OCCUPIERS' LIABILITY AND BREACH OF DUTY: WHY WE NEED A SYSTEMATIC TEST

Sixty years have passed since occupiers in England and Wales have been under a statutory duty to keep visitors to occupied premises reasonably safe. The legislation, however, did not detail the exact operation of this duty of care. The case law, expected to fill in the gaps, has arguably developed without sufficient consistency and/or predictability. This apparent confusion can be remedied through applying a systematic test to the question of whether a breach of duty has occurred. The test initially verifies that the case falls within the field of occupiers' liability because of the presence of a danger attributable to the state of the premises. It then examines three questions in turn, as follows: 1) whether the risk of injury was foreseeable, 2) whether the occupier could reasonably have been expected to have addressed this very particular risk, and 3) whether any remedial action the occupier actually took was appropriate.

Keywords: torts; occupiers' liability; duty of care; standard of care; visitors.

1. INTRODUCTION

'Occupiers' liability' may sound like an arcane area to the torts non-specialist, but its principles are regularly invoked by victims of a serious injury who are searching for a possible remedy. In 2016 alone, cases were decided that had been brought by a man who became quadriplegic after falling off a bridge in a park,[1] a tourist who fell into the moat of a castle,[2] and a prisoner who was injured during an electricity power outage.[3] The abundant case law indicates a field prone to considerable

[1] *Edwards v Sutton LBC* [2016] EWCA Civ 1005.
[2] *English Heritage v Taylor* [2016] EWCA Civ 448.
[3] *G4S Care and Justice Services (UK) Ltd v Manley* [2016] EWHC 2355 (QB). See below for a discussion of more recent cases.

litigation and judicial disagreements. At its core sits the question: did the *occupier* of the premises where an incident took place *breach the duty of care* owed to all *visitors* to these premises?

The legislation in England and Wales which currently governs occupiers' liability to visitors is the Occupiers' Liability Act 1957 (OLA 1957). The intention behind this statutory provision had been to simplify a legal area which had been developing under the common law and was criticised for being in a 'confused state'.[4] It was also a response to the inconsistency and harshness of the common law where the scope and extent of the duty owed depended on the type of lawful entrant to premises. This statute reformed the law by providing that occupiers owe a common duty of care to all visitors to premises and that the duty is '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] It was accepted that the contours of breach of duty drafted in such general terms would have to be defined more precisely by the courts in the course of time.

Commentators generally welcomed the legislation.[6] One dissenting voice was Diplock QC, who thought that the codification would cause 'for a considerable period of years until the new case law has been settled, uncertainty over a wide field of legal rights and obligations which affect every member of the public in his daily life'.[7] Echoing this scepticism, Payne foresaw extended litigation as 'the greater the discretion conferred on the court, the more uncertain the outcome of a case will be, and the higher will be the proportion of cases that go to trial instead of being settled out of court'.[8]

This remark was prescient. In the six decades since the Act came into force, the factors judicially considered in determining breach of duty have multiplied: was the injury foreseeable or

[4] Law Reform Commission, *Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers* (1954) Cmd 9305, p 493.
[5] OLA 1957, s 2(2).
[6] As noted by P North *Occupiers' Liability* (Oxford: Oxford University Press, 2014) p 10.
[7] Law Reform Commission, above n 4, Minority Report by Mr Kenneth Diplock QC, p 515.
[8] D Payne 'The Occupiers' Liability Act' (1958) 21 *MLR* 359, p 374.

was the danger so obvious that a reasonable person would have been expected to avoid it? Should there have been a warning notice, a fence to close off the dangerous area, or some other protective measure? Would the latter have made a difference or would visitors have ignored it? Might it have represented a disproportionately cost for the occupier? And so on and so forth.

The factors taken into account vary from case to case, and often within one case from one level of jurisdiction to the next. Uncertainty as to which factor will be deemed crucial (or even simply relevant) in any one case puts legal representatives in a difficult position, as well as judges who do not direct the arguments submitted to them. What cannot be contested is that competing interests are at stake and have to be balanced against each other: 'on the one hand, there is the interest of the land occupier to have untrammelled use and control of his property; on the other hand, and in opposition to this, there is the interest of society in ensuring the physical safety of all its members, and when a member is injured the interest to see that he is compensated'.[9] A compromise must be reached between conflicting and evolving values, such as the need to reign in the excesses of a growing 'compensation culture'[10] and the importance of continuing to protect members of society, especially when they are vulnerable.[11]

After over 60 years of judicial decisions an analysis of the common themes identified by the courts in determining breach of duty under the OLA 1957 is timely. Based on a critical review of the case law, this article seeks to expose inconsistencies in judicial adjudication and to identify the central factors that should guide the courts in determing breach of duty. This approach offers a more structured legal analysis of the myriad factual scenarios that may be presented to the courts and is

[9] B McMahon 'Conclusions on judicial behaviour from a comparative study of occupiers' liability' (1975) 38 *MLR* 39. See also F Barker and N Parry 'Private Property, Public Access and Occupiers' Liability' (1995) 15 *Legal Studies* 335.

[10] For a perspective stressing this point, see J Elvin 'Occupiers' Liability, Free Will, and the Dangers of a "Compensation Culture"' (2004) 8 *Edinburgh Law Review* 127.

[11] For an argument emphasising protection, see J Bridgeman 'Unrelated Adults and Unaccompanied Children: Obligations, Risks and Responsibilities' (2013) 25 *Child and Family Law Quarterly* 159;

intended to clarify how guidelines relevant to the question of an occupier's standard of care - developed by the courts under the jurisdiction of the OLA 1957 - should be applied.

We recognise that a range of legal actions can arise from the same set of circumstances, but the attention in this article is on the particular issues that arise under the OLA 1957 – the specific statutory provision that regulates an occupier's responsibility to their lawful visitor - and so we do not examine potential parallel liability in common law negligence (such as employers' liability due to the dangerous state of premises at work). Furthermore, our intention is not to propose a framework of liability for all actions in general negligence, but to clarify issues related to the specific regime of liability for the occupier of land which Parliament introduced in 1957.

Determining liability under OLA 1957 first requires to establish whether the visitor is at all owed a duty under this Act.[12] For this to be the case, the injury must have occurred because of a danger due to the state of the premises. If it was due to the nature of the activities which took place on the premises (an example might be diving in shallow water), then the claim falls outside OLA 1957. If the injury to the claimant was caused by a defect or danger on the premises, we propose that the courts should proceed in three consecutive stages to determine whether a breach of duty has occurred. The first relates to foreseeability. If the risk of injury was not foreseeable to a reasonable person, the occupier cannot be liable; no further discussion is needed to conclude the case on occupier's liability. If the risk was foreseeable, the second stage of the analysis is to consider whether the occupier could have reasonably been expected to take steps in order to mitigate the risk through remedial action. If this test is answered in the affirmative, a third question arises: were the measures adopted by the occupier appropriate? Only if this answer is negative will there be a breach of OLA 1957's duty of care.

[12] The so-called 'threshold' test. See W Norris and Q Fraser 'Occupiers Liability: issues arising in recent case law (2015) 2 JPL 71, p 72.

The application of these guidelines should assist the development of a clearer body of case law, at the same time as eliminating the need for discussions which currently seem to occupy much judicial time despite being unnecessary within our scheme (because they pertain to an issue which needed not be addressed). The test should also equip occupiers with a better understanding of what the law requires of them, thereby inciting them to keep their premises in a safe state or, when incidents take place, to accept settlement at an early stage.[13] Last but not least, the clarity gained through the application of a more systematic and logical test should enhance the transparency of judicial reasoning. This should make the policy choices that underpin the way the judiciary exercises its discretion in this area more explict, thereby facilitating debate in society as to the values that the law is protecting.

