] EWHC 1022 (QB), it was relevant when judging the safety of a staircase to bear in mind that it was located in licensed premises. Referring to section 2(3) of the Act, the judge noted the claimant's argument 'that one of the purposes for entering the Pulse Bar was to consume alcohol and that therefore the Defendant should have had regard to the possibility that visitors were
p. 765 under the influence of alcohol when using the staircase: the staircase ought to be ↵ safe for use by visitors who had been drinking.' That point appears to have been accepted. The claimant had lost his footing after drinking around six or seven pints of beer: this was momentary carelessness and not a suitable case for a finding of contributory negligence; but it was also to be expected given the purpose of his visit. Equally, in *White Lion Hotel v James*, which is extracted in Chapter 3, the Court of Appeal held that a duty was owed to a hotel guest who had, after attending a wedding, chosen to sit on a window sill to smoke. Perhaps this is a further context in which visitors may be expected to be intoxicated; but it is also likely that the defective window posed a danger to a guest whether they were intoxicated, or not. The key question was considered to

be whether the guest had voluntarily assumed the risk (OLA 1957, s.2(5)); and here the fact that the guest was (predictably) intoxicated was a reason why they were unable to absolve the occupier of responsibility—a factor of assistance to their claim. It can therefore be said that the treatment of claimants who are intoxicated is at the very least quite nuanced. Intoxication did not save the claimant in *Ovu v London Underground* [2021] EWHC 2733 (QB), who made a poor choice, from being treated as having become a trespasser, for example.

Dangers Created by Independent Contractors

According to section 2(4)(b) of the 1957 Act, an occupier is not liable 'without more' for dangers created by independent contractors in the execution 'of any work of construction, maintenance or repair'. In *Ferguson v Welsh* (below) this was interpreted by the House of Lords as extending to demolition work. To benefit from the protection of this provision, the occupier must have acted reasonably in entrusting the work to a contractor and must also have taken reasonable steps to ensure *both* that the contractor was competent, *and* that the work had been 'properly done'. It should be remembered that these are ways in which the occupier may *discharge* the common duty of care, since they amount to reasonable steps to keep the visitor safe. Under what circumstances will an occupier still be liable under the Act for harm done by an independent contractor on the premises? This has become a vexed question.

In *Ferguson v Welsh* [1987] 1 WLR 1553, a district council contracted with a company (S) to carry out demolition work on their premises. The council prohibited subcontracting of the work without permission. S nevertheless did subcontract the work to two brothers (W) who adopted unsafe working practices. The plaintiff (F) was offered a job by the W brothers, and while assisting with the demolition was seriously injured. Judgment was given against the W brothers. The appeal to the House of Lords concerned the possible liability of the council as occupier.

The House of Lords determined that the council had not breached its duty under the 1957 Act in this case. However, Lord Keith's interpretation of the potential duties was broad. Lords Brandon and Griffiths concurred with Lord Keith, but Lords Oliver and Goff added some qualifications. As we will see later, more recent cases in the Court of Appeal are hard to reconcile with Lord Keith's expansive view of the duties under the 1957 Act, and are more consistent with the views of Lords Oliver and Goff.

Lord Keith thought that the council should be treated as having 'invited' F on to the premises, since it had put S into occupation of the premises and 'put him [S] into a position to invite the W brothers and their employees onto them' (at 1559). This is questionable, since there was a prohibition on subcontracting without permission. Lord Goff by contrast thought it possible that F might be a visitor in respect of S, but a trespasser in respect of the council, although he was prepared to accept that F was a visitor for the sake of argument.

p. 766 ↵ Second, Lord Keith decided that the injury to F arose out of a danger that fell within the scope of the 1957 Act. This was expressly doubted by Lord Goff, who thought that F's injury 'arose not from the state of the premises but from the manner in which he carried out his work on the premises'. Lord Keith on the other hand said that the 'dangers' covered by the Act are 'not only … dangers due to the state of the premises but also known dangers due to things done or omitted to be done on them' (at 1559).

Third, Lord Keith interpreted the occupiers' duties under section 2(4)(b) quite broadly. Considering this provision, Lord Keith said:

> **At 1560–1**
>
> It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, *where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work,* it might well be reasonable for the occupier *to take steps to see that the system was made safe.*
>
> The crux of the present case therefore, is whether the council knew or had reason to suspect that Mr Spence, in contravention of the terms of his contract, was bringing in cowboy operators who would proceed to demolish the building in a thoroughly unsafe way. The thrust of the affidavit evidence admitted by the Court of Appeal was that Mr Spence had long been in the habit of sub-contracting his demolition work to persons who proceeded to execute it by the unsafe method of working from the bottom up. If the evidence went the length of indicating that the council knew or ought to have known that this was Mr Spence's usual practice, there would be much to be said for the view that they should be liable to Mr Ferguson. No responsible council should countenance the unsafe working methods of cowboy operators.
>
> [Emphasis added]

