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Liability claims: Avoiding winter slip-ups

Overview

Recent months have seen forecasts of the UK being faced with the 'coldest winter' ever. Amidst predictions of increased snow and ice, insurers of employers and occupiers will be keen to ensure that they are complying with any obligations to protect employees and visitors from the risk of slips and falls.

Key issues to consider:

- The Occupiers' Liability Acts, together with the Health and Safety at Work Act 1974 and associated regulations, impose duties protecting the safety of individuals while at work or visiting property
- For occupiers (businesses and individuals) this means the removal of ice and snow from paths and car parks. Warning signs will not usually be sufficient to discharge the duty owed
- Employers have a duty to ensure the safety of employees in the areas in which they work
- If a claimant has voluntarily undertaken a hazardous activity or has taken a risk, then this could negate any cause of action against a defendant or mean a finding of contributory negligence. There is no duty on defendants to protect against all risks
- Risks should be assessed, with systems put in place to manage it where appropriate. This may take the structure of monitoring temperatures, identifying areas likely to be affected by ice, and actions to be taken, such as gritting, diversions or covering thoroughfares
- A delay in implementing suitable risk prevention and the time available to respond to events will be a factor when a determination is made on whether or not there is a breach of duty

Key legislation and guidance:

- The Occupiers' Liability Acts 1957 and 1984
- The Health and Safety at Work Act 1974 and associated regulations, impose duties protecting the safety of individuals while at work or visiting property
- Guidance from the Health and Safety Executive

Occupiers' Liability

The Occupiers' Liability Act 1957 s2(2) imposes a duty on both private and business occupiers to:

- Take care as is reasonable in the circumstances
- To ensure that visitors are safe for the purposes that they are invited or permitted by the occupier to be there
- Ensure that pathways and areas accessible to visitors are cleared of hazards caused by snow and ice

These areas can include car parks, entrances, exits, driveways and pathways.

Warning signs?

Using a sign to warn people of the risk of snow and ice is unlikely to be sufficient to discharge the duties of an occupier.

A warning sign should be used in conjunction with positive action to prevent slips and trips – this may be the clearance of ice and snow or salting/gritting the affected areas.

As to the statutory background of what actions are considered when discharging the duties, s(2)(4)(a) of the 1957 Act states:

"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.

Practical guidance

The HSE issued guidance earlier this year on how to prevent risks from ice and snow:

- Identify the outdoor areas used by pedestrians most likely to be affected by ice, for example: building entrances, car parks, pedestrian walkways, shortcuts, sloped areas and areas constantly in the shade or wet
- Monitor the temperature, as prevention is key
- Take action whenever freezing temperatures are forecast. Use weather sites such as the Met Office where available
- Put a procedure in place to prevent an icy surface forming and/or keep pedestrians off the slippery surface
- Use grit or similar, on areas prone to be slippery in frosty, icy conditions
- Consider covering walkways or use an insulating material on smaller areas overnight
- Divert pedestrians to less slippery walkways and barrier off existing ones
- Remove warning cones/signs once the hazard has passed or they will eventually be ignored

The HSE has also provided guidance on how/when to use gritting and salting facilities, confirming that salt is most effective when it is ground down and placed down before the frost/ice can settle.

Gritting should be carried out when frost, ice or snow is forecast or when walkways are likely to be damp or wet and the floor temperatures are at, or below freezing.

Case law

Despite the likelihood of slips and trips on icy conditions, reported case law on claims brought under the Occupiers' Liability Acts is not as prevalent as might be suspected. This may be simply due to the fact that cases are settled before the need to proceed to trial.

Murphy v Bradford MBC (1991)[1]

A teacher sustained an injury when she slipped on an icy path. The pathway had been cleared of snow and treated with salt around an hour beforehand. Nonetheless, the local authority was liable. The pathway in question had a steep slope, had been the scene of previous accidents and so particular efforts should have been made to keep this clear.

Cook v Swansea City Council (2017)[2]

The claimant slipped on a car park operated by the defendant. The local authority did not grit unmanned car parks and instead operated a reactive system. The claimant argued that this was not sufficient. The Court found that the circumstances meant that a proactive system was inherently implausible. There was no liability on the defendant.

Scotland

Scottish decisions have suggested that the actions to be completed by an occupier in order to comply with their duties are not as onerous as in England (where contrasted with *Murphy* for instance).

McCondichie v Mains Medical Centre (2003)[3]

The claimant was visiting the defendant medical centre. She slipped and fell in the car park. Ice had formed after snowfall the previous day.

Only the pedestrian routes had been gritted, the Court found that this action discharged the occupiers' duty. The defendant had taken 'reasonable' steps to safeguard pedestrians.

Donald v McDonald (2006) [4]

The claimant alleged that she had slipped on a patch of snow outside the defendant's property.

The Court was not satisfied that it was a patch of compressed snow or ice which caused the claimant to slip and fall. Therefore, the claim failed.

Bonham v Pentland Housing Association (2013)[5]

The claimant fell on the pavement area outside her rented home, breaking her ankle.

