
**WHAT PROSPECT NOW FOR THE INJURED VISITOR OR
TRESPASSER?
- OCCUPIERS' LIABILITY AFTER TOMLINSON AND
FAIRCHILD**

By

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1. Introduction

A series of recent decisions culminating in the House of Lords' judgment in Tomlinson v Congleton Borough Council 2004 AC 46 have clarified the scope of the duty of care which arises under the Occupiers' Liability Act 1957 and the Occupiers Liability Act 1984. The effect will be to restrict the number of cases where a claimant will establish liability against an occupier. This will be so for both visitors and trespassers. For visitors, establishing a breach of duty will be more difficult. For trespassers, establishing both the existence of the duty and its breach will be more difficult.

2. 1957 Act

2.1 The Act amends and codifies the common law:

“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” (section 1 (1)).

It is to be noted that the Act only applies to risks due to the state of the premises or to things done or omitted to be done on them.

- 2.2 The common law rules as to the definition of an occupier are adopted and the categories of invitee and licensee are amalgamated to produce a single category of visitor.

“...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”(section 1 (2)).

- 2.3 The duty owed is the common duty of care, the scope of which is defined by section 2 (2) - (5):

“(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.

(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, incumbrance 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, 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).

3. 1984 Act

- 3.1 The Act replaces the rules of common law for the purposes of determining the existence and scope of any duty owed by an occupier to persons other than his visitors but again the Act only applies to risks due to the state of the premises or to things done or omitted to be done on the premises:

“(1) The rules enacted by this section shall have effect in place of the rules of 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.”

3.2 If the risk is one to which the Act can apply then the existence of the duty is determined by applying section 1 (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.”

3.3 Once a duty is established the question of whether there has been a breach is to be determined by the application of section 1 (4) - (6) :-

“(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 persons 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).”

4. **Tomlinson v Congleton BC**

4.1 In a country park occupied by the defendants was a lake formed in a disused quarry. Many visitors were attracted to the lake in hot weather. There were notices prohibiting swimming in the lake and rangers were employed to give oral warnings and hand out leaflets. These measures had little effect and several accidents resulted from swimming in the lake. The defendants intended to plant vegetation around the shore to prevent people from going into the water, but had not done so because of a shortage of financial resources. On a hot day the claimant, aged 18, went into the lake and from a standing position in shallow water dived and struck his head on the sandy bottom, breaking his neck. Damages were claimed for breach of duty owed to him as a trespasser under Section 1 of the Occupiers Liability Act 1984.

- 4.2 The trial judge held that the danger and risk of injury from diving in the lake where it was shallow was obvious. In the circumstances an occupier had no duty to warn or take other measures against a risk that was obvious.
- 4.3 The Court of Appeal, by a majority, allowed the appeal. The majority relied on a history of incidents relating to swimming in the lake and extensive consideration of the problem by the defendants. In these circumstances they held it was reasonable that the defendants should owe a duty of care to the claimant and in failing to implement the plan to prevent access to the lake, they were in breach of that duty.
- 4.4 The House of Lords were unanimous that the appeal of the defendants should be allowed. The leading judgment is that of Lord Hoffmann. The salient points are:
- (1) The duty under the 1984 Act was intended to be a lesser duty than the duty under the 1957 Act as to both incidence and scope.
 - (2) The claimant was to be treated as a trespasser because although he had permission to come onto the defendants' land, he did not have permission to dive into the water.
 - (3) There was no risk within the terms of the 1984 Act. Under section 1 (1) there had to be a danger "due to the state of the premises or to things done or omitted to be done on them" The risk of injury from diving in shallow water was not due to "the state of the premises". Nor was it due to "things done or omitted to be done" on the premises e.g. by permitting power boats

to threaten the safety of swimmers. Having regard to the terms of section 1 (1) no duty of care could arise on the facts of this case.

(4) If there had been a risk which could give rise to a duty under the 1984 Act, then section 1 (3) required three considerations to be satisfied before a duty arose:

(a) The occupier must be aware of the danger or have reasonable grounds to believe that it exists.

(b) The occupier must know or have reasonable grounds for believing that the trespasser is in the vicinity of the danger or may come into the vicinity of the danger.