Lord Keith here speculates that *if* an occupier has 'reasonable grounds to suspect' unsafe working practices, they *may* have a duty to *supervise* the contractor's activities. Lord Oliver (at 1562), while agreeing that there was no breach of duty in this case, emphasized that he did not think any such duty of supervision, if it arose, would arise out of the defendant's status as occupier. More would be required than that:

> It is possible to envisage circumstances in which an occupier of property engaging the services of an independent contractor to carry out work on his premises may, as a result of his state of knowledge and opportunities of supervision, render himself liable to an employee of the contractor who is injured as a result of the defective system of work adopted by the employer. But I incline to think that his liability in such case would be rather that of joint tortfeasor than of an occupier.

Similarly, Lord Goff (at 1564) thought that Lord Keith's approach threatened to impose too extensive a duty on occupiers.

p. 767 ↵ More recently, in *Fairchild v Glenhaven* [2001] EWCA Civ 1881; [2002] 1 WLR 1052, the Court of Appeal set out a restricted approach to the coverage of the two Occupiers' Liability Acts. In particular, the Court of Appeal ruled that the 1957 Act and the 1984 Act are confined to 'occupancy duties', and do not extend to dangers arising out of *activities* carried out on the premises. This is inconsistent with Lord Keith's view that the injury to F in *Ferguson v Welsh* arose out of a danger that was within the scope of the duties under the 1957 Act.

The distinction in *Fairchild* was reaffirmed by the Court of Appeal in *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575:

> **Brooke LJ**
>
> 42 It appears … that some confusion lingers over the effect of the decision of this court in *Fairchild v Glenhaven Services Ltd* Of course, there may be many occasions when an occupier may be legally liable in negligence in respect of the activities which he permits or encourages on his land. This liability stems from his 'activity duty'. He may also be legally liable for the state of his premises, and this liability stems from his 'occupancy duty'. *Fairchild* was a rare case in which it was necessary to make a distinction between the two, and this court held that an employee of a very well-known firm of contractors was owed no occupancy duty by the CEGB in the early 1950s as occupiers of the power station in which the claimant contracted mesothelioma during the contract works.
>
> 43 It was unnecessary for the House of Lords in *Ferguson v Welsh* [1987] 1 WLR 1553 to get themselves involved in this arcane debate.

In *Bottomley v Todmorden*, the defendant cricket club had arranged for a two-man stunt team named 'Chaos Encounter' to conduct a pyrotechnic display at an annual fundraising event. The members of Chaos Encounter (who did not appeal a finding of liability against them) had invited the claimant to assist, and he was injured. The Court of Appeal found that this was a case where the occupier was liable because it had failed to exercise reasonable care to select competent and safe 'contractors' (albeit unpaid on this occasion). However, this liability was in negligence, and *not* under the 1957 Act (at [48]–[49]). Brooke LJ argued that the duty passed the *Caparo* test and that it was 'fair, just, and reasonable'.

Exclusion of Liability, and Defences

A Note about Notices

We have already seen that occupiers may provide warnings—sometimes in the form of notices—which if sufficient to keep the visitor safe may discharge the common duty of care. Notices may have more than one function, however. Of course, they may seek to exclude visitors altogether ('Keep Out!'), or they may set out the limits of permission ('No swimming'). In either case, they may be relevant in defining the status of the claimant as visitor or non-visitor (*Tomlinson v Congleton*, earlier in this chapter). Some notices, however, go further, and seek to exclude liability for injury or damage done ('the occupier accepts no liability for any injury suffered on the premises', or more simply, 'Enter at your own risk'). It is wise to keep in mind all three of these potential uses of a notice. In terms of their legal implications, they need separate consideration. Here we consider the last variation.

p. 768 ### Exclusion of Liability

How far is the occupier able to exclude or limit liability for injury or damage under the 1957 Act? Even in the absence of a contract, such notices are governed by the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015. Which statute applies seems to depend on whether the visitor is a 'consumer'. Neither statute

applies where the visit is purely recreational (or, in the case of the 1977 Act, educational), unless it falls within the business purposes of the occupier—eg, if the occupier makes money from recreational visitors.

Unfair Contract Terms Act (UCTA) 1977

1 Scope of Part I

(1) For the purposes of this Part of this Act, 'negligence' means the breach—

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);

(c) the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957.

...

(3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—

(a) from things done or to be done by a person in the course of a business (whether his own business or another's); or

(b) from the occupation of premises used for business purposes of the occupier;

and references to liability are to be read accordingly but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier.

