

Dizzy Heights and Occupiers' Liability

Professor Mark Pawlowski examines recent case law on the distinction between “activity” dangers and “premises” dangers under the Occupiers' Liability Act 1984



Three recent cases have sought to clarify the extent of an occupier's duty of care owed to trespassers under the Occupiers' Liability Act 1984. In two of these cases, liability was denied largely because the relevant danger had arisen from the trespasser's own activities as opposed to the actual state of the premises. In the third case, the occupier was held to be in breach of the duty of care imposed under the 1984 Act because the property itself was inherently dangerous despite the trespasser (a 12 year old boy) being engaged in dangerous behaviour.

The 1984 Act

Section 1(1)(a) of the Act makes clear that the relevant duty of care owed by the occupier to trespassers is confined to any risk of suffering personal 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.” Section 1(3) provides that a duty is owed to the trespasser if the occupier:

- is aware of the danger or has reasonable grounds to believe that it exists (s.1(3)(a))

- knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (s.1(3)(b)), and
- the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection (s.1(3)(c))

The duty is to take such care as is reasonable in all the circumstances to see that the trespasser does not suffer injury on the premises by reason of the danger concerned. The obligation to take reasonable care may, in appropriate circumstances, be discharged by taking such steps as are reasonable to give warning of the danger or to discourage persons from incurring the risk.

Adults

In *Siddorn v. Patel* [2007] EWHC 1248 (QB), the claimant sought damages from her landlord for injuries sustained whilst dancing on a garage roof. The claimant was one of the tenants of a first floor flat which adjoined

a garage, which had a flat roof and two skylights covered by corrugated perspex. The only means of access from her flat onto the roof (which did not form part of her tenancy) was through a window within the flat. During a party at the flat, the claimant was among several people who had climbed out onto the roof and, whilst dancing around one of the skylights, she inadvertently stepped onto the perspex cover and fell through it. Her claim against the landlord for negligence and breach of duty of care under s.1(1)(a) of the 1984 Act alleged that the skylight was unsafe (in not having a suitable cover) and that no adequate warning had been given of the unsafe condition of the roof. In response, the landlord argued that the roof did not come within s.1(1)(a) because the danger to the claimant had arisen from her own activity in dancing around the perspex cover without looking carefully at what she was doing.

Not surprisingly, the court rejected the claimant's argument. The duty of care under the 1984 Act could only arise if the danger referred to in s.1(1)(a) was due to the state of the premises and not a claimant's activity. There was nothing to suggest that the cover

was unsuitable or in a state of disrepair. The decision accords with a number of earlier authorities which establish the proposition that the 1984 Act is not engaged where the injury is sustained because the claimant chooses to engage in an activity with inherent dangers and not because the premises are in a dangerous state. In *Donoghue v. Folkestone Properties Ltd* [2003] QB 1008, for example, a young adult had dived into a harbour and struck his head on an underwater pile. Lord Phillips (at 1019) observed:

"There are some features of land that are not inherently dangerous but which may tempt a person on the land to indulge in an activity which carries a risk of injury. Such activities include cliff-climbing, mountaineering, skiing, and hang-gliding by way of example. It does not seem to me that a person carrying on such an activity can ascribe to the 'state of the premises' an injury sustained as a result of a mishap in the course of carrying on the activity – provided of course that the mishap is not caused by an unusual or latent feature of the landscape."

Similarly, in *Tomlinson v. Congleton Borough Council* [2004] 1 AC 46, a young person sustained severe injuries by diving into a stretch of shallow water. Lord Hoffmann said (at para. 27):

"[The claimant] was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity."

Most recently, in *Maloney v. Torfaen County Borough Council* [2005] EWCA Civ 1762, the claimant sustained injuries when he stumbled over an unfenced retaining wall and fell down a sloping grass bank onto a concrete floor of a pedestrian subway. He was drunk at the time of the accident. There had been two previous incidents involving people falling down the slope, in particular an incident that had occurred less than one month prior to the claimant's accident, where the injured party had suffered a fatal fall. The Court of Appeal, agreeing with the trial judge, concluded that the accident had occurred as a result of a danger due to the state of the premises. Interestingly, the contrary argument, namely, that the accident was caused by the claimant's "own foolhardy actions . . . when drunk", was treated as being relevant only to the issue of contributory negligence and not causation. In this connection, the trial judge had found the claimant two-thirds contributory negligent for what had happened. In the end result,

however, the council was absolved of liability on appeal because it had not been shown that it knew (or had reasonable grounds to believe) that the claimant might have come into the vicinity of the danger within the meaning of s.1(3)(b) of the 1984 Act.

Children

Two recent cases are of particular interest. In *Keown v. Coventry Healthcare NHS Trust* [2006] EWCA Civ 39, an 11 year old boy had been climbing the underside of a fire escape at the trust's hospital premises when he fell to the ground and was badly injured. In defence, the trust argued that the fire escape was not itself dangerous and that any danger was due to the boy's activity on the premises. Longmore L.J. concluded that premises which were not dangerous from the point of view of an adult could, nevertheless, be dangerous for a child. The question was one of fact and degree and much would depend on the age of the child and his ability to recognise the danger. Thus, "injury suffered by a toddler crawling into an empty and derelict house could be injury suffered by reason of a danger due to the state of the premises" whereas injury suffered by an adult in the same circumstances would probably warrant a different conclusion: *ibid*, para. 12. The same could be said of banisters or railings with spaces wide enough to allow only a child's head to be trapped between them. However, a child's choice to indulge in a dangerous activity could not be ignored simply because he was a child. In the instant case, the boy was 11 years old. Moreover, he was aware of the risk of falling and knew that what he was doing was dangerous. In these circumstances, the relevant danger could not be said to arise from the state of the premises – it was clearly the result of what the boy had deliberately chosen to do. In particular, it was apparent that there was nothing inherently wrong with the fire escape in the sense of having a physical defect or structural deficiency.

