

## Note on the Occupiers' Liability Act 1957 and 1984

In English law there is a strict distinction between persons who were allowed to be on the premises (visitors), and unauthorized persons (trespassers or others<sup>1</sup>). In the past, the courts had developed the tort of negligence for injuries caused by land or structures, by distinguishing numerous categories of persons for who various detailed duties of care existed. These rules were found unsatisfactory. The Occupiers' Liability Act 1957 replaced those rules with a 'common duty of care' (s. 2(1)). The Act thereby still builds on the common tort of negligence; it can therefore be considered as a form of negligence that is modified by a statute (and it is *not* an instance of the tort of breach of statutory duty!).<sup>2</sup>

For visitors, the occupier of the land is liable under the Occupiers' Liability Act 1957 for 'dangers due to the state of the premises' (s. 1(1)). The occupier is the person who 'has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there'.<sup>3</sup> The owner in possession of the premises is an occupier, but others may be in such a position as well. The act applies to visitors, a person who was given permission to enter (s. 1(2)). The occupier has a duty of care to all visitors (s. 2(1)), which is defined in s. 2(2): "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." This duty is further explained in s. 2(3) and 2(4) regarding relevant circumstances (such as warnings). It is important to note that the duty can be restricted by agreement (s. 2(1)), and that there is no duty of care to risks that the visitor willingly accepted (s. 2(5)).

Individuals that were not authorised by the occupier to enter the land are covered by the Occupiers' Liability Act 1984. It applies principally to trespassers, but also to persons exercising a private right of way (who therefore enter the land legally), persons exercising an access right under National Parks legislation. Persons exercising a public right of way (e.g. driving on a public road) is covered by highways legislation. That act provides for liability only where the occupier of the land is, simply put, aware of a danger for which it is reasonable that the occupier protects trespassers.<sup>4</sup> S. 1(3) provides three cumulative elements that determine when the duty arises:

- 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.

If those requirements are fulfilled, a duty arises '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.' (s. 1(4) Occupiers' Liability Act 1984). This duty can be discharged also by reasonable steps to give warning or to discourage persons from incurring the risk (s. 1(5)). Willing acceptance of the risk also relieves the occupier of the duty (s. 1(6)).

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<sup>1</sup> Such as persons who exercise a private right of way.

<sup>2</sup> Cf s. 1(1) Occupiers' Liability Act 1957 where it is more or less spelled out that the act replaces certain of the common law rules, which implies that those rules that are not replaced remain in force.

<sup>3</sup> *Wheat v Lacon & Co Ltd* [1966] AC 552, at 577, see Winfield and Jolowicz 2020, para 10-007. This concept has not been defined or altered by the Act, therefore is still determined by the common law rules.

<sup>4</sup> Paraphrasing s 1(3) Occupiers' Liability Act 1984, see Winfield and Jolowicz 2020, para 10-037.

The duty of care that is expected is lower than towards visitors under the 1957 Act. The courts may distinguish between persons having a right of way or innocent trespassers (particularly children) on the one hand, and burglars or other intentional trespassers with criminal intent on the other hand. The different level of care shows, for instance, in that a warning is often a proper way to discharge the duty against trespassers, and risks that everyone should know about (such as general risks of swimming in a lake) do not require any warning. But if the occupier could reasonably expect young children to trespass, he might have to take additional steps to keep them outside (such as erecting a fence). For serious dangers, such as high-tension cables, the occupier also needs to take more protective measures. The occupier may add dangers to deter trespassers (dogs, spiked fences), but may not set hidden traps.