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How Reckless May An Occupier Be?

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The Supreme Court decision in *Weir Rodgers v SF Trust*, [2005] 1 ILRM 471, raises new, disturbing questions as to the meaning of "recklessness" in the Occupiers' Liability Act 1995. The Act was enacted in response to alarmist concerns of farmers about their potential exposure to liability to entrants onto their lands, such as walkers, campers, hunters and people visiting historic monuments, who might sustain injury. The fact that no claim had been successfully taken against a farmer by such entrant did not prevent the formation of a strong lobby, to which the legislators predictably responded.

The 1995 Act improved matters for most entrants who had the occupier's permission to be on the premises. It categorised them as "visitors" and imposed on the occupier "the common duty of care" – in essence, a negligence standard. Thus, courts no longer have to worry about the refinements of "unusual" or "hidden" dangers or about determining whether an entrant is a licensee or invitee. It is plain that the new statutory test of the common duty of care does not place undue pressure on occupiers. In *Heaves v Westmeath County Council*, (20 ILT (ns) 236 (Circuit Ct, Mullingar, October 17, 2001) Judge McMahon emphasised that the duty is "to take reasonable care and no more" and that "one must be careful, when assessing the [occupier]'s conduct that one is not condemning with the benefit of hindsight".

The Act created a new category of "recreational user", an entrant who, with or without the occupiers' permission or at the occupier's implied invitation, is present on premises without a charge (other than a reasonable charge in respect of the cost of providing vehicle parking facilities) being imposed for the purpose of engaging in a recreational activity (s 1(1)):

> "'Recreational activity' means any recreational activity conducted, whether alone or with others, in the open air (including any sporting activity), scientific research and nature study so conducted, exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archaeological or scientific importance".

Recreational users are not treated very generously by the legislation: they are regarded as having no greater rights than trespassers. Section 4(1) relieves the occupier of "the common duty of care" towards either recreational users or trespassers. All that is required of the occupier is that, in respect of a danger existing on premises, the occupier neither injure them (or damage their property) intentionally nor act with reckless disregard for them (or their property). Section 4(2) provides that, in determining whether or not an occupier has so acted with reckless disregard, the court is to have regard to all the circumstances of the case, including the following:

"(a) whether the occupier knew or had reasonable grounds for believing that a danger existed on the premises;
(b) whether the occupier knew or had reasonable grounds for believing that the person and, in the case of damage, property of the person, was or was likely to be on the premises;
(c) whether the occupier knew or had reasonable grounds for believing that the person or property of the person was in, or was likely to be in, the vicinity of the place where the danger existed;
(d) whether the danger was one against which, in all the circumstances, the occupier might reasonably be expected to provide protection for the person and property of the person;
(e) the burden on the occupier of eliminating the danger or of protecting the person and property of the person 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, of so doing;
(f) the character of the premises including, in relation to premises of such a character as to be likely to be used for recreational activity, the desirability of maintaining the tradition of open access to premises of such a character for such an activity;
(g) the conduct of the person, and the care which he or she may reasonably be

expected to take for his or her own safety, while on the premises, having regard to the extent of his or her knowledge thereof;

(h) the nature of any warning given by the occupier or another person of the danger; and

(i) 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".

What is striking about s 4 is its use of the term "reckless disregard" with no further clarification as to its meaning save that which is suggested by s 4(2).

In *Weir Rodgers v SF Trust Ltd.*, the plaintiff was injured when she lost her footing as she was getting up from sitting down and fell down the edge of a cliff "which turned out to be much more sheer than she would have expected". She sued the defendant occupier for negligence and for breach of its duty under s 4 of the 1995 Act. She succeeded before Butler J but the Supreme Court reversed.

