

OCCUPIERS' LIABILITY

Introduction to scope of legal duties

1. Most local councils own buildings and land and, accordingly, have legal obligations to those who visit them. This Topic Note covers the responsibilities of local council land owners pursuant to the Occupiers' Liability Acts of 1957 and 1984.
2. Every occupier of land owes a legal duty of care towards anyone coming on to his premises. Any breach of that duty which causes personal injury or damage to goods, makes the occupier liable to pay damages (the common law is extended by Occupiers' Liability Acts 1957 and 1984). Under both the 1957 and 1984 Acts, premises include land, buildings, any fixed or movable structures (e.g. a youth shelter), vessels, vehicles or aircraft.
3. The duty arises through occupation not ownership of land. An occupier does not necessarily need to be physically present at the premises. For example; a local council which provides a children's play area is the occupier if it controls the site.
4. There can be more than one occupier, or different occupiers, at different times of the day or for different parts of a building. A simple test is: you are an occupier if you have enough control over premises to allow or prevent other people entering. Your failure to use sufficient care may result in injury or loss to someone coming into the premises and you becoming liable to pay damages.
5. Those entering the premises of another person may be either visitors or trespassers. The duties owed, and therefore potential liabilities to visitors are governed by the Occupiers' Liability Act 1957. A visitor is either someone invited by the occupier expressly, or by implication, or someone with a legal right to enter the land, whether or not they have the occupier's express permission. Examples include:
 - An independent contractor (someone invited under a contractual right);
 - a guest (someone expressly invited);
 - a postman (someone who is impliedly invited since the occupier's desire to have post delivered to his door implies an invitation to the postman to enter

- his property;
 - anyone with a private right of way;
 - a meter reader;
 - a policeman with a search warrant; and
 - a fire fighter
6. In the case of visitors, the occupier's legal duty is to take reasonable care to see that his premises is reasonably safe for the purpose for which visitors are permitted to be there. The concept of "reasonableness" is an elusive one. It can best be grasped by looking at it from the point of view of the average reasonable person and asking "is this sensible?"
 7. It is important to remember that the duty only exists when the visitor is in the premises for the purposes for which he was invited or has a right to enter. For example a meter reader who, having read the meter, then takes a stroll through the garden becomes a trespasser.
 8. Trespassers are those who have not been invited and have no lawful right to be in the premises. Liability to trespassers is governed by the Occupiers' Liability Act 1984. There is little difference between the duty of care owed to visitors under the 1957 Act and the duty of care owed to trespassers under the 1984 Act. Under the 1984 Act, the occupier owes a duty of care to a trespasser, in respect of any such risk or danger that he has reasonable grounds to believe exists, has reasonable grounds to believe that the trespasser may be in the vicinity of and is a risk which in all the circumstances of the case he would be expected to offer some protection.
 9. An occupier may be tempted to take passive steps to protect his property e.g. broken glass on the top of a wall. However, any action must be a deterrent and not punitive e.g. no man-traps. Where trespassers are not objected to or action is not taken to prevent trespass, the trespassers may become visitors, with an implied permission to enter the land.
 10. In **McGeown v Northern Ireland Executive [1994]**, the House of Lords held that a person using a public right of way does so by right and cannot be classed as a visitor of the owner of the land over which the way passes. Such persons are not covered by the 1957 Act and by virtue of s.1(7) are excluded by the 1984 Act. The decision has been criticised because of the statutory protection afforded to trespassers under the 1984 Act. It means any duty owed to such persons would be at common law; the

owner/occupier must maintain his land in a reasonably safe condition, so as to avoid the likelihood of injury occurring on a public highway.

