

OCCUPIER'S LIABILITY

This area of law relates to land or property owned or occupied by one person and the use of that property by others. It is also concerned with how a claim might be made for recovery of damages for injuries sustained by persons while on land or premises belonging to another, and which are caused by the dangerous or unsafe state of that land or premises. This is governed primarily by the Occupier's Liability Act, 1995. Any injury which is not covered by this Act is instead potentially actionable under the common law. It is possible to make a claim for the recovery of damages under the Act for a wide range of losses including physical or psychological injuries to the person, and damage to property belonging to someone who enters onto another person's land or premises (called "entrant" in the legislation). An occupier's duty to protect entrants specifically excludes employers in respect of their duties towards their employees.

The 1995 Act contains a number of definitions which determine whether the Act applies and whether liability will be imposed on the occupier. "Premises" is defined as including land, water, any fixed or moveable structures on land or water, and includes vessels, vehicles, trains and aircraft. The Courts have allowed a broad interpretation of the term over the years, and have approved the definitions of "premises" to include structures such as ladders, diving boards and diggers among other things.

An "occupier" of land does not simply refer to its owner. Instead, a control test is used, so that an occupier is a person who has such control over the state of the land or premises "...that it is reasonable to impose upon that person a duty towards an entrant in respect of a particular danger..." For example, if an owner of a house rented out that house to another person, the "occupier" could be either the person renting or the owner, depending on who has responsibility for the state of the premises.

The duty of care is owed by an occupier towards an entrant. An entrant, under the Act, is any person who enters on to land or premises and is not the occupier. The definition of an entrant is further broken down into three classifications: visitors, recreational users and trespassers, and the duty of care owed by the occupier will differ depending on the category of entrant.

The highest duty of care is owed towards visitors. Visitors are persons who are present at the invitation or with the permission of the occupier or his or her family, or who are present by virtue of an express or implied term in a contract. The occupier must "...take such care as is reasonable in all the circumstances ... to ensure

that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.”

The second-highest duty of care is owed towards recreational users. A recreational user is a person who is present on land or premises with or without permission, free of charge, and for the purpose of engaging in a recreational activity. Recreational activity is defined as including sporting activities, scientific research, and exploration of caves, sites, or buildings of historical, architectural, artistic or archaeological importance. In this case, the occupier owes recreational users a duty to avoid injuring them intentionally, and to avoid acting with reckless disregard for their safety.

The Act states that in determining whether an occupier acted recklessly, all of the circumstances of the case must be taken into account, including a number of factors specifically listed in the Act as follows:

- whether the occupier knew or should have known that a danger existed on the premises
- whether the occupier knew or should have known that the person would be on the premises
- whether the occupier knew or should have known that the person was likely to be in the vicinity of the place where the danger existed
- whether the danger was one which the occupier should be expected to provide protection for the entrant
- the burden on the occupier of eliminating the danger, having regard to the difficulty, expense or impracticality associated with same
- the nature of any warnings given by the occupier
- the care which the entrant might be expected to take for his own safety

The third category of entrants is that of trespasser. Traditionally, the duty of care owed towards trespassers was at a very low level. It was therefore very rarely that a trespasser could successfully sue for damages for injuries sustained due to a danger on another’s land. Over time the common law began to recognise that a trespasser could not be treated as the occupier pleases. The 1995 Act elevates the duty owed towards trespassers to that enjoyed by recreational users. Therefore occupiers owe trespassers a duty to avoid injuring them intentionally and to avoid acting with reckless disregard for their safety. However, the 1995 Act also states that an occupier does not have a statutory duty towards a trespasser who enters onto premises for the purposes of committing an offence, or to a trespasser who commits an offence on the premises. This would cover a situation where for example a person broke a window to gain entry to a premises for the purposes of stealing and sustained injuries on the broken glass.

The different levels of the duty of care owed by occupiers can be either extended or restricted pursuant to the Act. Section 5 provides that the duty owed to visitors may

be restricted, modified or excluded by express agreement, but only where the changes have been brought to the attention of the visitor and where they are reasonable in all the circumstances. The limitation imposed by the Act on any such restrictions or exclusions is that the duty of care owed to visitors cannot be lowered to below the duty owed to recreational users and trespassers. Therefore, the least onerous duty owed towards entrants is the duty to avoid injuring them intentionally or to act with reckless disregard for their safety.

The duty of care is commonly restricted by means of a notice placed at the entry to an occupier's property. If an entrant has been warned of a particular danger before entering onto another's property, this may be sufficient to absolve the occupier from liability towards that entrant for any injury or damage that might result from that danger. Where children are concerned, however, a notice may be of no benefit. In the case of *McNamara –v- ESB* (a case which pre-dates the 1995 Act) the ESB were held liable for the injuries of a young boy who broke into an ESB substation which was surrounded by a wire mesh fence topped with barbed wire, on the basis that the ESB had been aware that children had been entering the substation.

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September 2009 (Revised November 2018) Wolfe & Co. Solicitors
Market Street, Skibbereen, Co. Cork - web: www.wolfe.ie
Tel: 028-21177, fax: 028-21676, e-mail: info@wolfe.ie