The accident had occurred at 8 pm in April. There was a short stretch of broken down fencing in the area, as well as some trodden grass which the plaintiff regarded as a path. This led her to believe that people had walked there a good deal. She claimed that she had been misled as to the nature of the cliff and that it had not seemed as if she was over a cliff. One of her friends who had been with her that evening gave evidence that he had not sensed any danger at the time "because the sheer drop was hidden from view for a start and the slope looked gradual enough; it did not look like a steep slope that you would find yourself falling if you fell. It was deceptive".

An expert witness called by the plaintiff conceded in cross-examination that, if one were to put up a notice every place where there was a ridge or a cliff, the place would be littered with notices. In his judgment in the Supreme Court (with which Murray CJ and Denham J concurred), Geoghegan J observed:

"One does not have to be an engineer to agree with that answer and one does not have to be blessed with a high degree of common sense to opine that it is highly unlikely that the Oireachtas ever intended any such thing. [The expert witness]'s evidence was extreme but, in my view, it logically had to be given to support the case of the respondent. For instance, in re-examination [counsel for the plaintiff] referred to a question [counsel for the defendant] has asked [The expert witness] as to whether he was suggesting that every stretch of the coast line should be fenced. I rather suspect that [counsel for the plaintiff] was hoping for a different kind of answer than he got. [The expert witness] said that any area that is heavily pedestrianised should certainly have some warning signs and that there should also be a fence there as well. I must confess that this conjures up in my mind huge areas of coastline right around Ireland fenced against the public and littered with warning notices. An Oireachtas intention to that effect would seem unlikely but, if a statute required it, the courts would be bound to uphold it. That is the question which I have to address when I deal with the law".

Geoghegan J noted that, at para 12.109 of the third edition of McMahon and Binchy's *Law of Torts,* the following is stated: "It is clear from consideration of the several factors prescribed in the legislation that recklessness connotes objective default rather than necessarily requiring any subjective advertence on the part of the occupier to the risk of injury". Geoghegan J's observations on the possible meaning of recklessness under s 4 merit full quotation:

"I do not intend to express any view on the subjective/objective question. Such consideration should be left for a case where it properly arises. My concern in this regard arises from the fact that notwithstanding the recommendations contained in both the Consultation Paper and the ultimate report of the Law Reform Commission that the liability towards trespassers and recreational users should be one of *'gross negligence',* the Oireachtas appears to have rejected this recommendation and adopted the phrase arising from the old case law namely 'reckless disregard'. It may well be, therefore, that the liability is something more than what might be described as 'gross negligence'. However, this is a case of a lady falling down the edge of a cliff. It is suggested that there was an inherent danger in the nature of the actual ground and portion of cliff where she fell. This, of course, is so but only in the sense that wherever there is a cliff edge it is to be reasonably expected that there may be parts of it more dangerous than others. At any rate, it would be reasonable to assume that the occupiers in this case would have had some awareness of the danger. For the purposes of this case and without deciding the issue, I am prepared to accept that the test of recklessness is an objective one as suggested by the authors of McMahon and Binchy. In the same paragraph of that work the authors make a very astute and prescient remark. They state the following:

'One can only speculate about the extent to which the courts are in practice going to set the standard at a lower level than the (equally objective) standard of reasonable care. The 1995 Act gives no guidance as to how much lower the level should be. The nine factors specified in section 4(2) contain no such yardstick; indeed, they might constitute a trap to an unwary judge who could easily seek to apply them without adverting to the fact that, although they are similar to criteria applicable for determining the issue of negligence, they have to be pitched at a level more indulgent to the defendant'.

It would seem to me that that is exactly what happened in this case and that the learned trial judge unconsciously fell into this trap.

As it happens, I take the view that even if the duty on the occupier in this case was the ordinary *Donoghue v. Stevenson* neighbourly duty of care the

respondent would not be entitled to succeed. Interestingly in *Donovan v. Landy's Limited* [1963] I.R. 441, a case in which, as the Law Reform Commission noted, Kingsmill Moore J. reviewed all the Irish and English authorities, Lavery J. gave a judgment agreeing with the judgment of Kingsmill Moore J. but making the following apposite comment:

> 'I agree with his conclusions and in the main with the reasons which he has given. I am, however, in some doubt as to whether the distinction between negligence and reckless disregard is necessary to be drawn and I fear that such a distinction may well lead to difficulty in a trial before a jury in explaining a case of this kind. There are already so many distinctions which have been elaborately explained in innumerable judgments'.