(c) The risk must be one against which the defendants might reasonably be expected to offer the claimant some protection.

(5) The existence of a foreseeable risk of injury did not mean there was necessarily a duty to do what was necessary to prevent it. In deciding whether the defendants might reasonably be expected to offer some protection, the court had to balance the risk and gravity of injury against the cost of preventative measures and the social value of the activity which may be curtailed.¹ The social value of the activity and the desirability of people accepting responsibility for the risks they choose to run required a finding that there was no obligation on the defendants to offer some protection and hence no duty arose

¹ The social value of the activity and the expense of eliminating the risk were important factors in *Bolton v Stone* 1951 AC 850 (the cricket ball hit out of the ground). Contrast the absence of social value and lack of additional expense in *Jolley v Sutton LBC* 2000 1WLR 1082.

- (6) Even if swimming had been permitted and the defendants had owed a duty under section 2 (2) of the 1957 Act, that duty would not have required them to take steps to prevent the claimant from diving or to warn him against dangers which were obvious.

4.5 Lord Hobhouse delivered a judgment in similar terms and Lord Nicholls agreed with Lord Hoffmann. Lord Hutton considered that the dark and murky water of the lake which prevented a person seeing the bottom when diving could be viewed

as “the state of the premises”. He agreed that no duty of care arose because the condition contained in section 1 (3) (c) was not satisfied. It was contrary to common sense and not sound law to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so. Lord Scott stated that it was unreal to regard the claimant’s injury as having been caused while he was a trespasser. He held it was wholly unacceptable to find that the defendants had to discourage visitors from entering the water and playing about. There was no breach of the duty under the 1957 Act.

4.6 The judgment in **Tomlinson** is a powerful assertion of the “individualist values of the common law”. Adults of full capacity who choose to engage in activities involving risk cannot expect to be compensated by occupiers of premises when injury results.

5. The belief that the individual must take responsibility for his or her actions, which is so evident in the judgments of Lord Hoffmann and Lord Hobhouse in **Tomlinson** is also to be found in the earlier Court of Appeal decisions of **Ratcliff v McConnell 1999 1 WLR 670** and **Darby v National Trust 2001 PIQR P372**. In **Ratcliff** a student entered his college’s swimming pool at night when swimming was prohibited and the pool was closed for the winter. He climbed over a locked gate and dived into the pool, hitting his head on the

bottom. The Court of Appeal held that the risk of injury from diving into shallow water was common to all swimming pools and was obvious to any adult. There was no duty on the defendants as occupiers to protect the claimant against apparent dangers of which he was fully aware. The claimant was fully aware of the risk and willingly accepted it. In **Darby** the deceased, an adult, drowned while swimming in a pool at Hardwick Hall,

Derbyshire. There was held to be no breach of the duty of care under section 2 (2) of the 1957 Act in failing to warn or prohibit swimming. It was an obvious risk which would have been known to the deceased.

6. When determining under section 1 (3) of the 1984 Act whether a duty was owed to the claimant, the court must consider the circumstances as they applied at the time of the accident in determining whether the defendants knew or had reasonable grounds to believe that the claimant was in the vicinity of the danger concerned. In **Donoghue v Folkestone Properties Ltd 2003 QB 1008** the occupiers knew that in summer substantial numbers of trespassers dived and swam in a harbour in the vicinity of grid piles which were under water adjacent to a slipway. The claimant, after midnight in mid-winter, dived from the slipway and hit a grid pile. The defendant had no reason to believe the claimant or anyone else would be swimming and diving in mid-winter in the middle of the night. In these circumstances section 1 (3) (b) was not satisfied and no duty was owed to the claimant under section 1 of the 1984 Act.

