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A2 GCE LAW

G158/01/RM Law of Torts Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G158 LAW OF TORTS**SPECIAL STUDY MATERIAL****SOURCE MATERIAL****SOURCE 1****Extract from the Occupiers' Liability Act 1957.**

2(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(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. 5

(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 10

(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) – 15

(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, maintenance 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 in order to satisfy himself that the contractor was competent and that the work had been properly done. 20
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(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

Extract from the Occupiers' Liability Act 1984.

Duty of occupier to persons other than his visitors

(1) The rules enacted by this section shall have effect, in place of the rules of common law, to determine – 30

(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 35

(b) if so, what the duty is.

(2) For the purposes of this section, the persons who are to be treated respectively as an occupier of any premises (which, for those purposes, include any fixed or movable structure) and as his visitors are —

(a) any person who owes in relation to the premises the duty referred to in section 2 of the Occupiers' Liability Act 1957 (the common duty of care), and 40

(b) those who are his visitors for the purposes of that duty.

(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; 45

(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 the vicinity or not); and

(c) the risk is one which, in all the circumstances of the case, he may be reasonably expected to offer the other some protection. 50

(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. 55

(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person ... 60

SOURCE 2

Keown v Coventry Healthcare NHS Trust [2006] All ER (D) 27 (Feb)

In 1999, the claimant, aged almost 12, climbed the underside of a fire escape on the outside of a building owned and occupied by the defendant trust. The building was in hospital grounds, which, as the trust knew, were used by the public as a means of access between the streets on either side, and by children as a play area. The claimant fell from a height of about 30 feet, fracturing his arm and suffering a significant brain injury which led to loss of intellectual functioning and, it was said, a personality change which allegedly caused him to be convicted of various sexual offences. The claimant commenced proceedings against the trust in respect of his injury. The parties accepted that the claimant had to be treated as a trespasser while climbing the fire escape. At the hearing, he gave evidence to the effect that he had appreciated that it was dangerous to climb the underside of the fire escape and had known that he should not be doing it. The judge found that there had existed a 'danger due to the state of the premises' within the terms of s 1(1)(a) of the Occupiers' Liability Act 1984; that the trust had been aware of the circumstances giving rise to the danger and had thus, presumably, been aware of the danger, within s 1(3)(a) of the Act; that the trust had known that children played in the grounds and that there was a risk of their coming into the vicinity of the fire escape, within s 1(3)(b); that the risk of suffering injury by reason of the danger due to the state of the premises was a risk against which the trust might reasonably have been expected to offer some protection, within s 1(3)(c); and that the maxim *volenti non fit injuria* did not apply in the circumstances. He accordingly held that the trust was in breach of duty to the claimant, but that the claimant was two-thirds responsible for what had happened. The trust appealed.

Held – The appeal would be allowed.

The claimant had not passed the threshold requirement contained in s 1(1)(a) of the 1984 Act. The fire escape was not itself dangerous. Any danger was due to the claimant's activity on the premises and was not due to the state of the premises. The fire escape was a normal fire escape and the premises were required by law to have means of egress in case of fire. A building with a fire escape was not dangerous any more than a building with a drain pipe or premises with trees growing on them were dangerous. If an adult or a child chose to create danger by climbing them, any such danger was due to such person's activity, not the state of the premises. The question whether premises which were not dangerous from the point of view of an adult could be dangerous for a child was a question of fact and degree. In the instant case it could not be said that the claimant had not recognised the danger.

SOURCE 3***Jolley v Sutton London Borough Council [2000] 3 All ER 409***

A small boat was abandoned in the grounds of a block of flats owned and occupied by the defendant local authority. The boat, which was left on a grass area where children played, became derelict and rotten. J, a 14-year-old boy, attempted to renovate the boat with a friend, and jacked it up in order to repair the hull. He was under the boat when it fell on him, causing him severe injuries. In subsequent proceedings based primarily on alleged breaches of the Occupiers' Liability Acts 1957 and 1984, the authority stressed that J was working on the boat, rather than playing with it. The judge held that the boat was a trap or allurement to children, that play could take the form of mimicking adult behaviour, that it was reasonably foreseeable that children would meddle with the boat at the risk of some physical injury, that the authority was in breach of its duty to J as occupier of the land and that accordingly it was liable for his injury. On appeal, the authority conceded that it had been negligent in failing to remove the boat with its rotten planking, but contended that its negligence only created a foreseeable risk of children climbing on the boat and being injured by the rotten planking giving way. That contention was accepted by the Court of Appeal which held that J had been engaged in an activity very different from normal play, and that it was not reasonably foreseeable that an accident could occur as a result of the boys deciding to work under a propped-up boat. Accordingly, the appeal was allowed, and J appealed to the House of Lords.