2. THE LEGAL FRAMEWORK

Before starting our review of the case law, it is important to circumscribe the scope of OLA 1957. The term 'occupier' refers to any person who, under common law rules, occupies premises. The legislative intention was and remains to have the liability fall on the person most likely to have been in a position to prevent the harm from occurring. This may or may not be the owner; it is anyone who occupies the premises, i.e., who has control over them.[14]

The term 'premises' can cover all kinds of things, including railway lines, aircrafts, ships and other vehicles, the sea bed in a harbour, pubs, schools, fairground attractions and even ladders.[15] Section 1(1) of the 1957 Act states that the occupiers' duty of care arises in respect of 'dangers *due to the state of the premises* or to things done or omitted to be done on them'.[16] If the injury was due

[13] As the Law Commission hoped would happen when it recommended extending occupiers' liaility to trespassers: '*Report on the liability for damage or injury to trespassers and related questions of occupiers' liability*', Law Com No 75, 1976, at [11]. See also L Bennett 'Judges, child trespassers and occupiers' liability' (2011) 3 *International Journal of Law in the Built Environment* 142.
[14] *Wheat v Lacon & Co Ltd* [1966] AC 552.
[15] North, above n 6, p 58; M. Jones, A. Dugdale and M. Simpson *Clerk and Lindsell on Torts*, (London: Sweet and Maxwell, 21st edn, 2014) p 871.
[16] Emphasis added.

to activities taking place on premises, the case falls outside OLA's material scope and is governed by negligence rules under the common law. For example, in 2017, an injury caused by a fall from a bouldering wall was quickly found to be attributable to the undertaking of an inherently dangerous activity rather than to the dangerous state of the premises.[17]

As alluded in our introduction, pre-1957 common law classified visitors in different categories on a sliding scale, with some visitors needing to be protected against *unusual* danger of which the occupier knows or ought to know, but others only having to be warned of any *concealed* danger (or trap) of which the occupier knew.[18] The distinction between 'unusual' and 'concealed' dangers was not obvious; this is one of the reasons why OLA 1957 introduced a *common* duty of care, owed to all visitors.[19]

The statutory duty contained in s.2(2) OLA 1957 explicitly establishes that the occupier must ensure the individual visitor is reasonably safe, not the premises *per se*[20] and so the vulnerability of the entrant (including their specific mental or physicial attributes) is a relevant factor when examining whether the occupier has met the appropriate standard of care.[21] This focus on the safety of the visitor, not the premises, means that a warning of a danger or a barrier surrounding the danger (rather than the need to eliminate it) may well be sufficient for the occupier to satisfy the standard of care. Furthermore, the section is clear that the occupier's duty extends only to protecting the visitor 'for the purposes for which he is invited or permitted by the occupier to be

[17] *Maylin v Dacorum Sports Trust* [2017] EWHC 378 (QB).
[18] The first category of visitors, e.g. persons entering a shop, were denominated 'invitees'; the second, including for example someone allowed to cross the premises or guests to a dinner, 'licensees': Law Reform Commission, above n 6, p 481.
[19] OLA 1957 defines visitors in s 1(2) as 'the persons who would at common law be treated as … invitees or licensees'.
[20] The duty is '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'.
[21] For example, note the decision in *Pollock v Cahill* [2015] EWHC 2260 where a visitor with limited eyesight suffered serious injuries when he fell out of an open window – in itself not unsafe to a sighted visitor.

there'. Thus, the occupier is not expected to protect the visitor from dangers due to his or her misbehaviour on the premises.

OLA 1957 only gives limited guidance as to what factors should be used to assess whether the occupier has breached their duty. Section 2(3)(a) provides that an occupier should be prepared for children to be less careful than adults. Section 2(3)(b) adds that an occupier may expect professional visitors to guard themselves, 'in the exercise of their calling', against any special risk ordinarily incident to the job they have been called to perform. Section 2(4)(a) also specifies that any warning given by the occupier to visitors is not to be treated as absolving the occupier from liability, unless it is enough to enable the visitor to be reasonably safe. Beyond this, OLA 1957 simply states that 'regard is to be had to all the circumstances'.[22]

Occupiers of premises have been held liable for various acts and omissions, including: polishing a floor to such an extent as to make it dangerous,[23] omitting to light stairs adequately,[24] or failing to remove hazards likely to injure playing children.[25] The case law also contains numerous examples of situations where an occupier has been held not liable, for example when adequate warning notice had been given,[26] a hotel guest had slipped on a pool of water in the vicinity of a jacuzzi,[27] or a teenager had dived into a paddling pool.[28]

3. MULTIPLE FACTORS

Before turning to our test, it is worth explaining what prompted us to devise it. Despite contrary opinion,[29] we find the case law concerning OLA 1957 surprisingly abundant. This may be attributable to the absence of precise legislative guidelines to determine how to assess whether an occupier has

[22] OLA 1957, s 2(4).
[23] *Adams v SJ Watson & Co* (1967) 117 NLJ 130.
[24] *Stone v Taffe* [1974] 1 WLR 1575.
[25] *Jolley v Sutton* [2000] 1 WLR 1082 (derelict boat left ready to fall onto children playing).
[26] *Cotton v Derbyshire Dales DC*, Times, June 20, 1994 (CA).
[27] *Tedstone v Bourne Leisure Ltd (t/a Thoresby Hall Hotel & Spa)* [2008] EWCA 2008 Civ 654.
[28] *Cockbill v Riley* [2013] EWHC 656 (QB).
[29] For a different view, see North, above n 6, p 10.

breached the duty of care owed to visitors, which gives the judiciary freedom to take into consideration a multitude of ever increasing factors. The problem with this approach is that judicial reasoning then fails to identify which factor must be considered key, nor does it indicate how the various factors logically relate to each other, creating uncertainty in the law.

Legislative and judicial precepts make it possible to draw a long list of possibly relevant factors, as follows: #1. foreseeability of injury; #2. obviousness of the danger; #3. absence/presence of warnings; #4. whether adequate lighting was provided; #5. whether fencing was erected; #6. age range of expected visitors; #7. purpose of their visits; #8. conduct that could reasonably be expected of them; #9. whether the injured visitor was acting in the exercise of their calling;#10. the extent of precautions the occupier could be expected to take (less for a householder, more for a professional);#11. whether the occupier knew or should have known about the danger; #12. how difficult and expensive it would have been to remove the danger; #13. the general practice of occupiers in the relevant field; #14. the existence of official or semi-official safety rules; #15. whether the occupier had acted on professional or semi-professional advice; #16. whether a risk assessment had been performed; #17. the likelihood or otherwise of the danger materialising; #18. the desirability of keeping the amenity in an unaltered state; #19. aesthetic matters; #20. the desirability of leaving the premises in their original conditions; #21. the seriousness of the injury; #22. a (lack of) history of past incidents; #23. how much time had passed since the danger was identified; #24. whether additional protective measures would have had any effect; #25. whether the visitor would have utilised additional safety measures; #26. whether repairs were regularly carried out; #27. what is happening on the premises (e.g. the use of explosives requires a high degree of care);[30] #28. the desirability (social value) of the activity performed on the premises; #29. a recognition that those who take risks out of their own free will

[30] As per *Bottomley v Todmorden Cricket Club* [2003] EWA Civ 1575.

should not expect compensation for injury;#30. the undesirability of living in a society where all risks have been eliminated.

