

Hello, my name is Elaine Healy, a partner in the Litigation and Dispute Resolution Department in Dillon Eustace. Today I am going to provide a brief overview of the Occupiers Liability Act 1995, as amended, which sets out the duty of care owed by occupiers in respect of dangers existing on their premises. The 1995 Act was amended by Courts and Civil Law (Miscellaneous Provisions) Act 2023 ('**2023 Act**') and I will outline some of the key changes brought about by this legislation.

Section 3 of the Act deals with the duty owed to visitors to a premises. An occupier of a premises owes, what is called, a common duty of care, to a visitor to that premises. A common duty of care is a duty to take care which is reasonable in all of the circumstances to ensure that the visitor does not suffer injury or damage on account of a danger existing at the premises.

Pursuant to the Courts and Civil Law (Miscellaneous Provisions) Act 2023 / ('**2023 Act**'), it is now required that when determining this common duty of care, regard must be given to a number of factors, including

- the probability of a danger existing on the premises;
- the probability of the occurrence of an injury to, or of damage suffered by, a visitor by reason of a danger existing on the premises;
- the probable severity of an injury to a visitor that might result from a danger existing on the premises;
- the practicability, and the cost, of precautions or preventative measures; and
- where applicable, the social utility of the activity or conduct that gives rise to the risk of injury or damage.

These factors ensure that that the probability of risks and the occurrence of an injury must be considered when determining the general duty of care of an occupier.

Further, under Section 5 of the 1995 Act, an occupier may by express agreement or notice restrict, modify or exclude the common duty of care to visitors but it must be reasonable to do so. That is, it won't extend to allowing an occupier act with reckless disregard for a visitor or the property of a visitor. In addition, reasonable steps must be taken to bring this notice to the attention of the visitor, for example by prominently displaying such notice at the normal means of access to the premises.

Also, the common duty of care shall not impose on any occupier any obligation to a visitor in respect of risks willingly accepted by the visitor, so long as he or she is capable of comprehending the nature and extent of the risks. Any determination as to whether a visitor has willingly accepted a risk may be based on his or her words or conduct without a requirement for evidence of communication or interaction with the occupier. As such, a written agreement is not necessary to limit or release an occupier from liability.

Section 4 of the Act deals with the duty owed to Recreational Users or Trespassers to a property – A recreational user is an entrant who with or without the occupiers permission is present at the occupier's premises without a charge being imposed for the purposes of engaging in a recreational activity, **for example** – the duty on the occupier in this situation is lower than the Common Duty of Care, which we have just discussed. Instead, the duty on the occupier to a recreational user

or trespasser is to not injure such a person or damage their property intentionally and/or not to act with reckless disregard for the person or their property.

In terms of determining whether or not an occupier has acted with reckless disregard, the factors to be considered include;

- Whether the occupier knew of, or was reckless as to whether, a danger existed on the premises;
- whether the occupier knew of, or was reckless as to whether, the person or property was likely to be on the premises;
- whether the occupier knew of, or was reckless as to whether, the person or property was likely to be in, the vicinity of the place where the danger existed;
- the burden on the occupier of eliminating the danger or of protecting the person or property from the danger, taking into account the difficulty, expense or impracticability, having regard to the character of the premises and the degree of the danger
- the character of the premises including the desirability of maintaining the tradition of open access to premises of such a character for such an activity;
- the conduct of the person, including whether or not he or she entered onto the premises as a trespasser, and the care which he or she may reasonably be expected to take for his or her own safety, while on the premises
- the nature of any warning given by the occupier or another person of the danger; and
- whether or not the person was on the premises in the company of another person and, if so, the extent of the supervision and control the latter person might reasonably be expected to exercise over the other's activities.

Where a structure on a premises has been provided for use primarily by recreational users, the occupier shall owe a duty towards such users to take reasonable care to maintain the structure in a safe condition. However, this duty shall not arise in respect of risks willingly accepted by the recreational user where the recreational user is capable of comprehending the nature and extent of those risks. Again, as with the voluntary assumption of risk which we discussed in respect of visitors, a written agreement is not necessary to limit or release an occupier from liability and instead a recreational user can be said to have willingly accepted risk in this regard based on their words and conduct.

Where a person enters on to a premises for the purpose of committing an offence, the occupier shall not be liable for a breach of duty in terms of not acting with reckless disregard, unless a court determines otherwise in exceptional circumstances, having regard to matters such as the nature of the offence, the extent of recklessness on the part of the occupier and if the person committing the offence was not a trespasser. The 2023 Act amended the 1995 Act which had previously stated that the occupier would not be in breach of a duty in these circumstances unless the court determined otherwise "in the interests of justice". However, the discretion of the court to consider "the interests of justice" has now been removed and instead, the occupier shall not be liable unless in "exceptional circumstances. The purpose of this change is to limit the

circumstances in which a court can impose liability on an occupier where a person has entered onto premises to commit an offence.

[to conclude]

the changes introduced by the 2023 Act, and which came into effect in July 2023, put decisions of the High Court, which dealt with the balance between the obligations of occupiers and the rights of visitors and recreational users, on a statutory footing and represented a shift toward limiting the scope of claims that can be made against occupiers.