Held – A finding or admission of want of care on the part of a defendant established that it would have cost him no more trouble to avoid the injury which had occurred than he should have taken in any event. In those circumstances, the defendant would be liable for the materialisation of even relatively small risks of a different kind. Moreover, the ingenuity of children in finding ways of doing mischief to themselves or others should never be underestimated. For those reasons, in the instant case the judge had been correct to describe the risk as being one that children would meddle with the boat at the risk of some physical injury. Moreover, his observation that play could take the form of mimicking adult behaviour was a perceptive one, and he was justified in holding that an accident of the type which had occurred was reasonably foreseeable. Accordingly, the appeal would be allowed.

SOURCE 4***Harris v Perry and Another The Times, 25 August 2008***

THE LORD CHIEF JUSTICE,

[T]he defendants had hired a bouncy castle and a bungee run for a tenth birthday party for their triplets. Prior to the party, various children were playing on the inflatables. The second defendant was supervising them from a position in front of both inflatables. The accident occurred when the second defendant's back was turned from the bouncy castle. She had gone to help a child on the bungee run. During that time, three children each did one somersault, the last accidentally caused the claimant's injuries. The [trial] judge held that the second defendant's duty of care to the claimant required her to maintain uninterrupted supervision of the bouncy castle and that, if she had so acted, she would have been able to stop the somersaults in time to prevent the accident and thus that her breach caused the accident.

[...] The issue [on appeal] was what positive steps would a reasonable parent take for the safety of a child of the claimant's age playing on a bouncy castle. The answer to that question must depend critically on the risks that the reasonable parent ought to foresee would be involved in the use of the bouncy castle. The injury suffered by the claimant was of horrifying severity. It resulted from contact between the claimant's forehead and another boy's unshod heel.

The hire agreement recommended that the equipment should be supervised at all times and that boisterous behaviour should be stopped. A reasonable parent could foresee that if children indulged in boisterous behaviour on a bouncy castle, there would be a risk that, sooner or later, one child might collide with another and cause that child some physical injury of a type that could be an incident of some contact sports. It was not reasonably foreseeable that such injury would be likely to be serious, let alone as severe as the injury sustained by the claimant. The standard of care that was called for on the part of the defendants was that appropriate to protect children against a foreseeable risk of physical harm that fell short of serious injury. On that basis, there could be no justification for holding that the duty of care required that children who were playing on a bouncy castle must be kept under constant surveillance.

[...] The [trial] judge imposed an unreasonably high standard of care. The second defendant acted reasonably in concluding that she could supervise both inflatables at the same time. She could not reasonably have foreseen that, in turning to help strap in a child on the bungee run, she would expose the children playing on the bouncy castle to an unacceptable risk. The accident was a freak and tragic accident. It occurred without fault.

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SOURCE 5

Jenny Steele, Tort Law: Text, Cases and Materials, 3rd Edition (2014), Oxford University Press, pp 730–731

Children

Section 2(3)(a) states ... [t]hat occupiers must be prepared for children to be less careful than adults when it comes to their own safety. Pre-1957 Act case law is often referred to in interpreting this section, but this case law is inconsistent.

In *Glasgow Corporation v Taylor* [1922] 1 AC 44, the defendants were occupiers of a Botanical Garden to which children (including unaccompanied children) had free access. The plaintiff's son, who was 7 years old, went to the garden unaccompanied and died when he ate the berries of a poisonous shrub. Since the child was entitled to be present in the relevant part of the gardens, which was much frequented by children, and since there was ready access to the tree, the House of Lords held on a preliminary issue that there was a good cause for trial. The berries could constitute a hidden danger as against a child. This case indicates that the idea of an 'allurement' or 'trap' for children may have some use where children are present with permission, and is not limited to cases of 'implied licence'. 5

A continuing puzzle, mentioned but not resolved in *Glasgow Corporation v Taylor*, concerns the degree to which occupiers are obliged to make their premises safe for unaccompanied children. Smaller children are of course expected to be less careful than older ones; but by the same token adults are expected to supervise those small children to a greater extent. The degree of parental supervision that is considered appropriate may well be expected to change over time, although it is also not surprising that in the days when (it appears) children as young as 4 were left to wander public parks alone, the courts refused to impose on occupiers the duties that parents did not (or could not) fulfil. 10