2 Negligence liability

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

p. 769 [(4) This section does not apply to—

(a) a term in a consumer contract, or

(b) a notice to the extent that it is a consumer notice,

> (but see the provision made about such contracts and notices in sections 62 and 65 of the Consumer Rights Act 2015).][10]
>
> ### 11 The 'reasonableness' test
>
> (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. …

The Act expressly extends to liability under the 1957 Act (section 1(1)(c)). The provisions of section 2 apply *only* to 'business liability' (section 1(3)), which is defined by reference to the use of the premises for business purposes (section 1(3)(b)). If people gain access to the property for educational or recreational purposes, any resulting liability is *not* business liability, *unless* those educational or recreational purposes fall within the business purposes of the occupier. However, by amendment to section 2, if the claimant enters the premises pursuant to a consumer contract; or if the notice is a 'consumer notice', UCTA 1977 will not apply, and the relevant law will instead be found in the Consumer Rights Act 2015. The critical question will be what is a consumer notice? The answer can only be gleaned from the latter Act. By section 76(2), the definition of 'consumer' and of 'trader' will be the same in both parts of the Act. Therefore, all that is required is that the individual be 'acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'—that is, that they are *not* traders, professionals etc for the purpose of their visit. There is no need for the visitor to be intending to enter into a contractual relationship as 'consumer' when they enter the premises. However, by section 66(4), purely recreational visits are again outside the provisions below.

Consumer Rights Act (CRA) 2015

Part 1 Consumer Contracts for Goods, Digital Content and Services

2 Key definitions

(1) These definitions apply in this Part (as well as the definitions in section 59).

(2) *'Trader'* means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

(3) *'Consumer'* means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

...

p. 770

Part 2 Unfair Terms

61 Contracts and notices covered by this Part

(1) This Part applies to a contract between a trader and a consumer.

(2) This does not include a contract of employment or apprenticeship.

(3) A contract to which this Part applies is referred to in this Part as a *'consumer contract'*.

(4) This Part applies to a notice to the extent that it—

(a) relates to rights or obligations as between a trader and a consumer, or

(b) purports to exclude or restrict a trader's liability to a consumer.

(5) This does not include a notice relating to rights, obligations or liabilities as between an employer and an employee.

(6) It does not matter for the purposes of subsection (4) whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer.

(7) A notice to which this Part applies is referred to in this Part as a *'consumer notice'*.

(8) In this section *'notice'* includes an announcement, whether or not in writing, and any other communication or purported communication.

62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(5) Whether a term is fair is to be determined—

(a) taking into account the nature of the subject matter of the contract, and

(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

(6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

(7) Whether a notice is fair is to be determined—

(a) taking into account the nature of the subject matter of the notice, and

(b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.

(8) This section does not affect the operation of—...

(d) section 65 (exclusion of negligence liability).

p. 771

65 Bar on exclusion or restriction of negligence liability

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

(2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

(3) In this section '*personal injury*' includes any disease and any impairment of physical or mental condition.

(4) In this section '*negligence*' means the breach of—

(a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,

(b) a common law duty to take reasonable care or exercise reasonable skill,

(c) the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957, or

(d) the duty of reasonable care imposed by section 2(1) of the Occupiers' Liability (Scotland) Act 1960.

> **66 Scope of section 65**
>
> ...
>
> (4) Section 65 does not apply to the liability of an occupier of premises to a person who obtains access to the premises for recreational purposes if—
>
> (a) the person suffers loss or damage because of the dangerous state of the premises, and
>
> (b) allowing the person access for those purposes is not within the purposes of the occupier's trade, business, craft or profession.

It appears that UCTA 1977 will now apply *only* if the person entering the premises is *not* a consumer. Therefore, the provisions of UCTA in relation to occupiers' liability appear to apply only to those entering in the exercise of a trade, craft or profession. For others, the provisions of CRA 2015 will be relevant.

Business Liability and Trader-Consumer Liability

Under UCTA 1977, in cases of business liability, it is not possible to exclude or restrict liability for personal injury or death (section 2(1)). In the case of other damage (and property damage is covered by the 1957 Act), any attempt to exclude or restrict liability is subject to the test for reasonableness set out in section 11. Under CRA 2015, similar provisions apply to prevent exclusion of liability for personal injury or death where a trader is dealing with, or giving a notice to, a consumer (section 65). In the case of other damage, the test for fairness set out in section 62 will apply.