More or less the same view was taken by Judge McMahon, one of the authors of McMahon and Binchy, in his submission to the Law Reform Commission between the time of the Consultation Paper and the ultimate report. He was strongly of the view that the duty should be an ordinary duty of reasonable care.

The Commission rejected his advice and again recommended a threshold of 'gross negligence'. The Oireachtas, however, did not adopt that expression in the legislation and instead went back to the old expression 'reckless disregard'. It may well be reasonable to argue therefore that the threshold is even higher than 'gross negligence'. I do not find it necessary to express any definitive view on any of this because as I have already indicated I believe that even if the duty was merely a duty of reasonable care and not the obviously higher duty not to act with reckless disregard for the personal property of the person the result in this case would be the same. It is perfectly obvious to all users of land higher than sea level but adjoining the sea that there may well be a dangerous cliff edge and in those circumstances the occupier of the lands cannot be held to be unreasonable in not putting up a warning notice. Still less has he reckless disregard for the safety of the person using the land".

What are we to make of this analysis? The most obvious point to note is that Geoghegan J makes it abundantly plain that he is not coming to any final conclusion on the issue. He canvasses three possible interpretations of recklessness under s 4. The first is gross negligence but he seems to believe that, because the Oireachtas used the term "recklessness" after the Law Reform Commission had recommended a gross negligence test, the concept of recklessness does not mean gross negligence. Such a conclusion is not inevitable, by any means. In choosing not to define "recklessness" but prescribing a detailed series of factors to which the court is to have regard when determining whether the defendant was reckless, the Oireachtas may well have sought to achieve this equiparation. The content of these several factors involves an objective test whereby the reasonableness of the defendant's conduct is to be assessed; the only matter left unstated is just what level of reasonableness is envisaged. (It should be mentioned that the Oireachtas debates provide surprisingly little guidance on the exact meaning of "recklessness".)

The second possible interpretation canvassed by Geoghegan J is some objective standard even less demanding (from the occupier's point of view) than gross negligence. This would involve a novel test in Irish law. Some American jurisdictions have a "wantonness" criterion. Perhaps this is the level that Geoghegan J is envisaging.

The third possible interpretation mentioned—but not developed—by Geoghegan J is to interpret recklessness in subjective rather than objective character. This would require the defendant actually to have addressed the danger: if the defendant did not, then, however negligent he or she might have been, and however obvious the danger, he or she would not be held liable. There is an obvious difficulty with this interpretation. The factors listed in s 4(2) clearly are objective rather than subjective in character. The reference to the question whether the occupier "knew or had reasonable grounds for believing" certain facts is a constant refrain in factors (a) to (c). Factor (d) requires the court to make a value judgment: whether the danger was one against which, in all the circumstances, the occupier might reasonably be expected to provide protection for the person or property of the entrant. Factors (e) to (i), in referring to empirical matters, clearly place a burden on the court to respond normatively to them when making its objective value judgment. There could *just* be a tenuous argument that factors (a) to (c), in referring to whether the occupier had reasonable grounds for believing certain facts, was doing no more than what s 2(2) of the Criminal Law (Rape) Act 1981 does—namely, refer to an objective reasonable test merely as a guide to determining a factual question of what the defendant *actually* believed. This interpretation cannot prevail in the face of factor (d), which simply does not involve any transposition from the normative to the empirical order and factors (e) to (i), which require the court to journey in precisely the opposite direction.

When one turns to seek guidance from the pre-legislation case law as to the meaning of recklessness on the part of an occupier, one encounters difficulty.