This list is indicative rather than comprehensive; new circumstances will always lead to the identification of additional potentially relevant factors. What this section highlights is that it is not immediately clear why some factors rather than others are considered in any one case. Without a 'control' system determining when a specific range of factors should be applied, the approach appears ad hoc and unable to guarantee against inconsistent judicial decision making and unfairness. We shall demonstrate this point through a review of five cases (all but one decided in 2016). Any number which appears in parentheses refers to the list above.

English Heritage concerned a visitor who had sustained a serious head injury after falling in the moat of a castle on the Isle of Wight. The first instance judge and the Court of Appeal agreed occupier's liability was incurred, but arguably focused on different reasons. Emphasis at first instance was on the lack of warnings (#3), with the judge finding that additional warnings should have been in place to ensure the safety of the claimant, given the sheer drop of the moat.[31] The Court of Appeal confirmed the liability of English Heritage, but seemed to put the stress on whether there had been an obvious danger (#2), given there is no need for an occupier to protect irresponsible visitors against perfectly obvious dangers.[32] Here the danger was found not to have been obvious.

In *Rochester Cathedral*, differences of judicial opinion as to which factors should be considered produced different outcomes. In this case, a man tripped on a small lump of concrete which was protruding from the base of a traffic bollard in the precints of Rochester Cathedral. The court at first instance found for the claimant, whereas the Court of Appeal held the cathedral not to be liable. The key factor at first instance seems to have been that there was a foreseeable risk of

[31] *English Heritage v Taylor* [2016] EWCA Civ 448, at [34].
[32] The exception is where there is 'no genuine and informed choice': See *Tomlinson v Congleton* [2003] UKHL 47, [2004] 1 AC 46, at [46] (Lord Hoffmann); *English Heritage*, at [7] (LJ McFarlane).

injury (#1). Although the Court of Appeal also considered the foreseeability of injury, it was swayed by other factors such as the difficulty and expense of removing the danger (#12), in particular the time and money that occupiers would have to spend identifying and remedying any and every fault of this nature;[33] and the likelihood of the risk of injury (#17) (it was unlikely a pedestrian would walk so close to the bollard).[34]

Edwards v Sutton BC illustrates that similar factors can be considered at different levels of jurisdiction, but to different effects. A visitor to a park had fallen from a small ornamental bridge with a low parapet onto a rock in the water below, resulting in a spinal cord injury. He sued the park's occupier, Sutton Borough Council. To find the council liable, the first instance judge referred to the presence of a danger due to the state of the premises (our initial test);[35] the failure to have undertaken a formal risk assesment (#16);[36] the foreseeability of the claimant tripping (#1);[37] the fact that warnings could have been installed at no significant cost (#12);[38] the 'catastrophic' nature of the injury if it were to eventuate (#21);[39] and the absence of warning about the 'dangerously low' parapet (#3).[40] The Court of Appeal discussed most of these factors, but put them in a different context, thus finding Sutton BC not liable. It observed that it was important to first of all identify the danger (and admonished the trial judge for not having considered this issue adequately).[41] The danger would have been obvious, the court stressed, making the potential for injury obvious too (#2). The Court stated that occupiers are under no duty to protect or even warn against obvious dangers. The danger had been 'extremely unlikely' to materialise in this case (#17), and one cannot guard against the many foreseeable risks that are extremely unlikely to happen.[42] '[A]ny warning or

[33] *Rochester Cathedral v Debell*, [2016] EWCA Civ 1094 at [24].
[34] Ibid, at [26].
[35] *Edwards v Sutton*, at [42] (LJ McCombe).
[36] Ibid, at [43].
[37] Ibid, at [46].
[38] Ibid, at [52].
[39] Ibid, at [53].
[40] Ibid, at [61].
[41] Ibid, at [38].
[42] Ibid, at [45].

sign would not have told the claimant anything that he did not already know'.[43] Thus, 'there was no need for a risk assessment as it would not have lessened the accident risk' (#16).[44] The social value of walking over the bridge (#28) and its amenity (#18) as well as the absence of previous incidents (#22) were also mentioned.[45]

To close this review, we move to two cases which tragically involved children. *Bourne Leisure* (the one case decided prior to 2016 discussed in this section) concerned a two-year-old who had drowned whilst his family was holidaying at a caravan park.[46] At first instance, Bourne Leisure was held liable mainly due to the lack of warnings the parents had received (#3). In the judge's view, the holiday park had been under 'a high duty to inform, clearly and unequivocally, the parents fully of the location and means of access to such ponds or lakes as were present on the site';[47] merely providing parents with a map of the site without drawing their attention to the danger was insufficient. To quote, 'I am satisfied on the balance of probabilities that sensible information as to the location and easy access to the pond [from the claimant's caravan] would, without any dire over-worrying warnings as to the height of fences, have made every difference'.[48] The fencing reference in the last sentence alludes to a fence that the holiday park had installed after a four-year-old had nearly drowned at the same pond. This fence was not of the height recommended for domestic and/or school ponds by the Royal Society for the Prevention of Accidents (RSoPA) (#14). However, the judge did not find this circumstance critical, since the holiday park was neither a family home nor a school, and advice had been taken after the earlier incident from environmental health officers.[49] For the judge, the key issue was the absence of warning. On appeal, the holiday park was held not to be liable. At this level, the main issue appears to have been that the danger was obvious (#2). To

[43] Ibid, at [48].
[44] Ibid, at [57].
[45] Ibid, at [51].
[46] *Bourne Leisure v Marsden* [2009] EWCA Civ 671.
[47] Ibid, at [33].
[48] Ibid, at [40].
[49] Ibid, at [8].

quote, 'the danger of the lake to a small child, should that child in fact stray, was obvious'.[50] In the view of the Court of Appeal, any warning would not have told the parents anything they did not already know. 'Such warnings were irrelevant in a case such as this where the parents were quite aware of the need to accompany their young children and of the dangers at the water's edge, of which they needed no reminder'.[51]

In the Scottish case of *Anderson v Imrie*, a child had sustained serious skull and brain injuries.[52] The occupier of the land where this happened was found liable under the Occupiers' Liability (Scotland) Act 1960, which is similar to OLA 1957. The defendant lived on a 100-acre farm and had arranged for an eight-year-old boy to come and play with her five-year-old son. She had told the children they could play in the farmhouse and in the courtyard but that they must not go into the race (a type of livestock crush). She was going back and forth between the farmhouse, where her mother was taking care of her baby, and the courtyard, where she was dressing her horse. While she went to fetch something for her horse into the stable, the visiting child climbed over the gate separating the courtyard from the race. Once in the race he climbed on to a stock gate attached to a barrier. He lifted the chain off causing the gate to become detached from the barrier and over-balance on top of him, causing him to fall back and strike his head against the concrete surface of the race. For the court, taking into account the age of the visitor (#6) and finding that the race and the gate would have been irresistible to a child, the injury was foreseeable (#1): 'he must have been out of her sight for at least several minutes … that was dangerously long … a foreseeable risk that within such a timeframe the pursuer would suffer an accident'.[53] The judge found the mother liable.

It seems strange that the race in *Anderson* was found irresistable to a child but not the pond in *Bourne Leisure* (despite the previous incidence of a near-drown). It is also noteworthy that the occupier in *Bourne Leisure* was a professional contractor deriving income from the visits that were

[50] Ibid, at [17] (LJ Moses).
[51] Ibid, at [20].
[52] *Anderson v Imrie* [2016] EXOH 171.
[53] Ibid, at [33].

its raison d'être, whilst in *Anderson* it was just a mother who had had a child around to play at home. The difference in outcome between the two cases will be discussed further below.

