“But Baby, it’s Bad Out There?”

Claims Arising from Ice on Private Premises

By Philip Turton

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"Looks like a Cold, Cold Winter…"

Introduction

1. Just as it seems that a winter almost arctic in comparison to its predecessors is coming to a close, so, for lawyers, the claims commence. If the snow and ice we saw this year have implications for the Insurers of Highway Authorities (*see the article "But Baby It's Cold Outside" – Meeting And Defeating Claims Arising From Ice On The Highway"*) there are implications for others too, in particular those with an interest in premises attracting visitors of one sort or another. In reality that means most of us, but the question of liability is keenest for those welcoming visitors in large numbers, particularly employers. An employer welcomes not only significant numbers of visitors to its premises, but also its employees and the duties imposed by law are stricter in their application where employees are concerned. As with the roads, my feedback from insurers is that claims from this winter are already being notified and there will be more to follow. Thus this article endeavours to address the duties to be applied and to consider strategies which might be implemented now for the purpose of pro-actively managing such claims.

2. My last Article noted the outbreak of moral outrage expressed by the Daily Telegraph and Daily Mail at the notion that anyone acting to clear snow away might be more at risk of legal proceedings than someone taking no action at all. As ever with the press, the article attracted more attention than the rebuttal which followed it – the Institute of Occupational Safety and Health moved swiftly to decry "*inaccurate reporting*" of its position – but the concern still attracts comment. The notion that a person clearing their path risks litigation where no such liability could arise if nothing was done at all is based upon a misunderstanding of the rule against nonfeasance, which is of no application where a statutory duty is imposed. Thus a householder may, and an employer probably will, be liable if they take no steps at all to guard against risks posed by the presence of snow and ice on their premises.

3. What then, in law, is the position of property owners and employers, whose premises froze during the recent winter, and who are now faced with claims from visitors and employees who have slipped and fallen so as then to suffer injury.

"C'mon Over to my Place..."

Private Householders, Property Owners and other Occupiers

4. Any number of bodies allow persons other than their employees onto their premises. Railway Companies and shop-owners are two examples, but we all permit the postman and others to call. In doing so, we submit ourselves to the duty any occupier owes to his visitors – that contained in section 2 of the Occupiers Liability Act 1957 and known universally as "*the common duty of care*". The name reflects the similarity with the duty owed in common law negligence, which it replaced, and the section is one of the best known in the law:

> *"(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. Questions of what constitute premises, occupiers and visitors are long since determined. Thus we can say definitively that the word "*premises*" encompasses not just buildings and houses but the entirety of the land and matter erected upon it, and includes moveable structures such as vehicles, railway carriages or aircraft (Lomas v M. Jones & Son [1944] KB 4; Foulkes v Metropolitan Railway [1880] 5 CPD 157; Fosbroke-Hobbs v Airwork Limited [1937] 1 All ER 108;). Further, old concepts of licensees and invitees are superseded so that a visitor is any person entering with permission, the only distinction being drawn with a trespasser – of which more below. Finally an occupier constitutes any person with control of the premises or that part of them to which the visitor is invited (Wheat v E. Lacon & Co Ltd [1966] AC 552) – which may be more than one person at a given time. Thus a building owner who cedes possession to a subcontracted builder may transfer control to the builder depending upon the degree of supervision reasonably to be expected. Most commonly but by no means always, an occupier will be an owner or, if subject to a lease, a tenant, of the particular premises.

6. Thus far, issues are reasonably straightforward – in most cases no issue will arise as to premises, occupation nor visit. The more difficult issue concerns the discharge of the duty. What is required of the occupier waking up to discover his premises frozen and dangerous?

7. The duty imposed is qualified by reasonableness in two ways – the premises have only to be reasonably safe and the requirement is that the occupier take reasonable care. This is different to duties requiring a Defendant to "*ensure safe passage*" or to "*keep free*" from "*a substance which may cause a person to slip*" and the duty does not rely upon any defence of reasonable practicability. This would require the Defendant, who would bear the burden of proving the defence, to undertake, firstly, an analysis of what could be done, before consideration of what reasonably should be done in the particular circumstances. Rather the first question for an occupier is whether premises temporarily afflicted by ice and snow can be reasonably safe to visitors, who can probably be assumed to know of the weather conditions and to take care for themselves. The answer is probably one of degree – the forecast of a swift thaw might mean the premises remain safe - but it is not difficult to see that ice, in principle, can make premises dangerous. The issue is more likely to be one of what constitutes reasonable care and the answer, so the section tells us, will depend on all the circumstances of the case. This, inevitably, will involve assessment of the nature of the hazard (usually transitory) and the degree of risk it poses (variable and multi-factorial). The more people likely to visit and the harder the frost, the greater the degree of care that will be required, so that, as an example, railway companies, who will welcome thousands of passengers onto frozen platforms, or shopowners with significant footfall, are much more likely to have to take fuller steps than smaller businesses or, at the very end of the scale, private householders.