Interestingly, the court went on to consider the trust's potential liability had the fire escape been found to be inherently dangerous. In these circumstances, the court intimated that the claimant could have brought himself either within s.1(3)(a) of the 1984 Act (because the trust knew that the fire escape was unguarded and unfenced) or s.1(3)(b) (since the trust knew that children played in the vicinity of the unguarded or unfenced fire escape). The court doubted, however, whether the claimant could have succeeded under s.1(3)(c) because it would not be reasonable to expect the trust to offer protection from the risk. According to Longmore L.J., if such protection were found to be appropriate in relation to a normal fire escape, occupiers would also be required to offer the same protection from falling from drain pipes, balconies, roofs, windows and trees on land. This would be taking things too far.

The decision in *Keown* may be contrasted with the earlier case of *Young v. Kent County Council* [2005] EWHC 1342 (QB) involving a young boy, aged 12, who had climbed onto a flat roof of a school building in order to retrieve a football. He had climbed onto the roof using the flue of an extractor fan attached to the side of the building and was injured when he deliberately jumped up and down on a skylight and fell through it. The skylight was brittle and, consequently, inherently dangerous for a young child. The judgment of Morison J. suggests that the danger was attributable to the state of the roof itself rather than the claimant's own activity in climbing onto it and jumping onto the skylight. The council knew that children regularly climbed the flue onto the roof and there was a low cost solution to the problem, which involved fencing off the area. For these reasons, therefore, there had been a clear breach of duty under the 1984 Act. The child's own mischievous behaviour (i.e., in climbing onto the roof and jumping on the skylight) was characterised as going to the issue of blame in assessing his contributory negligence. On this point, the claimant's damages were reduced by 50 per cent to reflect his responsibility for the accident.

In the course of his judgment, Morison J. intimated that the claim would have failed had the claimant not been a child, since the danger would not then have posed a sufficient risk of causing injury to an adult trespasser. In this connection, the *Siddorn* case, referred to above, confirms that different factors will operate where the court is concerned with an adult intruder. In *Siddorn*, the case was characterised as involving an "activity danger" as opposed to a "premises danger". In particular, the court took into account the fact that the claimant (and her friends) were grown up, sensible people who had gone outside onto the roof when it was dark and when they were not entirely sober. Essentially, the accident had occurred as a result of the claimant dancing around the skylight without taking proper care.

Conclusion

Several conclusions can be drawn from the case law. It is apparent that different considerations will apply depending on whether the trespasser is an adult or child. In the case of an adult, the court is unlikely to be sympathetic where the injury has been caused because the claimant has chosen to indulge in an activity involving inherent dangers. In these circumstances, assuming the premises contain no latent or unusual dangers, the claim is almost invariably bound to fail.

Child trespassers may also deliberately court the risk of injury associated with a particular feature of the premises, which may be

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dangerous to them but not adults. Here, the age of the trespasser may be relevant in determining whether the danger is attributable to the state of the premises. Although a flat roof is not by itself a danger simply because a young child could fall off it, a lattice walkway which might trap a toddler's foot may be considered inherently dangerous to very small children. As Longmore L.J. observed in *Keown*, the question is one of fact and degree based on all the circumstances of the case and, although in some cases the child trespasser may have no capacity for discernment at all, it does not follow that the premises must always be made safe for very small children. As Lord M'Laren observed in the Scottish case of *Stevenson v. Glasgow Corporation* (1908) SC 1034, at 1039:

"In a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures . . . Now, as the common law is just the formal statement of the results and conclusions of the common sense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by common sense as unnecessary and inconvenient are not required by the law."

In accordance with this principle, it has been held that a person who owns a mountain in the vicinity of a town is not required to fence it off in case small children frequent it: *Simkiss v. Rhonda Borough Council* (1983) 81 LGR. 460. Moreover, in child cases, as in cases involving adults, the relevance of the claimant's choice to indulge in a dangerous activity cannot be ignored. Thus, the court will find little sympathy for the child who has sufficient capacity to recognise both the danger of what he is doing and the risk of injuring himself. This is made clear in *Keown*, where the Court of Appeal was able to characterise the boy as having the attributes of an adult in making a genuine choice to engage in a dangerous activity. As stated in the current edition of *Winfield & Jolowicz on Tort*, 2006, 17th ed., at p. 419:

"an adult trespasser or even a child with sufficient understanding who takes a risk which should be obvious to him cannot complain that the occupier did not take more rigorous steps to discourage his folly".

The recent cases, however, reveal a significant divergence in approach in determining the legal consequences of claimant culpability. In *Siddorn* and *Keown*, the claimant's blame precluded him from



satisfying the threshold requirement contained in s.1(1)(a) of the 1984 Act. This meant that the claim in both cases failed *in limine*. By contrast, in *Young and Maloney*, the issue of the claimant's misbehaviour (or folly) was treated as a matter relevant only to the issue of contributory negligence. Indeed, in *Maloney*, Laws L.J. went so far as to denounce the council's argument on causation as one of pure semantics and metaphysics. In his view, the argument was simply one which concerned the degree of the claimant's responsibility for what had

happened. As such, it was better dealt with as an argument for reducing damages.

The fact that there is no specific reference to the Law Reform (Contributory Negligence) Act 1945 in the 1984 (or 1957) Occupier's Liability Act has not, of course, deterred the courts from applying the principle of contributory negligence in determining claims under both statutes – a trend which (rightly or wrongly) now appears set to continue in cases concerning claimant activity which involves inherent risks of personal injury. ■

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