The case failed. The claimant admitted she did not know what caused her to fall. Furthermore, the claimant had to demonstrate gritting was commonly carried out by similar housing associations. She failed to do so.

Claimant takes on a degree of risk

Courts have traditionally been unwilling to find a breach of duty against an occupier where a claimant has taken a risk where there is an obvious prospect of injury:

Tomlinson v Congleton BC (2003)[6]

The defendant was not liable for a life-changing injury sustained by the claimant when ignoring warnings about swimming in a lake.

Wilson v Bourne Leisure (2015)[7]

The claimant elected to walk on an ungritted path despite being aware it was due to be gritted soon. He slipped, suffering an injury. The Court found for the defendant. The claimant had elected to take the path, and carrying out gritting sooner would have had no effect, as it would have been washed away.

1. The Times 11 Feb. 1991
2. [2017] EWCA Civ 2142
3. [2003] ScotCS270
4. [2006] ScotCS CSOH 42 2
5. [2013] ScotSC 10
6. [2003] UKHL 47
7. (2015) CC (Lincoln)

Employers' Liability

Those duties which employers owe as an occupier are as applicable to their own employees, albeit on a different statutory basis.

Duties owed to employees

There are a variety of duties and regulations owed to employees, and these often overlap meaning claims can allege breaches of various regulations.

Management of Health and Safety at Work Regulations

3(1) Every employer shall make a suitable and sufficient assessment of:

The risks to the health and safety of his employees to which they are exposed whilst they are at work

This is required to ensure that employers identify the measures required to comply with other statutory provisions such as:

Personal Protective Equipment at Work Regulations

4(1) Every employer shall ensure that suitable PPE is provided to his employees who may be exposed to a risk to their health or safety

This is applicable except in circumstances where the risk is adequately controlled by other means.

Workplace (Health, Safety and Welfare) Regulations

12(3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route of a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.

Manual Handling Regulations

4(1)Each employer shall—

(b)where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured—

(i). make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule,

(ii). take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable.

The Courts have previously made a distinction between risk exposed to at work and those risks which are no greater than those a member of the public would experience – but they happen to occur during working hours.

It could be argued that the Supreme Court decision in *Kennedy v Cordia* (2016) has removed this distinction, albeit decisions will continue to be made on a case by case basis.

Case law

Key Decision - Kennedy v Cordia (2016)[1]

The claimant slipped on an icy slope of a footpath to a patient's house. The Court found that her employers were liable as they had breached Regulation 3(1) of the Management Regulations.

The employers had given no consideration to the possibility of individual protective measures. Travelling to a patient's house was an integral part of the role and was therefore 'at work'. The risk posed by adverse weather had been identified, whether specifically or generally, in previous assessments.

In addition, incidents of a similar nature had occurred in previous years.

Their duty was not confined to taking such precautions as were commonly taken, or those that it would be neglectful to have forgot them. If the injury was caused by a risk which should have been protected by PPE which have been supplied, then it was reasonable to infer that failure was materially responsible for causation of the injury.

This decision stood in contrast to an earlier decision on a similar issue.

Parr v Wirral NHS Trust (2014)

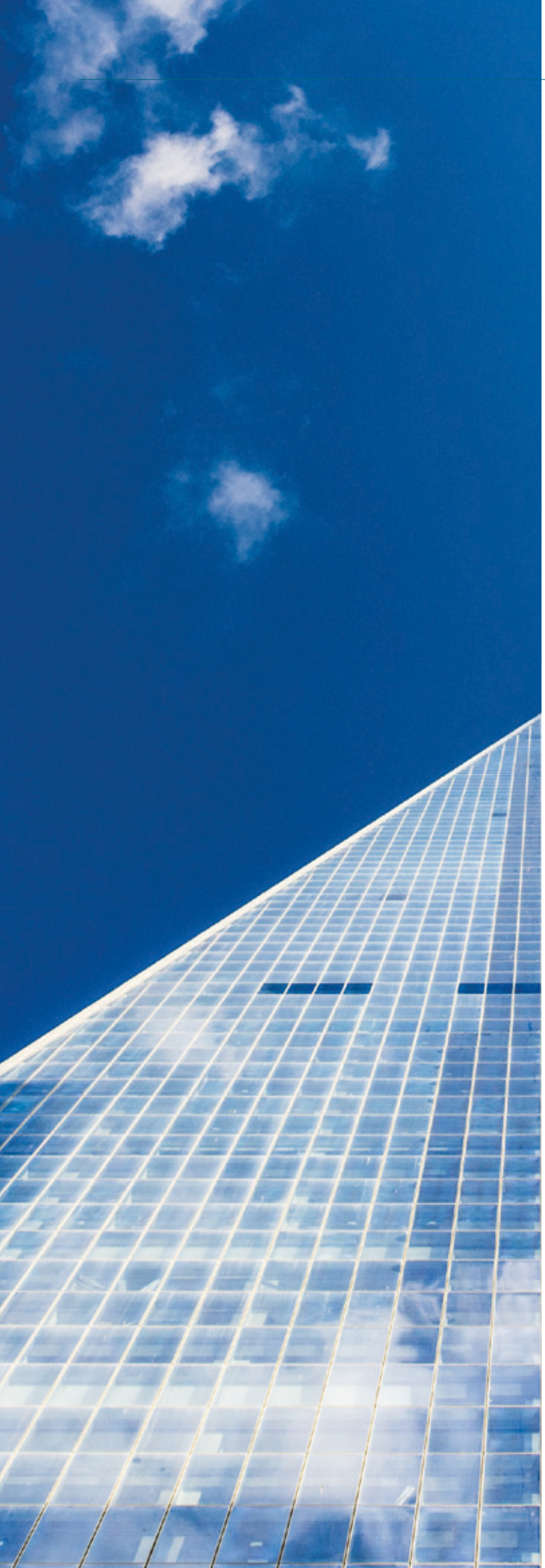
A midwife was injured when making a home visit. She brought a claim against the NHS Trust on the basis that the 'uniform and safe dress policy' relying on employees to supply their own footwear was inadequate. This did not prevent any health and safety risks associated with ice and snow.