8. The steps required will also vary, and the provisions of section 2(3 – 5) need also to be noted:

> *(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—*
>
> *(a) an occupier must be prepared for children to be less careful than adults; and*
> *(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, 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.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

9. Thus an occupier relies on a warning sign cautiously, which must be enough to confer reasonable safety in its own right if it is to discharge the duty. Further, reasonable steps must contemplate the more vulnerable, expressly children, but also, if visitors, the disabled, elderly and infirm. Thus the straightforward step of erecting a warning notice – *"Ice Proceed With Care"* - might be a reasonable step to guard against the danger if the premises are small and the visitor fully warned, but will not be if more is required. For larger occupiers, this is likely to mean some form of Winter Policy is required, removing or combating the risk of slipping when it arises for any extended period. The gritting of a demarcated path ought then to be sufficient to discharge the duty – it would certainly be difficult to criticise a private householder for going so far.

"Keep off the grass. Shine your shoes. Wipe your face"

The Law in relation to Trespassers

10. An occupier's liability is not limited solely to a duty owed to his visitors although the bulk, if not all claims arising in relation to ice will be brought pursuant to that provision. Since Herrington v British Railways Board [1972] AC 877, an occupier has had owed a duty to trespassers additionally and the duty is now contained in the Occupiers Liability Act 1984. Since the section is unlikely to apply in cases of liability attributable to ice, a full consideration of the duty owed is beyond the scope of this article, but for completeness, section 1 appears below:

> 1. *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 the common law, to determine —*
>
> *(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and*
> *(b) if so, what that duty is.*
>
> *(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 theOccupiers' Liability Act 1957 (the common duty of care), and*
> *(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;***

(b) ***he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and***

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

(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(7) No duty is owed by virtue of this section to persons using the highway, and this section does not affect any duty owed to such persons.
(8) Where a person owes a duty by virtue of this section, he does not, by reason of any breach of the duty, incur any liability in respect of any loss of or damage to property.

(9) In this section —

"highway" means any part of a highway other than a ferry or waterway;

"injury" means anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition; and

"movable structure" includes any vessel, vehicle or aircraft.

11. I have highlighted the relevant sub-section addressing the restricted duty owed. It will immediately be understood that the coincidence of snow and ice, itself transitory, and the proximity of a known trespasser will rarely arise. Where it does, absent any specific and unusual feature of the case, the court is highly likely to conclude that no specific steps were required.

"It's the work, the working, just the working life…"

Employers and Employees

12. Whilst a claim against an occupier for an accident on ice may be difficult to get off the ground, the position in relation to employers is markedly different. The distinction is easily understood - an employer profits from the labour of his employees. The law expects that such advantage should only be gained if employees are properly protected from avoidable injury in the process. Thus, although also an occupier, an employer is subject to a stricter and more onerous duty when he finds that his premises have become covered with ice and the car park a skating rink. Doing nothing in this situation can scarcely be an option if the risk of accident and subsequent liability is not to be run.

13. An employer is subject to a conventional common law duty to provide a reasonably safe place of work. However, employers are also subject to a statutory framework of regulations, governing safety, foremost of which are the Workplace (Health, Safety & Welfare) Regulations 1992. One thing an employer cannot do is hide behind the rule of nonfeasance – just as the Highway Authority, the statutory framework imposes express duties upon an employer to act and an employer will be in breach if he fails to do so.

14. The Workplace (Health, Safety & Welfare) Regulations 1992 apply to all premises made available as a place of work from 1st January 1996 and impose express duties upon employers and those with control of the workplace or parts of it.

15. Regulation 12(3) provides:

> *"(3) So far as is reasonably practicable, every floor … and the surface of every traffic route in a workplace shall be kept free from … any … substance which may cause a person to slip…".*

The editing is mine for the purposes of clarity. We are in familiar territory here. Whilst readers of my earlier Article will immediately see the correlation with the duty upon a highway authority, the reality is that duties of this nature are of longstanding in relation to employers and workplaces. Earlier comparable provisions can be found in the Factories Act 1961 (*section 28*) and the Offices, Shops & Railway Premises Act 1963 (*section 16*). Indeed, one of the objections to the amended provisions of Section 41(1A) is that they impose upon a Highway Authority duties more usually associated with employers. Whilst there is good reason so to bind an employer there is much less in relation to a public body charged with the upkeep of the highway and not profiting from its use.