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Other Cases

In other cases, section 2 and (therefore) section 11 of UCTA do not apply; nor do sections 62 and 65 CRA 2015. At common law, before the enactment of UCTA, occupiers were regarded as free to exclude their liability to visitors provided they took reasonable steps to bring the exclusion of liability to the attention of the visitor. Since the occupier was free to grant or withhold permission to enter the premises, he or she should also be free to set the conditions of entry (*Ashdown v Williams* [1957] 1 QB 409). It is assumed that the position remains the same for occupiers whose occupation is not caught by the definition of 'business occupation' (above) or (where applicable) who are not traders dealing with consumers. Jones argues that several qualifications are needed to this general assumption (M. Jones, *Textbook on Tort*, 8th edn, Chapter 6, pp. 308–11). In particular, it is doubtful whether the reasoning in *Ashdown* is applicable to those who enter premises in exercise of a 'right conferred by law' (section 1(6)); it is possible that exclusion clauses should be ineffective against children (unless perhaps it is reasonable to expect them to be supervised by an adult—see earlier); and there is an argument that the duty owed to non-visitors is unexcludable (see later) so that it should also apply against visitors if all other liability is excluded.

Other Defences

Although the 1957 Act does not mention contributory negligence, it is clear that the provisions of the Law Reform (Contributory Negligence Act) 1945 are relevant to liabilities arising under both Occupiers' Liability Acts. For that reason, the partial defence of contributory negligence is available in actions under these statutes (see Chapter 7).

Section 2(5) of the 1957 Act specifically refers to risks which are 'willingly accepted' by the visitor, amounting to a statutory form of the general defence of *volenti non fit injuria* or willing acceptance of risk (Chapter 7). It is made clear in section 2(5) that the principles to be applied are the same as those applied at common law. The decision in *White Lion Hotel v James* [2021] EWCA Civ 31, which is of importance to the interpretation of the *volenti* defence in general, was therefore extracted in Chapter 7: a hotel guest who chose to go through a defective window and sit on the sill to smoke while intoxicated had not consented to carry the risk. We touch on some controversies with *volenti* in respect of non-visitors, later.

1.4 The Duty Owed to 'Non-Visitors' Under the 1984 Act

Occupiers' Liability Act 1984

1 Duty of occupier to persons other than his visitors

(1) The rules enacted by this section shall have effect, in place of the rules of the common law, to determine—

(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and

(b) if so, what that duty is.

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(2) For the purposes of this section, the persons who are to be treated respectively as an occupier of any premises (which, for those purposes, include any fixed or movable structure) and as his visitors are—

(a) any person who owes in relation to the premises the duty referred to in section 2 of the Occupiers' Liability Act 1957 (the common duty of care), and

(b) (those who are his visitors for the purposes of that duty).

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(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.

(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to

another).

[(6A) At any time when the right conferred by section 2(1) of the Countryside and Rights of Way Act 2000 is exercisable in relation to land which is access land for the purposes of Part I of that Act, an occupier of the land owes (subject to subsection (6C) below) no duty by virtue of this section to any person in respect of—

(a) a risk resulting from the existence of any natural feature of the landscape, or any river, stream, ditch or pond whether or not a natural feature, or

(b) a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile.

(6B) For the purposes of subsection (6A) above, any plant, shrub or tree, of whatever origin, is to be regarded as a natural feature of the landscape.

(6C) Subsection (6A) does not prevent an occupier from owing a duty by virtue of this section in respect of any risk where the danger concerned is due to anything done by the occupier—

(a) with the intention of creating that risk, or

(b) being reckless as to whether that risk is created.]

(7) No duty is owed by virtue of this section to persons using the highway, and this section does not affect any duty owed to such persons.

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

p. 774 (9) In this section—

'highway' means any part of a highway other than a ferry or waterway;

'injury' means anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition; and

'movable structure' includes any vessel, vehicle or aircraft.

To Which Parties is the Duty Owed?

Subject to the exclusion in section 1(7) of persons using the highway, the duty under the 1984 Act is capable of being owed to all those who are not visitors under the 1957 Act. Therefore, the duties are not uniquely owed to individuals who can be described as 'trespassers'. Duties to people who enter in accordance with the 'right to roam' provisions of the Countryside (Rights of Way) Act 2000 are subject to special conditions.

When is the Duty Owed?

It has been said that the duty under the 1984 Act is a 'lesser duty, as to both incidence and scope' (Lord Hoffmann, *Tomlinson v Congleton*, at [13]). Not every non-visitor is owed a duty on every occasion. The criteria relevant to establishing *whether a duty arises* on a specific occasion are set out in section 1(3) of the 1984 Act.

These provisions have no direct counterpart in the 1957 Act, since the common duty of care under that Act is always owed to visitors.

According to section 1(3)(a), no duty will arise unless the occupier is aware of the danger *or has reasonable grounds to believe* that it exists. Similarly, according to section 1(3)(b), no duty will be owed to the non-visitor unless the occupier knows *or has reasonable grounds to believe* that the non-visitor is in (or likely to come into) the vicinity of the danger. Having 'reasonable grounds to believe' involves a subjective element: what knowledge did the occupier actually have?