The Court found in favour of the health authority. Slipping on snow and ice whilst making a home visit was not a 'risk while at work'. Regulation 3(2) only required clothing for adverse weather conditions where that was inherently linked to the employment. The claimant's core employment did not require her to work outdoors or be exposed to adverse weather conditions.

It can be argued that this decision would now be reversed if determined again on the basis of the decision in *Kennedy v Cordia*.

Employers should also be aware of the need to safeguard employees from winter risks; risks which the employee is actually employed to specifically address as set out below:

1. [2016] UKSC 6



King v RCO Support Services (2001)[1]

An employee slipped on an icy area two hours into gritting it. During an operation covered by the Manual Handling Regulations, the presence of the ice should have been risk assessed. The local authority was found liable as it was considered that the claimant's concentration would lapse over time.

However, the Court did assess contributory negligence at a level of 50%.

McKeown v Inverclyde Council (2013)[2]

A school janitor was injured when he slipped whilst collecting litter. His duties included salting paths and playgrounds which were covered in ice and snow. He was not advised of any set procedure and prioritised areas he considered to be of importance – such as the school entrance.

Whilst he had been supplied with correct PPE under the Regulations, the local authority failed to implement its own system. The janitor had been required to work without instruction or training, and therefore, unlike *King*, there was no contributory negligence on the part of the claimant.

1. [2000] EWCA Civ 314
2. [2013] CSOH 141

Highways

An owner/occupier of private land does not have a specific duty to clear snow and ice from public pathways/roads in proximity to their land. This is the responsibility of a local authority.

Section 41(a) of the Highways Act 1980 states that a local/highway authority has a duty to ensure (as far as reasonably practicable) that "safe passage along a highway is not endangered by snow or ice."

In terms of how far that duty extends, the key case of *Goodes v Essex County Council*[1] confirmed that a local authority's duty does not extend to the prevention of formation of ice and snow on the highway.

The Court in *Goodes* confirmed that s41 was to be interpreted as narrowly as repair – i.e to ensure that the road was passable as opposed to maintain it in a driveable condition at all times. No local authority can be expected to keep roads free of ice and snow at all times.

Case law

A series of cases have been decided on the issue of s41 since *Goodes* which have expanded upon the extent of the duty owed by local authorities:

Valentine v Transport for London (2010)[2]

A highway authority was not found to have breached its duty under the Highways Act by not removing grit from a road; the duty did not extend to a duty to remove surface-lying material.

Yew v Gloucestershire County Council (2013)[3]

The local authority was not found liable for a breach of the Highways Act when prioritising roadways over footpaths in adverse weather conditions, in particular where there were finite resources and low footfall. The steps taken by the local authority were reasonable in the circumstances.

Smithson v Calderdale MBC (2015)[5]

The extent of the local authority's duty under s41(a) was to keep motorists safe from snow and ice on highways. This encompasses properly monitoring the weather conditions the night before the accident.

Risk taken on by private individuals

A Snow Clearance Bill was proposed in 2010 to "provide immunity from prosecution or civil action for persons who have removed or attempted to remove snow from public places". However, this was not advanced beyond first reading.

Therefore, there remains the risk that private individuals or businesses who attempt to clear highways of snow could be liable for any injuries sustained as a result of their actions.

There is no legislation or case precedent detailing how an occupier who chooses to attempt clear snow and ice could be found liable for any injuries sustained by third parties.

Indeed a review of health and safety legislation indicated that no such case has ever been determined. However, in the absence of case law, there is no basis on which to say that private individuals cannot be found liable.

Any case would be determined on the specific facts.

1. [2000] UKHL 34
2. [2010] EWCA Civ 1358
3. (2013) CC Birmingham
4. Lawtel 4/7/2013
5. (2015) CC Manchester
7. https://services.parliament.uk/Bills/2010-12/snowclearance.html

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