16. Since there is no question but that ice or other frozen material is a substance liable to cause a person to slip, the effect of a cold snap if, for instance, it causes a company car park or walkways to freeze over, will be to create a breach of Regulation 12, subject only to the defence of reasonable practicability. The burden of proving such a defence rests upon a Defendant and it requires the employer to show that it had taken reasonably practicable steps to protect against the risk of slipping on ice. As will be understood, it is highly unlikely an employer would be able to discharge the defence by saying to the Court "*I did nothing*". On long established authority, an employer need not do all that is physically possible to discharge the defence, and must undertake a computation between risk and sacrifice – see Edwards v National Coal Board [1949] 1 All ER 743; Larner v British Steel [1993] 4 All ER 102 applied in Baker v Quantum Clothing [2009] PIQR P332; Bassie v Merseyside Fire & Civil Defence Authority [2005] EWCA Civ 1474 and more generally the cases referred to in "*Redgrave's Health & Safety*", *Part 2.51*. This usually involves asking what might be done, and weighing up the cost of taking the steps then identified. The cheaper and less onerous the step, the harder it is to justify not taking it. Conversely, the incurrence of expense for a risk that, in a short time, will have dissipated in any event may well not be subject to criticism. Thus, whilst a prolonged cold spell might require clear steps, such as gritting all paths, a forecast suggesting an early thaw might well render such a step unreasonable, although I would counsel that some form of warning or demarcated safe route into work ought always to be deployed.

17. Thus it can fairly be said that the first requirement is for an employer to have actually addressed the issue and formulated a cold weather policy. An employer who fails to take such a step is vulnerable in the event that one of his employees slips when entering or moving about work. In this however, the position is much less constrained than, for instance, that on the highway, where national Codes of Practice apply. Compliance with advice from bodies such as Her Majesty's Health and Safety Executive will be of real benefit, to the extent that such advice is available, but most employers will have a wide discretion to formulate their own policy – provided the steps decided upon are reasonable against the risk itself. Having done so, of course, compliance with that policy must also be shown. The defence requires not only the formulation but effective implementation of any policy when cold weather strikes. Thus it will be necessary to show that anticipated steps were in fact taken – most Defendants are able to show the policy they have in place, where the defence can run into difficulty is in being able to call the caretaker or site administrator who actually had in hand the task of responding to and dealing with the risk from cold weather on the particular day. The capacity to call evidence from such a witness is usually essential.

18. It is not easy to prescribe steps for every employer and I would be reluctant to do so in an article. Nonetheless, for any employer of significant resources, it would be prudent to proceed on the basis that, when snow covers the ground, a policy of rendering key walkways and traffic routes safe should be regarded as a minimum – if necessary accompanying signage should be used.

"Here they come, falling out of the blue..."

Preparing to meet Slipping Claims

19. My first Article advanced a number of propositions as to the manner in which Highway Authorities might prepare to meet the claims which were likely to follow after the Winter cold snap. Such steps included preparatory proofing of a Senior Highway Engineer for the purpose of producing a Council's formulated policy and the applicable Code of Conduct by which it could be measured. Further recommendations included the checking of records in relation to the discharge of that policy to ensure that, when required, they were readily to hand. Such preparatory steps are easily justified for a body

carrying liability for a road network over a large area, particularly where press reports suggested a high incidence of accidents on roads – as many as 123 on a single day in Nottinghamshire alone (*source: Nottingham Evening Post, 14th January 2010*).

20. Whilst good preparation is rarely wasted, it is probably overkill to suggest that an employer or an occupier of premises, or their Insurers, should be putting in hand such steps for claims, without indication that they will materialise. What is probably important currently is to identify where accidents have already occurred in circumstances which might give rise to a claim. Thus, if an employer or occupier is already aware that persons have been injured on their premises through ice, they should regard themselves as on notice of a potential claim and it would then, on any basis, be prudent to make sure that proper records are in hand and that the response to the weather on a particular day can be dealt with in evidence by nominated employees. The draft formulation of a statement in relation to an accident known to have taken place is not a step too far even if the claim has yet to be notified. Bearing in mind my comments above, having located the policy for dealing with cold weather, the first post-accident site visit should be to the man or woman who discharged it on the day. Getting their contact address and an early draft statement, saying what they did and when, may well pay dividends if the claim is not notified until some time later.

21. As ever, the longer a Defendant delays, the harder he will find it to gather evidence in due course – the Claimant after all has 3 years to bring his claim, during which period employees may move on, documents may be lost and memories will fade. As well to take steps now to ensure confidence as to the locations of evidence and its sources before such claims are ever notified.

Philip Turton

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Philip Turton

Philip Turton was called to the Bar in 1989.

He has over 20 years experience of personal injury cases and specialises in high value personal injury actions, clinical negligence claims and industrial disease cases, including Group Actions.

He has been cited as a Leader at the Bar in the field of Personal Injury work for the last 8 years.

He is a member of the following Special Interest Groups with Chambers:
Personal Injury, Clinical Negligence, Disease, Fraudulent Claims, Regulatory.

philpturton@ropewalk.co.uk