11. Every occupier's duty of care is higher in the case of children than of responsible adults. S.2(3) of the 1957 Act provides that the occupier must be prepared for children to be less careful than adults. Quite ordinary incidents such as slippery paths, trenches/uneven surfaces in recreational/open spaces can create dangers for children who are too young either to appreciate or to cope with the problem. Many features e.g. water in any form; machinery or open shafts, constitute traps or allurements for children.
12. Fulfilling the duty of care is largely a matter of common sense. Rickety stairs, slippery paths, lack of handrails, unfenced/exposed excavations, poor lighting, uneven surfaces, and hazardous machinery are common examples of a failure to take care. Water in any form, stacks of building materials and earthmoving equipment have all caused injuries for which the occupier of the premises has been held liable. It is therefore important for local councils to regularly monitor the condition of all premises they occupy and to check for, and safeguard against, the risk of dangers. There is no golden rule: the best rule of thumb is to ask "would I be content to see my wife/husband/ children enter the land in its present state?"
13. Warning notices are another method of fulfilling the duty of care and in some cases can be used to avoid liability. Detailed advice is contained in LTN 36 - Unfair Contracts Terms Act 1977.
14. There is one particular duty of care imposed by Parliament. A person having responsibility for animals is liable for any damage which occurs if these animals escape, either on to other land, or on to the public highway (**Animals Act 1971**). However this duty of care does not apply to straying on to a highway where animals are lawfully placed on a common or village green, or on land in an area where fencing is not customary. Further information is set out in LTN 29 - Straying Animals.
15. All public bodies, including local councils, are expected to show a greater degree of responsibility towards persons in their premises than private landowners and private occupiers.

Independent Contractors

16. Local councils should also be mindful of their common law and statutory duties when employing independent contractors. Firstly, pursuant to s.5(1) of the 1957 Act, a person entering premises under a contractual right is owed the same duty of care as any other visitor.
17. Secondly, s.2(4)(b) of the 1957 Act provides that where damage is caused to a visitor by a danger 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 as more than 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 carried out properly.
18. Local council occupiers may be held liable if an independent contractor's activities fall below the common law duty of care, unless they take reasonable steps to satisfy themselves that the contractor is competent, and if the nature of the works permit, to make sure that the work has been carried out properly.
19. Before awarding or entering into a contract with an independent contractor, a council should check that the contractor is qualified and competent to undertake the proposed works. After the works have been completed, the council should check this has been carried out properly. For a large scale, complex or technical project, a council should be able to rely on the report of an expert e.g. engineer, architect or surveyor, to confirm that the works have been satisfactorily completed. For a less technical job, such as cleaning or grounds maintenance, the council would be expected to, not only check that the contractor was competent to carry out the work but also that the work was carried out properly.
20. On a practical level, local councils should ensure all independent contractors executing works are competent to undertake the work and should ensure that, in any event, that the contractor has adequate public liability insurance cover.
21. An independent contractor may also be liable to any claimant either because he has been treated as the occupier, or under the common law principles of negligence.

Effect of the Occupiers' Liability Act 1984

22. The purposes of the 1984 Act are firstly, to clarify and amend the duty owed by the occupiers to trespassers, i.e. those who enter into premises without any kind of permission and whose presence there is either not known to the occupier or is objected to e.g. squatters, burglars, and those who were a lawful visitor to a specific part of land but not to all parts.
23. The duty referred to in paragraph 8 above is to take such action as is reasonable in all the circumstances of the case to ensure that the trespasser or non-visitor does not suffer injury on the premises because of their dangerous state (s. 1(4) of the 1984 Act).
24. The second purpose of the Act is to amend the Unfair Contract Terms Act 1977 to enable an occupier to exclude liability for loss or damage suffered by persons using his premises for recreational or educational activities where these are not business activities of the occupier. The 1977 Act is said to have caused an unwanted reduction in access to the countryside, because landowners were unwilling to allow access and risk negligence claims. To assist with reversing this trend, section 2 of the 1984 Act amends s.1(3) of the 1977 Act by supplementing the definition of business liability. Now the owner or occupier of premises who runs a business there (e.g. farming or forestry) may exclude liability for death or injury to visitors who are granted access for recreational or educational purposes - but only if such access is granted for purposes which are unconnected to the business use of the land by the owner of the business or the occupier of the land. If, however, access is granted for a purpose which relates to a business carried out on the land, the access becomes a business purpose and such liability cannot be excluded.
25. Parish and community councils cannot take advantage of the provision in section 2 of the 1984 Act because allowing recreational or educational use of land or premises owned by them is *always* a business purpose whether or not a charge is made – the definition of “business” in the 1977 Act includes ‘the activities of any government department or local or public authority’ (local authority in this context includes parish and community councils).
26. Pursuant to s.1(5) of the 1984 Act, the duties owed to persons other than visitors may be discharged by taking appropriate steps to give warning of the danger and to discourage persons from incurring the risk. The existence of a warning sign is