4. WHICH FACTORS APPLY IN ANY ONE CASE?

Can judges simply determine the factors which to them seem most relevant to the circumstances of the case before them, without having to justify their selection or demonstrating consistency with previous judgments? Certainly, the case law is not explicit as to the reasons why some factors are chosen over others and/or become key.

Tomlinson v Congleton is a leading House of Lords case in the field of ccupiers' liability. Ostensibly about the duty owed to trespassers[54] their Lordships nonetheless opined at length on matters relevant to the duty owed to visitors and it is cited in numerous cases concerning OLA 1957. *Tomlinson* confirmed that the right approach is to start by identifying a danger due to the state of the premises. Not all cases do this, however. For example, in a case brought against the London School of Economics by a student who had slipped in her university-owned shower room, a county court discussed the absence of previous accidents (#22), the fact that slip resistant flooring had been installed which accorded with relevant official safety advice for universities (#14), as well as the very small risk that the danger would have materialised (#17) before dismissing the claim.[55] This meticulous analysis was arguably superfluous: early in the judgment the possibility of the standard shower room having been a 'trap' had been eliminated. Yet more puzzling is another county court's decision which found a holiday resort incorporating a bar not liable after a customer had attacked another with a bottle of wine. The reason given was that the customer had not acted in a way that

[54] In 1972 the House of Lords ruled that trespassers could in some circumstances be owed a duty of care by occupiers, on the basis of a 'common humanity'. This prompted the Parliament to pass a new Occupiers' Liability Act in 1984 (OLA 1984) in relation to trespassers. The duty under this Act arises only if the occupier was aware of the danger and knew or had ground to believe that the trespasser was or could have been in the vicinity of the danger. It is of a lower standard than that pertaining to OLA 1957. In addition, the trespasser's claim can only be for compensation for death and personal injury (thus excluding loss of or damage to property). How the questions of our test could be slightly modified to apply to cases litigated under OLA 1984 is beyond the scope of this article.

[55] *O'Rafferty v London School of Economics* [2016] WL 08309370.

could have been foreseen (#1).[56] It would surely have been simpler to establish at the outset that there had been no danger due to *the state* of the premises.

In *Tomlinson*, Lord Hoffmann highlighted four major factors to determine breach of duty in occupiers' liability: the foreseeability of injury (#1), the seriousness of injury (#21), the social value of the activity (#28) and the cost of preventative measures (#12). The question of whether people should accept responsibility for the risks they choose to run (#29) was a fifth factor whose relevance in certain circumstances was stressed, in a context where the real or perceived dangers of a 'compensation culture' were a concern.[57] These factors remain regularly cited in the case law, as a review of three cases decided in 2017 may serve to illustrate. *Cook* concerned a fall on black ice in an unmanned car park.[58] To conclude that the city council had not breached its duty, the Court of Appeal relied on the first four factors, alongside the obviousness of the danger (#2): gritting the car park on a Saturday would have been 'disproportionate' to the risk and 'would have diverted such resources from situations where attention was more urgently required'.[59] *Singh* produced a first instance judgment on similar lines. Walking home along a path, the claimant slipped down into a brook and remained there overnight. The High Court reasoned that the injury was severe and the cost of fencing low but that the risk was low (no accident reported) and there was a real social value in allowing people to walk there; decisively, the visitor had willingly accepted the risk.[60] In *Robinson*,[61] about a two-and-a-half-metre fall from a terrace, the county court mentioned the four factors, but ended up rejecting the county's liabiity on the basis that no duty arose as there had

[56] *Burton v Butlins Skyline Ltd* 2016 WL 08116656.
[57] *Tomlinson*, at [34-44]. For consideration of the issues surrounding the perceived 'compensation culture', see K Williams, 'State of Fear: Britain's "Compensation Culture" Reviewed' (2005) 25 *Legal Studies* 499; A Morris 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury (2007) 70 *Modern Law Review* 349; Lord Dyson 'Compensation Culture: Fact or Fantasy?' Holdsworth Club Lecture, 15 March 2013; R Lewis 'Compensation Culture Reviewed: Incentives to Claim and Damages Levels' [2014] *Journal of Personal Injury Law* 20.
[58] *Cook v Swansea City Council* [2017] EWCA Civ 2142.
[59] Ibid, at [35] (LJ Hamblen). For a similar incident and outcome, *Cairns v Dundee City Council* [2017] CSOH 86, but adding at [21] that warning signs (#3) would have stated the obvious.
[60] *Singh v City of Cardiff Council* [2017] EWHC 1499.
[61] *Robinson v North Yorkshire County Council* County Court (Newcaste upon Tyne), 30 January 2017, unreported.

been no danger to the state of the premises, *and* the drop was obvious,[62] *and* the claimant had been drinking (#8).[63]

However, many cases concentrate on altogether different issues. This seems particularly the case when compliance with official guidance (#14) is at issue. In such cases, whether guidance was followed looms large. In the shower room case, the judge was clearly influenced by the fact that the University had addressed the risk of injury by installing slip-resistant flooring which accorded with the relevant Code of Practice.[64] Another example concerns a resurfaced balcony's balustrade which was below the height recommended by British Standards Institutions, which seems to have been determinant to find the Ritz hotel liable.[65] In yet another case involving a fall, a handrail had been below standard. This was key since the occupier--licensed premises--must have expected inebriated customers like the claimant to rely on handrails when taking stairs.[66]

In many cases, whether a risk assessment has been carried out (#16) is important, such as when a man fell from a hospital's roof,[67] whereas in other cases it is felt the assessment would not have added anything at all.[68] An absence of previous incidents (#22) sometimes appears determinant, such as in *Edwards* (fall from a low parapet bridge) for a finding of non liability. Lack of warning (#3) can be decisive for concluding that the occupier is liable,[69] but is dismissed as irrelevant in other cases where the risk is considered to be of an obvious nature.[70] In *Rochester Cathedral*, the

[62] A key theme in the judgment, see ibid, eg at [26-27].
[63] Ibid, at [4-8] and [27].
[64] *O'Rafferty.*
[65] *Ward v Ritz Hotel Ltd* [1992] PIQR P315.
[66] *AB (a protected party by his litigation friend, CD) v Pro-Nation Limited* EWHC [2016] 1022 (QB).
[67] *Spearman v Royal United Bath Hospitals NHS foundation Trust* [2017] EWHC 3027, at [62] and [64]. See also *C v City of Edinburgh Council* [2018] WLT (Sh Ct) 34, at [49] (local education authority liable to a pupil's mother injured by a sign which fell off a school wall).
[68] For example, *Edwards v Sutton*. Similarly, in *Mullen v Kerr* [2017] NIQB 69, the occupier of a private access road with no footpath was not liable to a pedestrian injured by a car. A risk assessment would not have been able to prevent the collision. Key factors were the light use of the road by vehicles (corresponding to #1 in our list) and the fact that even if a footpath had been provided, pedestrians would probably not have used it (#25).
[69] As in *Bourne Leisure* at first instance. See also *Ireland v. David Lloyd Leisure Ltd Ireland v. David Lloyd Leisure Ltd* [2013] EWCA Civ 665 (warnings should have been given about a piece of gym equipment in a rack called a barbell which severed a weightlifter's finger).
[70] Such as in *Bourne Leisure* before the Court of Appeal.

outcome ended up resting on the difficulty and cost of identifying and remedying in a systematic manner apparently small dangers such as the protruding concrete (#12).

Clearly it is the function of the judge to determine which facts are legally relevant and how they should be qualified and interpreted. In this sense, for different judges to examine arguably similar cases (or the same case at various levels) differently is not *per se* disturbing; this is inherent to the judicial function. What concerns us, however, is that occupier's liability appears to be a field where it is hardly possible to discern consistency in judicial reasoning and where an abstract, logical appreciation of how the factors to be taken into consideration interrelate seems to be absent.