The concept of recklessness was developed against a very restrictive background in which no duty of care was owed to trespassers. The progress of judicial thinking on the subject was first to acknowledge that an occupier might not *intentionally* injure a trespasser (subject, of course, to the defences of self-defence, defence of others, and defence of property), and only later to countenance the idea that liability should extend further to embrace egregious conduct lacking the intent to injure the trespasser. The language used by the judges varied fairly widely and lacked analytic sophistication. Most courts required that there have been some positive conduct on the part of the occupier: mere culpable inaction resulting in the maintenance of premises in a dangerous state was not enough to warrant the imposition of liability. The courts also,

understandably, required that the culpable act take place at a time when the occupier was actually aware of the trespasser's presence on the property or there was a very strong likelihood that the trespasser would be there.

A flavour of the judicial approach may be obtained from the following quotations. In the Privy Council case of *Grand Trunk Railway of Canada v Barnett*,[1] Lord Robson referred to "a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care". In *Coffee v McEvoy*,[2] Holmes LJ referred to damage being caused to a trespasser "by wilful or reckless act". In the House of Lords decision of *Addie v Dumbreck Collieries Ltd*,[3] Lord Dunedin referred to a situation where "the acting was so reckless as to amount to malicious acting".

In a number of decisions prior to *Purtill v Athlone UDC*[4] and *McNamara v ESB*,[5] the Irish courts displayed a lack of concern as to whether a test of recklessness or negligence should be applied towards trespassers where some positive act was occurring on premises or involving machinery. These earlier decisions may perhaps be regarded as not being helpful on the question of the actual meaning of the concept of recklessness, though they are important in guiding analysis on the separate question as to whether the 1995 Act has overtaken the common law in respect of activities as opposed to the dangerous state of the premises. It will be recalled that *Purtill* and *McNamara* involved a movement away from the traditional constriction of the occupier's duty to trespassers so as to allow for the imposition of a duty of care in negligence on occupiers relative to trespassers were there was a sufficient proximity of relationship between them. In the absence of such proximity, no duty of care was imposed: see *Keane v ESB*,[6] *O'Keeffe v Irish Motor Inns Ltd*,[7] and *Smith v CIE*.[8]

This brings us to a real confusion in the drafting of the legislation. Section 4(1) is dealing with the duty an occupier owes recreational users and trespassers "[i]n respect of a danger existing on premises". Section 1(1) defines "danger" in relation to any premises as meaning a danger due to the state of the premises. Such a danger, one might reasonably infer, should be contrasted with a danger due to some activity taking place on the premises. Yet s 4(1) requires the occupier not to injure the entrant intentionally or to *act* with reckless disregard for the entrant. Of course it is possible that with respect to dangers due to the state of the premises—an unsafe ceiling, for example—the occupier by his or her act in reckless disregard of the entrant could bring about injury to the entrant—by banging a pole against the ceiling. But there will be other cases where an occupier can injure an entrant by reckless conduct without there being any danger due to the state of the premises—as, for example, where an occupier chooses to spray the land with poison. There will also be cases where an occupier, with serious moral culpability, does nothing to protect an entrant from a danger that is exclusively due to the state of the premises. Can it be that the only case in which s 4(2) imposes liability is where the occupier, with respect to a pre-existing danger due to the state of the premises, recklessly engages in positive activity that causes injury to the entrant? This is what the language of ss 1(1) and 4(1), in cumulation, appears to provide. Such a conclusion is an unpalatable one, for a number of reasons. First, it would constitute a huge reduction in the scope of the occupier's duty to trespassers to a point less extensive than that which the common law courts, long before *Purtill* or *McNamara,* countenanced. Once the courts acknowledged that reckless disregard of a trespasser involved liability on the part of the occupier, they did not relieve the occupier of liability merely because such reckless disregard did not relate to a danger due to the state of the premises. No moral distinction could be drawn on this basis and the courts rightly made no attempt to draw such a legal distinction. Second, the Oireachtas debates on the legislation involve no suggestion that such a distinction was intended.