Devlin J attempted to set out a workable approach to such cases in *Phipps v Rochester Corporation* [1955] 1 QB 450 (a pre-1957 Act case in which he treated a 5-year-old child wandering on to an unfenced 'building site' near to his home as an implied licensee). His approach to the content of the duty owed requires an interpretation of where 'prudent people' will allow their children to go unaccompanied ... [T]he result of this was that if the child was so young that a degree of supervision by an adult ought to be expected, then the only required warnings are those that would be needed to alert a guardian to the danger. The relevant danger in Phipps (a trench in the ground) being obvious to an adult, there was no breach of the occupier's duty. This was not a case where fencing the entire area was regarded as feasible or necessary, and this distinguishes it from cases where children wander onto the railway, for example. 15

Bourne Leisure v Marsden [2009] EWCA Civ 671

In this case the Court of Appeal had cause to revisit the issues raised in *Phipps v Rochester*, and derived important principles from that case. The claimants had taken their small children to a holiday park. The children had briefly evaded the attention of their mother who was talking to another holiday-maker, and the older child (who was 2 years of age) had drowned in a pond. There was a path to the pond, which was fenced, but the child was able to climb over the fence. The Court of Appeal held that there had been no breach of duty under the 1957 Act. It would be impracticable to fence every source of hazard, and clearer information about the location of hazards would have made no difference. The court made plain that their decision did not imply fault on the part of the parents. But unless there is a reason to expect unaccompanied children to encounter a danger, there is no duty to warn of dangers that would be obvious to a parent or guardian. The Court of Appeal here reinforces the message which is one of the themes of recent case law in the area: some tragic accidents simply occur without culpability. The duty to be reasonably careful or make reasonably safe, if properly discharged, does not guarantee safety from every foreseeable risk. 20

SOURCE 6

Luke Bennett, Judges, Child Trespassers and Occupiers' Liability, (2011) IJLBE 3(2), 126–145

Text-book accounts of the development of legal principles in English Law concerning occupiers' liability towards child trespassers portray a "humanising" trend over the last 100 years, starting from a "draconian" position "derived from the nineteenth century moral judgment that a trespasser was deserving of his plight" (Markesinis and Deakin, 1999, p. 327). That Victorian jurisprudence is characterised as having "an over-zealous preoccupation with the sanctity of real property rights, even over that of human life" (OLRC, 1972, pp. 6–7). In such accounts, the 1929 House of Lords judgment in *Addie* is vilified as symptomatic of this inhumane attitude. In this case, a mine owner was found to owe no duty to a four-year old child trespasser fatally crushed by a spoil conveyor on its site. In finding no rule of liability towards the child their Lordships thus upheld a view that liability (if any) was dependent upon a "technical question of the capacity of the injured: invitee, licensee, trespasser".

In 1957, at the recommendation of the Law Review Committee, the principles of occupiers' liability for lawful visitors were codified in the Occupiers Liability Act 1957, removing a differentiation of levels of duty as between various types of invitee and licensee and replacing these with declaration of a "common duty of care" to be owed by occupiers to all lawful visitors. However, the common law was left unaltered as regards the position of trespassers.

In 1972, the House of Lords, in *British Railways Board v. Herrington* overruled *Addie* and, in a spirit of modernisation, and self-declared "humanisation" of the common law, held that circumstances could arise in which an occupier would owe a "duty of humanity" to a trespasser. However, due to concerns about how the five Law Lords had variously defined that possibility, the Law Commission was asked in 1976 to examine the law and submitted its recommendation for codification of the principles of occupiers' liability to trespassers. In 1984, a modified version of the Law Commission's proposals was enacted, as the Occupiers' Liability Act 1984 setting the current basis for occupier liability towards trespassers.

Changes in the built environment

As noted by Lord Wilberforce in *Herrington*, the law in this area tends to develop around issues, often physical things, that emerge and need addressing. For example, the railways industrialised long narrow tracts of the countryside from the mid-nineteenth century onwards giving rise to a wave of cases by which a distinct jurisprudence on railway-line hazards was created. Later, the electrical and mechanical hazards of tram systems had to be adjudicated on and so forth. The occupiers' liability cases of the industrial era (of which *Addie* is a classic example) were wrestling with the spatial consequences of industrialisation. New machines now sat in fields, exposed to the curious. Standard patterns of housing development in mining and other activity-specific locations were huddled for convenience adjacent to the mills and railways for which they provided worker accommodation (as was the case in *Addie*). The child trespassers lived locally and played locally. [T]he location and nature of such play was "intertwined with work" -- the contemporary spatial demarcation between places of play and places of work being a later twentieth century conceptual invention.

[...]

The twentieth century saw the rise of a notion of leisure and recreational space (and an expectation of access to it). The welfare state and the consumer society [...] brought with them new public spaces, premises, services and activities, each embodied within new physical structures. From the 1960s onwards, the law's concern with premises safety widened to take account of the changed nature of "public space".

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