5. FACTORS LACKING IN CLARITY

This state of affairs is accompanied by a lack of clarity regarding two factors which are arguably relevant to any case having to do with occupier's liability, whatever their precise circumstances, and which can therefore be presumed to be fundamental to this area of the law. This is the foreseeability of the injury (#1 in our list) and the obviousness of the danger (#2).

Foreseeability heads our list because it is regularly discussed in the case law, and appears quite early in most judicial reasoning. It was vividly discussed in *Rochester Cathedral*. The judge at first instance framed the main question as being the existence of a foreseeable risk, which it found established.[71] However, the Court of Appeal admonished the lower court for not having applied this criterion properly: 'The judge did not apply the foreseeability test in the appropriate way ... There is no recognition in the judgment that not all foreseeable risks give rise to the duty to take remedial action'.[72] The Court of Appeal explained that the test must be considered met 'only where there is a real source of danger which a reasonable person would recognise as obliging the occupier to take remedial action',[73] with anything else liable 'to result in too onerous a standard of care'.[74]

[71] *Rochester Cathedral*, at [11].
[72] Ibid, at [25] (as per . LJ Elias).
[73] Ibid, at [15].
[74] Ibid, at [13].

The second factor which also lacks clarity despite being fundamental and regularly commented upon relates to the obvious character of the danger (#2). Settled law has it that an occupier is under no duty to protect against dangers which are obvious to a visitor - who is expected to take reasonable care for their own safety. This principle derives from numerous cases, including one where a fall into what the Scots call a 'ha-ha' (a ditch) was found not to engage the liability of the occupier as the danger was obvious,[75] another where the college's duty of care did not extend to protecting someone of full age and capacity from obvious risks such as diving into a small inflatable pool,[76] and other cases already discussed above such as *English Heritage* and *Bourne Leisure*.

North explains: 'It is not every danger in relation to the state of the premises which may give rise to a duty of care owed by the occupier. He will not be liable for dangers stemming from obvious risks'.[77] Although this sounds wise, the precept should be refined in view of how, for example in *Bourne Leisure*, the danger of water would have been clear to parents, but not to the young children who could be expected to visit the caravaning site. As Stuart-Smith LJ said in an earlier case: 'the nature of and extent of what it is reasonable to expect of the occupier varies greatly depending on whether the [visitor] is very young or very old and so may not appreciate the nature of the danger which is or ought to be apparent to an adult'.[78] Lord Scott of Foscote seems also to have suggested in *Tomlinson* that it is insufficient to phrase the obviousness test in terms of what a reasonable person would or should be aware of.[79]

Admittedly, any factor in our list of thirty will always lend itself to being further refined as practice throws slightly new circumstances that call to be accommodated. For example, the 'difficulty and expense of removing the danger' might have appeared a precise factor - until

[75] *Cowan v Hopetoun House Preservation Trust* [2013] CSOH 9.
[76] *Risk v Rose Bruford College* [2013] EWHC 3869 (QB).
[77] North, above n 6, p 73.
[78] *Ratcliff v McConnell* [1999] 1 WLR 670, at [44].
[79] 'Much was made of the trial judge's finding that the dangers of diving or swimming in the lake were obvious, at least to adults. No one has contested that finding of fact. But I think its importance has been overstated … he was not taking a premeditated risk …': *Tomlinson*, at [94].

Rochester Cathedral highlighted that it should include not only the difficulty and expense of removing the danger, but also 'the cost in terms of time and money of having to identify … faults of this nature'.[80] Such tweaking is not intellectually difficult to accomplish and can easily be smoothly integrated as of when circumstances reveal. However, what this section has sought to highlight is of a different order, namely, that the way the fundamental factors at play in the area of occupier's liability should be understood and how they relate to each other suffer from a lack of conceptual clarity.

6. A REVISED TEST

To sum up, our review of the case law has identified three problems with the current judicial approach to occupiers' liability. First, cases are sometimes fully heard, which should arguably have been found to fall outside occupiers' liability because they did not relate to 'a danger due to the state of the premises'. Second, the judicial approach to determining the breach of duty of care owed by occupiers appears to satisfy itself with selecting in each case the factors that will be taken into consideration without motivating why the emphasis is put on some factors to the neglect of others. Third, there is a lack of clarity as to the meaning of some factors, despite them appearing as cornerstones of this area of the law. What is needed, therefore, is a more systematic approach capable of achieving a clearer and more logical integration between the multitude of possibly relevant factors. Our proposed test assembles the factors identified through 60 years of case law *via* a formal analytical process in order to establish breach of duty. We argue that the courts should examine four consecutive stages before determining breach of duty and subsequent liability.

Initial Test: Scope

The initial test to be applied asks: *Does the case concern 'a danger due to the state of the premises'?*

[80] *Rochester Cathedral*, at [24].

As emphasised by Lord Hoffmann in *Tomlinson*,[81] this question needs to be asked in order to check that the case falls within the material scope of occupiers' liability legislation.[82] Separating it out from the next stages avoids muddling the question of the application of occupiers' liability legislation with the assessment of the duty to act, as too often still happens.

This initial test should result in a yes/no decision. This does not mean that qualifying the circumstances for this purpose is a straightforward exercise. For example, should the fall of an 11-year-old trying to climb the underside of a fire escape be found to be due to the 'state of the premises' or to the claimant's conduct? The Court of Appeal decided the latter in *Keown*.[83] By contrast, in the arguably similar case of *Spearman*, which saw a vulnerable patient leaving the emergency department of a hospital, climbing five flights of stairs to a flat roof, going over a protective barrier and falling into a courtyard suffering serious injuries, the court determined that there had been a danger due to the state of the premises (rejecting the hospital's claim he had gone where he was not permitted and was thus a trespasser).[84]

At times, case law seems to manifest an uncertainty about when this threshold test should be accepted. There are cases where the issue of the danger of the premises and the applicability of OLA 1957 could have but was not contested. An example is *Bourne Leisure*. Others go to the trouble of finding a danger – for example identifying 'surface integrity issues' with the low-parapet bridge in *Edwards*. Whatever these possible hesitations, if the answer given to the initial test is negative, then there is no need to proceed further as the case is determined to fall outside the ambit of occupier's liability.

Stage 1: Foreseeability

[81] *Tomlinson,* at [26].
[82] If not, it might be a case of common law negligence. See eg *Pook v Rossall School* [2018] EWHC 522 (pupil falling whilst running to a hockey pitch); *Bosworth Water Trust v SSR* [2018] EWHC 444 (child hit on his face by a golf club swung by his friend at a birthday party).
[83] *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39.
[84] *Spearman,* at [56].

Once the application of occupiers' liability legislation has been verified by the initial test, an additional three-stage test follows. The first question it raises is: *Was the danger identified in the intial test actually presenting a foreseeable risk of injury?*

This corresponds to the first of the four factors highlighted by Lord Hoffmann in *Tomlinson* and is also factor #1 in our long list. Stage 1 must be distinguished from the initial test: it is not because the premises are posteriorily recognised to have been dangerous (thus fulfilling the requirement that it engages the field of occupiers' liability) that the defect should necessarily be recognised to have constituted a foreseeable risk of injury. Foreseeability is a key consideration in all cases. It cannot be approached as simply one factor amongst many. It requires its own stage of assessment.