In *Donoghue v Folkestone Properties* [2003] QB 1008, the claimant (a professional diver) chose to dive from a slipway into a harbour after midnight in midwinter. He struck his head on a grid-pile under the water and broke his neck, becoming tetraplegic. At first instance, the judge held that the defendants knew that substantial numbers of people used the slipway for diving into the harbour and that the grid-piles constituted a danger at certain states of the tide. Since these constituted a concealed danger, this was the sort of risk against which the occupier ought to offer some protection. Therefore, the defendants had a duty at least to place a warning notice on the slipway, since this would have deterred the claimant from diving. This was not a case, it might be noted, where the claimant had full knowledge of the risk involved.

The Court of Appeal reversed the judge's finding of liability, on the basis that the condition in section 1(3)(b) was not satisfied. Although the occupier was aware that people did use the slipway *at certain times*, they had no relevant knowledge of the likely presence of an individual at the actual time and place of the accident. A duty may thus be owed in the summer, but not in the winter. It should be noticed that although diving into a harbour in midwinter is not ordinarily to be expected, offering protection to winter visitors might not impose any additional burdens. A permanent notice, for example, would deter both summer and winter visitors. Lord
p. 775 Phillips suggested that if the council had displayed a notice ↵ during the summer, but taken it down during the winter, they would not have been in breach of a duty (at [56]). He concluded that a council which offered no protection at all could not therefore be in breach during the winter, either.

In *Rhind v Astbury Water Park* [2004] EWHC Civ 756 the position was more straightforward in that the defendant occupier was not in possession of any information which would have indicated the presence of the hidden danger—in this case, a submerged fibreglass container resting on the bottom of a lake. For that reason, the claim was dismissed on an application of section 1(3)(a). This illustrates the less onerous nature of the 1984 Act duties. In principle there is no obligation to check for hidden dangers in the water if swimming is prohibited. If the claimant had been a visitor, there would have been a duty to take positive steps of just this sort in order to ensure that he was reasonably safe.

There is a further important condition in section 1(3)(c). A duty will be owed only if the risk is one against which the occupier *may reasonably be expected to offer the non-visitor some protection*. It is important to note that this requires an examination of what is reasonable in relation to the *specific* trespasser. In *Ratcliff v McConnell*, the Court of Appeal emphasized that the claimant was an adult and could reasonably be expected to appreciate obvious risks which would be less obvious to a child. The Court of Appeal drew attention to the earlier case of *McGinlay (or Titchener) v BRB* [1983] 1 WLR 1427, a case under the Occupiers' Liability (Scotland) Act 1960. Here, a 15-year-old child had been considered sufficiently mature to appreciate the dangers of slipping through the gaps in a fence and wandering on to a railway line.

Obvious Dangers

The 1984 Act duty will not generally be owed in respect of obvious dangers (*Donoghue v Folkestone*, at [33]–[35]). If there are reasons to expect the presence of a *child* trespasser, however, then the same danger may give rise to a duty, unless the child should be mature enough to appreciate the danger.

In *Young v Kent County Council* [2005] EWHC 1342, the presence of children on a school roof was to be expected, even though the roof was clearly out of bounds. The child claimant was present at the school while attending a youth club, and it was known that children had gone on to the roof from time to time. On this occasion, the child was retrieving a football. Insufficient measures were taken to prevent access to the roof:

> **Morison J**
>
> 33 … the danger of serious injury to a child, albeit a trespasser, was or should have been apparent to the school, and the prevention of accident was cheap. In my view, any school such as this one ought to have carried out a risk assessment of their premises and, if they had done so, they would have come to the conclusion that there was a risk of children getting onto the roof and suffering injury or death, and their failure to fence off the access point was negligent. Having invited children onto their property, they did owe a duty to ensure that the wandering child, the non-visitor, the trespasser, was not allowed to encounter this danger. In my judgment, the defendants were in breach of their duty under the 1984 Act.

Interestingly, although the risk of harm from going on to the roof was not treated as sufficiently obvious to the 12-year-old claimant to come into the category of risks against which no protection is required, the
p. 776 claimant was still seen as sufficiently careless for his damages ↵ to be reduced by 50 per cent on account of contributory negligence. This was largely because of his behaviour while on the roof, where he jumped on a skylight. The school's duty was to take reasonable steps to deter him from going on to the roof at all.

Subsequently in *Keown v Coventry Healthcare Trust* [2006] 1 WLR 953, the Court of Appeal applied both the reasoning and the spirit of *Tomlinson v Congleton* [2004] 1 AC 46 to a case involving injury to an 11-year-old child. The distinction between adults and children is one of 'fact and degree' where their understanding of risk is concerned (at [12]). The claimant had fallen while climbing the outside of a fire escape on the defendant's hospital grounds, but the fire escape was not faulty and the child should have appreciated the risk. Therefore there was no danger due to the state of the premises for the purposes of section 1 (1)(a). Longmore LJ distinguished *Young*, arguing that in that case it was the 'brittle skylights' which made the roof dangerous premises in that case. It could not have been that the child did not understand the risk, because he was thought to be contributorily negligent. The same sort of approach was adopted in *Baldacchino v West Wittering* [2008] EWHC 3386 (QB), where the claimant was 14.

