MILLS & REEVE

briefing

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Occupier duties for snow and ice – to grit or not to grit?

It may have forged the Lake District over 10,000 years ago but landlords, tenants and other occupiers are still struggling to grasp the extent of their duties to "visitors" in the face of the obvious hazard caused by a build-up of snow and ice during inclement weather. Should they take "some steps" but risk being criticised if the hazard remains to some degree, or is "do nothing" the option that leaves visitors having to make their own assessments and taking their own chances when confronted with a "natural hazard"?

Case law is thin on the ground. Statute is vague (intentionally). The facts play a huge part in determining what might or might not be reasonable for any "responsible occupier" listening to a forecast of freezing temperatures and excessive precipitation (falling as snow).

Any business or individual exercising control over premises owes a duty of care towards its visitors under the Occupiers Liability Act 1957. The duty is a broad one; to take reasonable care in all the circumstances to ensure the visitor is safe when using the premises for the reason they have been allowed access in the first place.

On a snowy day that is going to include visitor safety between the carpark and the front door, or while availing themselves of other outdoor access routes that pedestrians are likely to frequent during their visit. As soon as the visitor sets foot within the boundary of the premises the duty bites, even if the public highway is still covered in white powder.

But isn't the presence of snow and ice (presumably not "black ice") an "obvious hazard" that a visitor has accepted knowingly and decided to run their own risk as they try and make it to our front door? That is certainly an argument to consider, and if the premises are a country park the answer will undoubtedly be a resounding "yes", but if the premises are an office, a GP's surgery, a retail or industrial park, or the common parts of a residential block of flats, the occupier (and there may be more than one) is likely to owe an active duty to its lawful visitors.

The answer lies in assessing what is "reasonable" in all the circumstances. That begins with giving the issue some thought (assessing the risks, considering the resources currently available, their adequacy, and identifying the steps that can be taken to address the hazard in a structured and proportionate way).

The practical answers to that process will have lead the occupier to:-

- Identify the outdoor areas used by pedestrians most likely to be affected by ice
- Identify those thoroughfares most likely to be used on a given day
- Monitor the temperature
- Take preventative measures where freezing and/or snow is forecast
- Apply procedures to prevent the formation of ice or the build-up of snow (gritting and shovelling)
- Keep pedestrians off slippery or untreated surfaces (warnings and even "no entry, untreated path" signs)

The Courts have accepted that keeping all access-ways absolutely clear of ice and snow at all times during bad weather is **not** a **realistic** standard to impose on either occupiers or employers for that matter (Burrows v

Northumbria Water 2014). As the McCondichie case in Scotland suggested in 2003, Landlords are unlikely to be liable for someone who may have had an accident in a carpark if, for example, they have put in place a reasonable system to clear access routes.

As indicated in the more recent but unreported case of B v Newcastle Upon Tyne University (2014) it is enough, even in the face of heavy snowfall, to have done what was reasonably practicable in all the circumstances even if that meant the snow clearance and gritting done perfectly well earlier in the day was an ineffective measure against a late but heavy flurry just before visitors were likely to depart the premises.

A 24 hour response service to the threat of ice and snow may be desirable but is rarely cost-effective other than for a local highway authority, and even then only in respect of its major roads.

For those occupying large sites with heavy footfall a good grasp of where the "many" visitors are likely to wander is essential so that resources can be appropriately targeted. It may not be essential to hire-in an external contractor, but the occupier will need to show that some careful thought and planning has gone in to prioritising certain areas.

The divvy-up of duties between Landlords, Tenants, Resident's Committees or Facilities Management agents is always a cause for concern once the first snowflake descends. Leases, and the covenants flowing from them might be rarely considered. Provided rental income and service charges are being paid by the tenants and the landlord deals with the leaking roof or broken lights in the stairwell, little thought may be given to who is responsible for what. So when it does snow, all concerned can be left very much "at sea" in deciding who is going to address the hazard. The possibility is that all potential interested parties may have a role to play as occupier.

Thought should have been given to the issue at the outset. The Lease should specifically determine who will retain responsibility, and specifically prescribe whether "snow and ice clearance" falls within the duty to "maintain".

Unless the Lease makes it crystal clear, it is not a foregone conclusion that the Landlord will be fixed with a snow-clearing duty. Nor will the Facilities Manager retained to fulfil a Landlord's obligations (under a separate contract) necessarily be obliged to provide that service. The freeholder and the FM may be the "obvious suspects" and often the first target for any claim or litigation, but the resident's committee or even the individual tenants might yet be responsible – much like I am for my own driveway.

These cases are "fact sensitive". Only by investigating the (several?) contractual positions and the reality of control "on the ground" will you be able to answer "who occupies?" and then map the extent of the duty that is owed; an elderly resident may not be expected to display the same enthusiasm for the task of clearing the common parts as some "new kids on the block", but "Doris and Derek" may still need a better plan than simply moving to Vancouver.

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