There are two rather different situations where one must conclude that the risk of injury was unforeseeable. The first is when the occupier did not know about the danger and could not have been expected to have known about it (#11). In the occupier's perspective, the harm was therefore utterly unforeseeable. The second situation where a conclusion of unforeseeability must be reached is when the danger due to the state of premises was known (or ought to have been known) but the risk of an incident giving rise to the injury actually materialising is considered to have been entirely minimal. This may be for a multitude of reasons. One could be that the premises were not expected to be visited.[85] Alternatively, foreseeability is not demonstrated where a reasonable person would not have predicted that an incident such as happened would ever take place. This is because the risk was so negligible that it was not foreseeable. The judiciary has used various terminology to try to capture the threshold at which the foreseeability of risk of injury bites.[86] We concur with those judgements that identify that the risk must have been more than 'slight and remote', 'small' or

[85] See eg *English v Burnt Mill Academy*, County Court (Southend), 1 August 2016 (unreported) (school not liable under OLA 1957 when child runs into a bollard located within a largely unused space).
[86] See previous note; also *Rochester Cathedral*, at [26] (requiring 'more than the everday risk'); *Edwards v Sutton*, where LJ McCombe commented at [51]: 'it appears to me that the probability of such an accident could properly have been sufficiently remote that the risk could be regarded as minimal'.

'minimal'.[87] Thus, more than a minimal or negligible risk of injury is required to satisfy the test of foreseeability.

Stage 1 includes two factors from our long list: the foreseeability of an injury being sustained if an accident were to happen (#1) and the likelihood of this accident actually happening (#17).[88] Other factors which may need to be considered at this stage include the age of the expected visitors (#6), their expected conduct (#8), the purpose of their visits (#7) and the nature of the activities performed on the premises (#27). The more similar accidents have been known to have happened in the past, the more likely it will be to conclude that the risk would have been either foreseeable or likely.[89] A history of accidents (#22) thus normally indicates that the foreseeability test is passed and that one should proceed to stage 2.

Stage 2: The response of a reasonable person

At stage 2, the test becomes: *Would a reasonable person have expected the occupier to take remedial action against the foreseeable risk due to the danger to the premises?*

Stage 2 asks whether there existed a *particular* duty to act on the part of the occupier in respect of the *particular* danger identified in the circumstances of this particular case.

This stage is less straightforward or objective than the previous stages, for it requires various interests to be balanced against each other to decide whether the occupier was under a duty to act.[90] At the heart of stage 2 lay policy choices: should the stress be on protecting members of the

[87] '[I]f the risk is so slight and remote it may not be reasonable that the occupier should take any steps'; 'it should not be so small a risk as not to trigger the Act'; 'the probability of such an accident could properly have been sufficiently remote that the risk could be regarded as minimal': *Tomlinson*, at [80].
[88] North rightly observes that foreseeability and likelihood of injury are two different issues: 'the fact that a risk is unlikely, such as slipping when diving into a swimming pool, does not mean that it is not foreseeable': North, above n 6, p 80 (referring to *Maguire v Fermanagh District Council* [1996] NI 110).
[89] *Edwards v Sutton* (fall from a bridge) rightly noted that past incidents are an indicator of foreseeability: at [51]. In *Tomlinson,* at [79] (Lord Hobhouse of Woodborough) the accident was described as 'unique', implicitly explaining why the risk of drowning was 'very low indeed'.
[90] This was recognised by Lord Hoffmann in *Tomlinson* Ibid, at [37].

public or on giving occupiers unfettered liberty?[91] To what extent does society want its members to be kept free from risk, thus imposing safety standards on everyone? Taking the debate in a different direction, how many resources should be devoted to safety, thereby diverting some resources from the pursuit of other social goods? This issue resonated in the judgment of Lord Hoffmann in *Tomlinson* where he identified that an occupier of land is not under a duty to prevent a claimant from freely choosing to engage in dangerous pastimes at their own risk. In addition to asserting this principle of individual responsibility, Lord Hoffmann also noted the negative impact overbearing safety requirements might have on the organisation of community events and other social and leisure activities and on the resources of public authorities.[92]

Illustrating this last point is the Court of Appeal's judgment in *Keown* (child climbing the underside of a fire escape), which concluded that the hospital was not liable after acknowledging that limits to funding forced the NHS to make choices.[93] It accepted that prioritising patient care over the maintenance of premises was a legitimate choice.[94] By contrast, the first instance judge had found there was a danger due to the lack of notices, warnings, barriers, fencing or security. Indeed, one might ask why the NHS would not be put in a position to attend both to patient care and to maintaining their premises in an adequately secure state. This seems to have been the perspective adopted by *Spearman* (fall from hospital roof), which identified--in a somewhat clunky terminology--the most vulnerable patient as the 'lowest common denominator' to be used when assessing the duty of care owed by a hospital to its visitors.[95]

In general, it can be said that the more serious the foreseeable injury (#21), the higher the duty to do something about it. This is even more so when the chances of the risk materialising--

[91] As noted by K Amirthalingham 'The common law and occupiers' liability. Case Comment' (2014) 130 Law Q Rev 211-214 (referring to 'the sovereignty interest of the occupier' and 'the personal safety of individuals who come upon the premises').
[92] *Tomlinson*, at [45]-[48].
[93] *Keown*, at [17].
[94] Alternatively, It was arguable that the claimant's action could have failed, in any event, at the first stage of the test as the fire escape was not inherently dangerous.
[95] *Spearman*, at [59].

identified at stage 1--are high, thus possibly necessitating urgent remedying action. Inversely, the less serious the foreseeable injury, and the less likely the chances of it materialising, the less pressing the duty to do something about it now or in the future. As Lord Hoffmann remarked, 'it may lead to the conclusion that even though injury is foreseeable…it is still in all the circumstances reasonable to do nothing about it'.[96]

Deciding whether society ('a reasonable person') would have expected the occupier to act can turn out to be a judgment call. In some cases, the response is nonetheless straightforward. Dividing stage 2 into three successive sub-questions helps to make this clear.

A) Do legal standards or general guidance indicate that society had expected the occupier to act?

This question ascertains whether applicable guidelines, including relevant professional or semi-professional standards (#14), or recognised general good practice exist in the field (#13). If such standards exist, the presumption should be that if the occupier fails to have regard to them the occupier was not satisfying the duty to protect lawful visitors. If Question A is answered positively, the relevance of Questions B and C is highly diminished; in most cases, the stage 2 test will already be passed.

B) Had the occupier satisfactorily considered the risk to the visitor?

This question first examines whether the danger was obvious (#2). If it was, the occupier is less likely to have been under a duty to take remedial action. It is important to ask whether the danger was obvious not just to a reasonable person but to persons who could be expected to visit (#7). How the visitors can be expected to conduct themselves (#8) is an important consideration. So can be their age (#6) as being young and unable to identify an obvious danger, or old and frail and less likely to be able to navigate it, militates towards finding that the occupier was under a duty to act. The same

[96] *Tomlinson*, at [37]. There is 'no duty to obviate any conceivable risk': *O'Rafferty*, at [62]. In *West Sussex County Council v Lewis Pierce* [2013] EWCA Civ 1230, the Court of Appeal reversed a first instance judgment and found a school not liable for the injury incurred by a child who, wanting to punch his brother, missed and hit a metal water fountain instead - the school had kept its visitors reasonably safe.

is true of other factors of vulnerability. Thus, a prison's delay in restoring electricity after a power failure to the cell of a prisoner whom G4S knew, or should have known, was suffering mobility problems, was found to have breached their occupier's duty of care.[97] At the opposite end of this spectrum, the duty to act is diminished where visitors are present in the exercise of their calling (#9), as per OLA 1957's specific terms – s.2(3)(b).[98] The purpose of the visits (#7), what is happening on the premises (#27), the activities performed by the visitors (#28), the risks they decide to take (#29) and the value society puts on not eliminating all risks (#30) are other potentially relevant factors.[99]