The thinking in *Keown* and *Baldacchino* may represent a hardening in attitude towards risk-taking claimants including 'older' children. But the attitude to claimants and protectiveness toward defendants who have custody of significant public amenities tend to run together. Part of the point behind the decision in *Baldacchino* is that the seafront cannot be made a risk-free area, without excluding people from it altogether.

The Content of the Duty

The content of the duty in section 1(4) is stated in very similar terms to the common duty of care under the 1957 Act. The sole difference is that under the 1984 Act, reasonable steps must be taken to ensure that the entrant does not 'suffer injury', while the 1957 Act obliges the occupier to take reasonable steps to ensure that the visitor is 'safe'. The difference reflects the exclusion from the 1984 Act of liability for property damage (section 1(8)).

Warnings/Discouragement

As with the 1957 Act, the duty may in appropriate cases be discharged by a relevant warning (section 1(5)). However, we have already seen that there is no duty to warn a visitor of risks that are obvious (*Staples v West Dorset*, Section 1.3 of this chapter). Clearly, the same is true of trespassers: *Ratcliff v McConnell*, below, at [27]; *Tomlinson v Congleton; Darby v National Trust; Baldacchino v West Wittering* (above).

It should be noted that in the 1984 Act, in addition to warnings, it may also be sufficient to discharge the duty if an occupier has taken reasonable steps to 'discourage persons from incurring the risk'.

Ratcliff v McConnell [1999] 1 WLR 670

The plaintiff, a 19-year-old student, chose to climb the fence of his college swimming pool at night, and execute a running dive into the water. He was very seriously injured. The college had fenced the pool in order to discourage swimming, and employed security guards to patrol the campus. The Court of Appeal held that there was no obligation to warn an adult trespasser of the obvious dangers of diving into a pool. It is well
p. 777 known that pools vary in their depth and configuration and that diving without checking the depth ↵ is dangerous. There was no hidden danger, and the existence of a slope between the deep end and the shallow end did not constitute such a hidden danger or trap (at [37]). There was no need to post more specific notices than those prohibiting swimming. Further, the steps taken by the college to discourage use were sufficient, even though there was some evidence of sporadic night-time use of the pool prior to the claimant's accident. The college did not have to punish offenders to emphasize the rules in order to satisfy their duty under the 1984 Act: such a suggestion 'goes far beyond discouragement' (at [47]). Further, the Court of Appeal thought it clear that in this case the claimant had 'willingly accepted the risk' (at [47]): see later.

Exclusion and Defences

Exclusion of Liability

The Unfair Contract Terms Act 1977 (UCTA) has not been amended to refer to the duty owed by occupiers under the 1984 Act. While there was some doubt over whether UCTA extended to the common law duty of humanity under *Herrington*,[11] it is clear that sections 2 and (therefore) 11 UCTA do *not* apply to the duty under the 1984 Act. The position may be very different if trespassers satisfy the definition of 'consumers' under CRA 2015. Given the brevity of that definition, extracted above, it seems possible that they would; so that notices directed at trespassers could be 'consumer notices'. If this is the case then trespassers could be protected by

the provisions of CRA 2015. Outside such cases, are we to conclude, as with the exclusion of non-business liability under the 1957 Act, that occupiers are entirely free (in accordance with *Ashdown v Samuel Williams*) to exclude liability? Before the 1984 Act, John Mesher suggested that since the reasoning in *Ashdown* turned on the occupier's ability to lay down criteria governing entry on to the premises, this reasoning cannot be extended to trespassers ([1979] 43 Conv 58, 63). Though he was writing of the *Herrington* duties, the reasoning is just as apposite now that the 1984 Act is in place. Should the duty therefore be regarded as an 'unexcludable minimum'? After all, such duties are owed only where it is 'reasonable in all the circumstances of the case' to offer the entrant some protection. Alternatively, if the 1984 Act can be excluded, is the *Herrington* duty still unexcludable as it is a duty of 'common humanity'?

Volenti/*Willing Acceptance of Risk*

Section 1(6) of the 1984 Act clearly states that the question of willing acceptance of risk is to be considered on the same principles as in other cases. In Chapter 5, we investigated the limited applicability of the *volenti* defence, at least so far as negligence is concerned. It was emphasized that *knowledge* of the risk is not the same as *willing acceptance* of the risk. However, in the case of occupiers' liability to trespassers under the 1984 Act, courts seem to have thought it sufficient to show that the claimant had full knowledge of and appreciated the risk; and that he or she had decided to enter the premises (or engage in prohibited use of the premises) notwithstanding the existence of that risk. This appears to have been the approach in both *McGinlay (or Titchener) v BRB* [1983] 3 All ER 770 and *Ratcliff v McConnell* (above).