7. **Child Trespassers**

Traditionally an occupier was only liable if he did some act with the deliberate intention of doing harm to the child trespasser or at least the act was done with reckless disregard for the presence of the trespasser (**Robert Addie & Sons (Collieries) Ltd v Dumbreck 1929 AC 358**). In relation to children, the harshness of the rule was ameliorated to some extent by the doctrine of allurement. The rule in **Addie's** case was reconsidered in **Herrington v**

British Railways Board 1972 AC 877. The judgments of the House of Lords differ as to the circumstances which will give rise to a duty and as to the content of that duty. It was that lack of clarity which led to the introduction of the 1984 Act. Despite the passing of the 1984 Act, *Herrington* remains an important influence on the law. In *Herrington*, Lord

Diplock's summary of the law was approved with one exception² by the Court of Appeal both in **Ratcliff** and **Donoghue** as accurately summarising the nature of the duty owed under section 1 of the 1984 Act. That summary is as follows:

- (1) The duty does not arise until the occupier has actual knowledge of the presence of the trespasser upon his land or of the facts which make it likely that the trespasser will come onto his land and of facts which are likely to cause personal injury to a trespasser unaware of the danger. The occupier is under no duty to make inquiry or inspection to ascertain whether or not such facts exist.
- (2) Once an occupier has knowledge of the facts, his failure to appreciate the likelihood of the presence of the trespasser or the risk to him does not absolve the occupier if a reasonable man would recognise the likelihood and that risk.
- (3) The duty, when it arises, is limited to taking reasonable steps to enable the trespasser to avoid the danger. Where the likely trespasser is a child too young to understand or heed a written or oral warning, this may involve providing reasonable physical obstacles to keep the child away from the danger.
- (4) The relevant likelihood to be considered is of the trespasser's presence at the actual time and place of danger to him. It will depend on all the circumstances

² Lord Diplock defined the degree of likelihood needed to give rise to the duty as being such as would "impel a man of ordinary humane feelings to take some steps to mitigate the risk of injury to the trespasser to which the particular danger exposes him. This is now replaced by the terms of section 1 (3) (c) and (5) of the 1984 Act.

of the case; the permanent or intermittent character of the danger; the severity of the injuries which it is likely to cause; in the case of children, the attractiveness to them of that which constitutes the dangerous object or condition of the land; the expense involved in giving effective warning of it to the kind of trespasser likely to be injured in relation to the occupier's resources.

8. Occupiers and Employees of Independent Contractors

8.1 In **Fairchild v Glenhaven Funeral Services 2002 1 WLR 1052** a number of consolidated appeals involved employees exposed to asbestos dust at premises not occupied by their employers. The employers could not be sued and claims were made against the occupiers. The Court of Appeal held that the common law distinction between an occupier's "occupancy duty" and his "activity duty" was replicated in the 1957 Act. The "occupancy duty" was confined to the dangerous condition of the premises. There could be no breach of the common duty of care under section 2 (2) where the claimant's injuries were the result of activities being conducted on the premises (what then is the meaning of the words "dangers due..... to things done..... on them"?). There was no duty imposed on the occupier at common law, where he had engaged competent contractors, to find out about risks which might imperil the contractor's workforce. If the occupier knew of the risk then he was under a duty to warn of the danger. However, constructive knowledge could not be relied on. The duty on an employer to investigate and identify risks which might injure his workforce did not apply to an occupier. The case went to the House of Lords on the causation issue but permission to appeal was refused in respect of the occupier's liability point.

8.2 Where an injury is sustained by an employee at a third party's premises, it will be important to identify whether the injury was sustained as a result of the

dangerous condition of the premises. If not, the 1957 Act cannot be relied on. The circumstances must be examined to see whether a duty on the occupier will arise at common law. Where the occupier has been the organiser of the work, he may owe a duty of care to the employee of a contractor.³ In **Fairchild** itself there would have been liability if there had been satisfactory evidence of the defendants' responsibility for organising the site where exposure to asbestos occurred.

9. Summary

- (1) In the case of a lawful visitor one starts with the assumption that the occupier owes a duty of care whereas in the case of a trespasser one starts with the assumption there is none.
- (2) It will be very rare for an occupier of land to be under a duty to prevent people from taking risks inherent in the activities they freely choose to undertake upon land.
- (3) A duty to protect against obvious risks or self inflicted harm exists only in cases in which there is no genuine and informed choice as in the case of employees whose work requires them to take the risk or some lack of capacity such as the inability of children to recognise danger.
- (4) The balance between risk on the one hand and individual autonomy on the other is not a matter of expert opinion: "It is a judgment which the courts must make and which in England, reflects the individualist values of the common law".

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³ *McArdle v Andmac Roofing Co.* 1967 1 All ER 583