C) Were the circumstances of the occupier such that he was actually not *expected to act, despite the risk to the visitor?*

The more time has passed since the danger was identified (#23), the more the occupier will be presumed to have been in violation of the duty owed to visitors. This presumption is nonetheless rebuttable. One factor that may offset the duty to act is the costs of identification and removal of the danger (#12), if these are disproportionately high. A householder should normally not be expected to take as many precautions as a professional or someone who derives economic benefit from the visits paid to their premises (#10).[100] Other elements mitigating against the obligation to take protective measures are a concern for the social value of the amenity (#18), aesthetics matters (#19), or the wish to keep the premises in their original condition (#20). In a different perspective, the positive or on the contrary illegitimate or unlawful nature of the activity which is being pursued on the premises (#28) may be highly relevant. Linked to this, respecting the individual freedom to

[97] *G4S Care and Justice Services (UK) Ltd*. See also *Spearman*, at [59]: '[A] hospital must anticipate that patients attending or being brought into the hospital will include vulnerable patients who are confused and mentally unstable and may therefore be expected to act in an unpredictable way'.
[98] For an illustration, *Yates v National Trust* [2014] EWHC 222 (no duty breached when accident results from the way some work was performed, the more so since the occupier was entitled to expect visitors engaged as specialist contractors to take care to guard against ordinary risks incidental to the job).
[99] More factors could be added of course. For example, in *Cook v Swansea City* Council [2017] EWCA Civ 2142, at [35], the Court of Appeal noted that the local authority had not been alerted by a member of the public to the particular danger of the ice in the car park.
[100] A per the common law prior to OLA 1957. See also *Harris v Perry* [2008] EWCA Civ 907 (householder not liable for failure to observe detailed health and safety instructions accompanying bouncy castle hired by him for a party).

take risks (#29)[101] should also be considered, however much our society has become risk averse (#30). To paraphrase *Edwards*, not all bridges should have a high railing.

Deciding whether the occupier was under a duty to act is different from assessing whether there was a foreseeable risk of injury (stage 1) arising from a danger due to the state of the premises (initial test). It may well be that even though there is a danger due to the state of the premises and a foreseeable risk of injury, there is no requirement on the occupier to act. Only if the answer to stage 2 is affirmative should the case proceed to stage 3.

Stage 3: The effectiveness of any protection offered

Stage 3 completes the test by asking: *was any action adopted by the occupier, prior to the injury occurring, appropriate?*

This question examines how effective the protection put it place by the occupier was, after it is accepted that protection was owed. Judicial authority makes it clear that the occupier should not necessarily be expected to have totally eliminated the risk of injury. As North observes, the duty is not one of perfection and the occupier should not be regarded as an insurer of the premises.[102] Whether any remedial actions taken by the occupier are deemed appropriate depends on all the circumstances of the case, with the key test being that the protective measures must be proportionate but no more than proportionate.

It may be conceptually useful to distinguish between different levels at which the question raised at stage 3 can be examined. It would be useful to check whether any applicable regulations, guidelines (#14) or good practice (#13) were correctly applied. If they were not, it will need to be assessed whether their respect would have been likely to prevent the accident (#24). At a next level, if there were no guidelines governing the field, the general attitude of the occupier will be worth

[101] See e.g. *Hood v Forestry Commission* County Court (Preston), 08 March 2017, unreported, at [17] (cyclist on a trail knows 'full well' the risks he is taking on a wet day, justifiying non-lability).
[102] North, above n 6, pp 76-77.

examining. Relevant questions include: was the occupier acting on professional/semi-professional advice (#15)? Should a risk assessment have been conducted, and if it was, was it acted upon (#16)? Were the premises generally well maintained and repairs regularly carried out as fitted the nature of the premises (#26)? At yet another level, the details of the concrete protective measures which were actually taken or could have been expected to be adopted will need to be scrutinised. For example, if warnings (#3) are relevant to the case, were there any and if so were they appropriate? If not, would the visitor have acted upon a proper warning or would they have ignored it (#25)? The same type of questions will arise in respect to lighting (#4), fencing (#5), and whatever other measure might be thought to be relevant to the circumstances of the case.

All the questions above will need to be examined by reference to the context of the case, e.g. the age range of the visitors who could be expected to visit the premises (#6), the conduct which could be expected of them (#8); what was happening on the premises (#27); the nature of the activities visitors were performing (#28); the private or profitable purpose of the visits (#10) as well as the occupier's status and possibly even resources.[103]

If at this final stage, the assessment is that the measures adopted by the occupier were not appropriate, then the occupier's liability is in violation of the duty owed to visitors. If, by contrast, in all the circumstances of the case, they were appropriate, then there is no breach of duty by the occupier.

7. REVISITING THE CASE LAW

Our review of the relevant factors that should be applied to establish breach makes it possible to understand why different cases put the emphasis on different elements. Revisiting three cases involving falls makes this crystal clear. *Robinson* stressed the claimant's drunken state surely because

[103] As per *British Railways Board v Herrington* [1972] AC 877, p 899 (Lord Reid).

this factor more than anything else explained in the eyes of the judge the fall from the terrace; the judge must have thought there would never have been any real ('more than minimal') risk of injury in normal circumstances. In other words, *Robinson* was a stage 1 case. If *Ritz Hotel* asked whether the balustrade to the balcony respected British Standards Institutions' recommended height, this is presumably because the case would have sailed through the first stages of our test, so to speak, with the important discussion pertaining to stage 3. It also makes sense that *Spearman* focused on risk assessment as it concerned hospital premises visited by vulnerable patients. In sum, the insights gained from our consecutive-stage analysis reveal that the highly selective approach we criticised in section 4 of this article to be ultimately logical.

Most often, applying our test to a case will not produce a different outcome from the one which the judiciary reached. This point can be illustrated through a systematic application of our test to particular situations. In circumstances such as arose in *Rochester Cathedral*, one can accept there was a danger due to the state of the premises. At stage 1, one may conclude that the risk was unlikely to happen, as confirmed by the lack of previous incidents. Even if the case is allowed to progress to stage 2, the case goes no further on the basis that not all risks give rise to a duty to take remedial action. Taking into account, as the Court of Appeal did, the cost of identifying and removing such faults as the protruding concrete, the outcome is that there was no duty to take remedial action in this instance, the more so since the unlikelihood of serious injury if the risk materialised and the social value of the activity (allowing people to walk in the precincts of a historical cathedral) would mitigate against finding liability.

To give a second example, *Edwards v Sutton* (fall from the low parapet bridge) could pass the initial test, in that there arguably was a danger due to the state of the premises. However, it would not necessarily progress beyond stage 1, for the most logical decision appears to be that there was no foreseeable risk of injury (with no past history of incidents decisive). Had an accident happened in the past, this could militate against an unforeseeable finding and translate at stage 2

into a preliminary finding that there was a need to remedy a danger which was greater than first met the eye. At this stage, however, the desirability of not attending to every possible danger and of leaving individuals at liberty to take the risks they wish, as well as the amenity value of keeping a park without high fences everywhere, to which could be added the social value of the activity undertaken (enjoying a walk in a park that feels open rather than unduly restricted) could lead to the case being closed for lack of a duty to take remedial action. Even if the case were to progress to stage 3, the finding of non liability by the Court of Appeal could still be confirmed by determining that there had been appropriate and proportionate protection, in that the low parapet would have properly indicated the border of the bridge.

If our test generally confirms the outcome reached by the courts, this is not true of the two cases reviewed above which involved children. Applying our test to their circumstances reinforces our feeling, already alluded above, that their outcome is rather incomprehensible.