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Contributory Negligence

This defence is clearly available in principle in actions under the 1984 Act, but there is reduced scope for its applicability given the prerequisites for the existence of a duty. For a case where the defence did operate, see *Young v Kent County Council* [2005] EWHC 1342. This case involved a child who was old enough to be regarded as contributorily negligent (he should have realized it was dangerous to jump on a skylight), but young enough to need protection from his own decision to go into a prohibited area (the roof).

Specific Users

Users of Public Rights of Way

We noted earlier that users of public rights of way are excluded from protection under the 1984 Act. If the right of way is adopted as a highway maintainable at public expense, there is a duty on the relevant highway authority (not the occupier whose land is crossed by the highway) to maintain it (Highways Act 1980, section 41). There would of course remain the possibility that the user of a public right of way will be owed a duty at common law, through the tort of negligence. Section 1(7) expressly preserves any existing duties.

As explained by F. R. Barker and N. D. M. Parry, 'Private Property, Public Access and Occupiers' Liability' (1995) 15 LS 335, the difficulty with any such negligence duty is that the occupier of land has traditionally been subject to no *positive* obligations (giving rise to liability for *failures to repair*) in respect of public rights of way: this is the rule in *Gautret v Egerton* (1867) LR 2 CP 371. Barker and Parry explain that this general approach was

challenged in the case of *Thomas v British Railways Board* [1976] 1 QB 912, in which a 2-year-old child crossed through a gap where a stile had been on a public footpath and wandered on to a railway line. She was still on the footpath when she was struck by a train. In *Thomas*, the Court of Appeal decided that the defendants owed a duty of care which had been breached through failure to replace the missing stile.[12] However, Barker and Parry also concede that there are several problems with attempting to develop a consistent approach based on *Thomas*. One such problem is that in *Thomas*, the Court of Appeal was influenced by the House of Lords' then-recent judgment in *BRB v Herrington* [1972] AC 877, and perhaps reasoned by analogy with the 'duty of common humanity'. As the authors point out, *Herrington* was afflicted by serious ambiguity and this is why it was superseded by legislation. Users of the highway were deliberately and expressly omitted from coverage under the resulting 1984 Act. It might therefore be bizarre to resurrect *Herrington*, with all its uncertainties, to cover an expressly excluded group, although there have been other suggestions that *Herrington* duties may survive, for example, if the 1984 Act duty is validly excluded. A further significant problem is that in the case of *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233, the House of Lords held (while not discussing *Thomas*) that an occupier could not be liable to the user of a public right of way for negligent nonfeasance (including failure to repair), explicitly affirming the rule in *Gautret v Egerton* (1867) LR 2 CP 371. If this means that *Thomas* is wrongly decided, then it means that a 2-year-old child wandering through a broken stile or fence on a footpath is owed no duty, while a 2-year-old or even 12-year-old child wandering through a broken fence into an area where she is not allowed to be will (if the knowledge conditions are satisfied) be quite likely to be owed a duty (see *Young v Kent CC*, discussed earlier).

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Access Land

The Countryside (Rights of Way) Act 2000 (CROW) introduced an important public 'right to roam' on certain land (referred to as 'access land'). Through amendments to the 1957 and 1984 Acts, CROW introduced specific limitations on the duties that may arise in respect of 'access land'. Individuals exercising the 'right to roam' are excluded from the definition of visitor in the 1957 Act (section 1(4)(a)), and new provisions in the 1984 Act add particular conditions governing the question of whether a duty is owed. We should also note section 12(1):

Countryside (Rights of Way) Act 2000

> 12 (1) The operation of section 2(1) in relation to any access land does not increase the liability, under any enactment not contained in this Act or under any rule of law, of a person interested in the access land or any adjoining land in respect of the state of the land or of things done or omitted to be done on the land.