probably not enough; it should ensure that the risk is made obvious (e.g. by erecting clear warning/no entry signs and/or fencing off or securing the area of land concerned - A specimen notice is set out in paragraph 1 of the Appendix to this Note).

27. By virtue of s.1(6) of the 1984 Act, no duty is owed to persons who willingly accept the risk (e.g. those whose hobby it is to explore old mine shafts) or to persons using the highway (normally the highway authority is liable for the dangerous state of the highway).
28. Breach of the s.1(3) duty does not give rise to liability for loss of, or damage to, property.
29. The Unfair Contract Terms Act 1977:
 - a. prohibits the occupier of premises used by him for business purposes from excluding liability to persons lawfully visiting the premises for death or personal injury resulting from his negligence; and
 - b. allows him to exclude or restrict such liability in **other** cases of loss or damage (e.g. to property) only if it is reasonable to do so.
30. It is accordingly essential that all councils ensure that their public liability insurances are adequate and up to date.
31. It is possible, however, for a council to exclude liability for loss of or damage to property if it is reasonable to do so. (As to what is "reasonable", see LTN 36). A specimen form of notice is set out in paragraph 2 to the Appendix to this note.

Open Access

32. Section 13(1) of the Countryside and Rights of Way Act 2000 (CROW) amends the 1957 Act (s.1(4)) and this provides:

"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."

33. Section 13(2) of CROW inserts into the 1984 Act (ss.1(6A)-(6C)) with the effect that an occupier of access land is not liable to any person in respect of :-

- a risk resulting from the existence of any natural feature of the landscape (defined as a plant, shrub or tree, of whatever origin) or any river, stream, ditch or pond whether or not a natural feature; or
- 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.

34. The exemptions stated above do not apply where where the danger concerned is due to anything done by the occupier:

- with the intention of creating that risk; or
- being reckless as to whether that risk is created.

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
23	Health and Safety	Sets out the other duties owed to and by independent contractors.
29	Straying Animals	Sets out the responsibilities of the owners of animals.
36	Unfair Contracts Terms Act 1977	Sets out the principles relevant to exclusion clauses.
41	The Responsibility of Councils as Landowner	Sets out other responsibilities of councils as owners of land.
67	Nuisance (Private)	Sets out the relevant considerations.
68	Negligence	Sets out common law duty of care and considerations for arranging public liability insurance.
77	Public Rights of Way	Sets out the rights and responsibilities for a footpath, bridleway, Byway Open to All Traffic (BOAT), or Restricted Byway.
87	Procurement	Gives an overview of the legal requirements and processes in a procurement exercise.

APPENDIX – SPECIMEN NOTICES

1. (See paragraph 21 above).

WARNING NOTICE TO ACT AS SAFEGUARD

“Occupiers’ Liability Act 1984

Warning – these premises are dangerous. Persons entering must beware of (marshy ground if they leave the made-up paths) and should take adequate precautions to secure their own safety.

This warning is given by the (name) (parish) (town) (community) council to protect from these dangers.”

2. (See paragraph 26 above)

EXCLUSION OF LIABILITY NOTICE

“Unfair contract Terms Act 1977.

Take notices – persons using (this ground) (these premises) do at their own risk. The (name) (parish) (town) (community) council accepts no liability for any loss of or damage to their property arising from their use of (this ground) (these premises).”

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