Bourne Leisure (drowning of a two-year-old) meets the initial test, with an expanse of water by nature a danger. Stage 1 is met too: the risk of injury is foreseeable; it is neither minimal nor unlikely to materialise (per the nature of ponds, and as confirmed by the previous near-drowning). Stage 2 is more complex, making it worthwhile to go through its three sub-tests. Was there relevant guidance such that Bourne Leisure would have been expected to act to reduce or eliminate the identified danger? The answer to question A appears positive, but as the judge found the RSoPA guidance not applicable, we shall proceed with asking question B, which is whether the occupier had properly considered the risk to the visitors. These include young children who are known to go unaccompanied on caravaning sites for short periods of time. Their state of vulnerability should therefore have provided 'the denominator' (in *Spearman*'s language) used to assess whether the holiday park had breached its duty of care. To these children, the danger, far from being obvious, was an 'alluring trap'.[104] This is the more so since from the occupier's perspective the visit was

[104] A vocabulary we borrow from the common law. See e.g. *Glasgow Corpn v Taylor* [1922] 1 AC 44.

commercially profitable.[105] All this indicates a duty to act, which is the more pressing given the seriousness of the injury if the risk materialises. Question C nonetheless needs to be raised to check whether there might have been elements counteracting this duty. The holiday park's large capacity (4,500 guests) suggests that it could have supported the cost of installing effective protective measures. Submerged pond guards would have been unlikely to diminish the aesthetic appeal of the setting. The case should thus have proceeded to stage 3 and the appropriateness of any measure taken by the occupier examined. Fencing was below the height recommended by RSoPA for domestic and school ponds. The judge found this irrelevant (despite occupiers sometimes being found liable for failing to respect non legally binding guidelines).[106] Even if the fencing was not ruled inappropriate, the appropriateness of warnings should have been examined more closely than it was.[107]

The case of *Anderson v. Imrie*, where a child was injured by a falling gate whilst playing at his friend's house, clearly met the initial test. Whether stage 1 was met is arguably more difficult to decide in that there may not have been a foreseeable risk of injury (given the absence of past incident and the fact that the children had not been expected to go to the race). However, presuming stage 1 was found to be met, stage 2 arises. The occupier either knew or ought to have known about the danger. Given the age of the visitor and the purpose of his visit, there was a duty on the part of the occupier to act. Proceeding to stage 3, warning the children not to go there, guarding against the risk by fixing the gate with a chain, and keeping an eye on the children for all

[105] As recognised by the pre-1957 common law distinction between licensees and invitees.
[106] See e.g. *Ward v Ritz Hotel Ltd* [1992] PIQR P315. The ruling in *Bourne Leisure* seems to have been based on one environmental officer stating that he 'regarded the guidance in relation to garden ponds and schools as useless … a pond in a school is an entirely different thing to a pond in a park'.
[107] The Court of Appeal dismissed the issue of warnings as not telling parents anything they did not know. In our view, the parents should have been made aware of the location of the pond. It was accepted in court that welcome packs and site plans are not scrutinised for dangers : 'parents cannot be expected to do more than look for the location of their caravan and of any attractions which they might visit': at [21]. And in any event the plan in the pack did not show the path down which the children had wandered.

but a few minutes appear to us to have been proportionate actions to the personal situation of the occupier, making the finding of liability difficult to justify.

We have already noted how occupiers' liability is not a neutral area, but one which involves values and policy choices. One uncontroversial principle is that in general responsibility for little children rests with their parents.[108] Whilst we accept it, we suspect that *Bourne Leisure* and *Anderson* may reflect an attitude towards mothers to which we would object. This would be that mothers who fail to successfully protect their child (or a child under their supervision) against dangers which are retrospectively determined to have been, or ought to have been, foreseeable to them, deserve to be legally sanctioned.[109] We are concerned that this view--though not shared by the whole judiciary[110]-- seems to explain the outcomes in *Bourne Leisure* and *Anderson*. One could surmise that the courts are failing to put appropriate emphasis on the statutory requirement found in section 2(3)(a) of OLA 1957 regarding the obligation for occupiers to safeguard children on their land.[111]

8. CONCLUSION

The OLA 1957 has failed in its attempt to make the law on occupiers' liability to visitors simpler, or at least clearer. Higher courts frequently admonish lower courts for their misunderstandings of the law; commentators regularly note its confusion.[112] Even outcomes which are instinctly persuasive seem to rest on the application of factors which could appear to have been selected out of judicial whim rather than because this was logically compelling. Such a situation does not favour early settlement,

[108] *Phipps v Rochester Corporation* [1955] 1 QB 450.
[109] This 'anti-mother' stance may be confirmed by decisions which, by contrast, find no occupiers' liability for injuries sustained by children when it is public authorities who are the occupier. *Keown* has already been discussed. See also *Dyer v East Sussex County Council*, decided on 19 December 2016, County Court (Brighton) (unreported), where a child was struck by a metal gate in a school playground.
[110] In *Perry v Harris* [2008] EWCA Civ 907, [2009] 1 WLR 19, Lord Phillips recognised that children cannot and should not be under the constant surveillance of their parents.
[111] For a similar view, expressed in regard to older children, see Bridgeman, above n 12.
[112] See, in 2017 alone, J Wheeler, '*Rochester Cathedral v Debell*' (2017) 1 *JPI Law* C21-C24; K Amirthalingam, 'Occupiers' liability in England: time for some housecleaning?' (2017) 33 *Professional Negligence* 50; A Morris, '*G4S Care & Justice Services (UK) Ltd v Manley* Case Comment' (2017) 1 *JPI Law* C18-C21.

and translates into extended litigation. Moreover, it leaves occupiers in the dark as to the steps they are legally required to take in order to ensure their visitors are reasonably safe. One benefit of our proposed test is that occupiers of land should have a clearer understanding of what OLA 1957 requires of them.

Drawing on judicial edicts, we have attempted to construct a breach of duty test which could achieve the clarity which has so far proved elusive. After having verified that the legislation applies because there was a danger due to the state of the premises, it is made up of three additional consecutive stages which respectively concern: 1) the foreseeability of both the risk of injury and the likelihood that this risk would materialise; 2) a reasonable expectation that the occupier was under a duty to have taken remedial action; and 3) the question of whether this duty was discharged in an appropriate way. Of these, stage 2 is the most complex for it involves the implicit or explicit consideration of social and political values, including regarding the handling of risks, the definition of worthwhile activities, and the purpose of compensation.

Needless to say, adjudication is a matter of interpretation, which it is the responsibility of the judges to exercise. Our test, although linear, is not mechanical.[113] It requires judgment at every stage of the process. We are putting forward a test that retains flexibility but which brings about a more systematic approach to adjudication.[114] A greater systematisation and transparency in the way these steps are taken should be of benefit to everyone in society, given we all assume the role of occupiers and visitors multiple times on a single day.[115]

[113] We disagree that 'It is not essential to approach [occupier's liability] in a “linear” fashion: first identifying the relevant danger and only thereafter considering whether the occupier has shown a reasonable degree of care in regard to it': *Dawson v Page* [2013] CSIH 24, at [13].

[114] We do not wish to recommend that a new legislative provision incorporate our framework test. However, we note that there is precedent for the adoption of ‘guidelines’ that assist the courts in deliberating on the interpretation of statutory terminology, and that this could be done in relation to OLA 1957 too.

[115] Of course, mere breach of duty towards visitors does not of itself result in automatic liability – the general principles of causation and remoteness and relevant defences will all need to be considered before a final judgment can be made.