2 Conclusions

i. While applying the provisions of the two Occupiers' Liability Acts, the courts are undeniably concerned to strike the right balance between protection of the safety of visitors to premises, and avoidance of unfair and onerous duties on occupiers of land. Recent cases emphasize the free choice of claimants (and of those others who may wish to make the same sort of choice in the future), but they are also

preoccupied with certain 'collective' questions. In particular, there is a concern with public amenity and its continued availability. Occupiers' liability therefore naturally raises the sorts of issue that have become associated with 'compensation culture', and the case of *Tomlinson v Congleton* has become a key illustration of the way that courts are capable of raising such issues for themselves. Occupiers' liability is concerned not just with the narrow application of statutory provisions, but with the distribution of risks associated with premises.

ii The statutory provisions allow this balance to be struck in a number of ways. One way in which courts have struck the balance in recent years is through restriction of occupiers' liability to 'occupancy', rather than 'activity' duties. Others include the redefinition of a visitor who strays beyond the purpose of their visit as a trespasser; and, importantly, the recognition that obvious dangers require no warning. Overall, visitors and trespassers are owed only a duty to take such steps as will make them 'reasonably' safe, and this permits the courts to develop a distinctive notion of what level of expectation is reasonable. Trespassers, for their part, are owed duties only in respect of hazards of which occupiers are or should be aware, and only if the occupier should be aware of their presence. While it remains true therefore that occupiers owe enhanced duties as a consequence of their occupation of premises, these duties are by no means unrestricted, and the boundaries of such duties are carefully defined with their consequences in mind.

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Further Reading

Bailey, S., 'Occupiers' Liability: The Enactment of 'Common Law' Principles', in T. T. Arvind and J. Steele (eds), *Tort Law and the Legislature* (Hart, 2013), 207.

Barker, F. R., and Parry, N. D. M., 'Private Property, Public Access and Occupiers' Liability' (1995) *15 LS* 335.

Buckley, R. A., 'The Occupiers' Liability Act 1984—Has Herrington Survived?' [1984] *Conv* 413.

Goodhart, A. L., 'The *Herrington* Case' (1972) *88* LQR 310.

Jaffey, A. J. E., 'Volenti non fit injuria' [1985] 44 CLJ 87.

Jones, M., 'The Occupiers' Liability Act 1984' (1984) 47 MLR 713.

Law Commission, *Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability* (Law Com Report No 75, Cmnd 6428, 1976).

Law Reform Committee, *Third Report* (Cmnd 9305, 1954).

Mesher, J., 'Occupiers, Trespassers, and the Unfair Contract Terms Act 1977' [1979] 43 Conv 58–60.

Morgan, J., 'Tort, Insurance, and Incoherence' (2004) 67 MLR 384.

North, P. M., *Occupiers' Liability* (London: Butterworths, 1971).

Stevens-Hoare, M., and Higgins, R., 'Roam Free?' (2004) 154 NLJ 1846.

Notes

[1] The 1957 Act covers both personal injury and property damage; property damage is excluded from the operation of the 1984 Act.

[2] Although there was an appeal to the House of Lords in *Fairchild* [2002] UKHL 22; [2003] 1 AC 32, that appeal did not concern the occupiers' liability issue.

[3] At first instance, the judge had held that there was a duty to warn the claimant that the matting provided would not keep him safe from injury if he fell heavily on to it. The Court of Appeal disagreed, but thought that such a duty would in any event not arise within the Occupiers' Liability Acts because there was no defect in the property of which to warn.

[4] For an argument that the distinction between acts and omissions is far more important than the distinction between 'activity and occupancy', and that the relationship between occupier and entrant onto land is crucial in determining whether positive duties to keep safe will arise, see S. Bailey, 'Occupiers' Liability: The Enactment of 'Common Law' Principles', in T. T. Arvind and J. Steele (eds), *Tort Law and the Legislature* (Hart, 2013), 207.

[5] A further example is *Harrison v Intuitive Business Consultants Ltd* [2021] EWHC 2396 (QB), where it was pointed out that there is an inherent risk of accidents when participating in an obstacle race (here, an inherently physically tough race). There was no liability on the part of the organisers in this instance.

[6] This decision seems harsh to the occupier given that the contractors had persuaded him to let them in and do the work despite the danger: he had not expected them at that particular time. It should be noted that these were contribution proceedings brought by the injured man's employer against the occupier, and the employer was held to take a greater share of the blame for having failed to ensure a safe place and system of work—a recognized non-delegable duty (Chapter 10).

[7] We consider children separately later.

[8] Apart from *Glasgow Corporation v Taylor*, see *Hastie v Edinburgh Magistrates*, 1907 SC 1102 (4-year-old fell into a lake); *Stevenson v Glasgow Corporation*, 1908 SC 1034 (small child fell into a river in a public park). In *Thomas v BRB* [1976] 1 QB 912, a 2-year-old had wandered from her own garden while her mother was in and out of the house and it was inherent to her claim that the railway line should have been properly fenced off.

[9] Absence of a 'nurse' for the children—mentioned in *Hastie v Edinburgh Magistrates*—is of course some indication that the children were not those of well-off families.

[10] These words were added by the Consumer Rights Act 2015.

[11] J. Mesher, 'Occupiers, Trespassers, and the Unfair Contract Terms Act 1977' [1979] 43 Conv 58, argued at 63 that UCTA did not extend to this duty.

[12] It was found that such a young child, who had left her garden nearby, would not have climbed a stile.

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