Section 2(1) is relevant to the solution of this puzzle. It provides that, subject to s 8 (which preserves certain rules relating to liability (such as employers' liability) and defences (such as self-defence)), the duties, liabilities, and rights provided for by the Act are to have effect in place of those which previously attached by the common law to occupiers of premises "as such in respect of dangers existing on their premises to entrants thereon". It may be argued that this provision makes it clear that the legislation is not seeking to alter common law duties so far as they do not relate to occupiers' conduct in other contexts. Thus it seems clear enough that an occupier who is negligent towards a visitor in contexts other than those relating to dangers due to the state of the premises may still be sued for negligence at common law. In *Hackett v Calla Associates Ltd*,[9] where the plaintiff was injured by a member of security staff engaged by the occupier of premises, Peart J referred to the restricted definition of "danger" in s 1(1) as meaning a danger due to the state of the premises and commented:

> "It must follow from this that the plaintiff's claim is not one coming within the duty of care imposed by section 3 as the allegations of negligence are not related in any way to the state of the premises but rather the behaviour of the bouncers on the night in

[1] [1911] AC 361, at 370.
[2] [1912] 2 IR 290, at 308.
[3] [1929] AC 358.
[4] [1968] IR 205.
[5] [1975] IR 1.
[6] [1981] IR 44.
[7] [1978] IR 85.
[8] [1991] 1 IR 314.
[9] Unreported, High Court, Peart J, October 21, 2004.

question. It is necessary to consider this claim by reference to the more usual non-statutory criteria in relation to the possible breach of the common law duty of care owed to the plaintiff by the owners/occupier of the premises ...".

Peart J did not refer to s 2 but his acceptance that the common law claim for negligence survived the legislation is to be noted. His approach contrasts with that of Herbert J in *Meagher v Shamrock Public Houses Ltd t/a the Ambassador Hotel*,[10] but it would seem mistaken to build too much theoretical analysis on the brief reference in *Meagher* to s 3(2) of the 1995 Act.

It is striking that in England, where the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984 both replaced the rules of common law, not only in respect of dangers due to the state of the premises but also in respect of dangers due to "things done or omitted to be done" on the premises, some courts and commentators argued that these Acts did not affect the "activity duty".[11] If a credible case can be made that the "activity duty" remains even where legislation refers to things done or omitted to be done on premises, the case is far stronger where, as is the position under the Irish legislation of 1995, the statute professes to affect only the rules relating to dangers due to the state of the premises.

The issue is of little practical importance in relation to the occupier's duty to visitors since the occupier's duty to the visitor will in any event be one of due care, whether categorised as the statutory "common law duty of care" or the duty of care under common law negligence principles. With regard to recreational users and trespassers, however, the issue assumes supreme significance. If s 2(1) preserves the pre-existing common law rules relating to occupiers' positive acts (save perhaps those acts relating to dangers due to the state of the premises), then the law as stated in *Purtill* and *McNamara* would continue to apply so far as such acts are concerned. It is true that the facts of both these cases might be categorised as involving dangers due to the state of the premises, but the legal principles expressed in them clearly extended to cases involving activities by the occupier.

Let us now try to bring these strands of analysis together. Section 2 of the 1995 Act makes it clear that the Act changes only the rules relating to the occupier's duty to entrants relative to dangers resulting from the state of the premises. Section 4(1) requires the occupier, relative to trespassers and recreational users, only to avoid injuring them intentionally or acting with reckless disregard for them. The reference to "act" in s 4(1) is highly problematic. It appears to relate to acts in respect of dangers to the state of the premises. If this is so, what about other acts? If *Purtill* and *McNamara* still apply for them, the Act will have had a radically different effect from what the farmers' lobby believed it to have achieved. Moreover, difficult questions of characterisation will arise. Take the facts of *Smith v CIE*, where the plaintiff, having got onto the Dublin-Cork railway line near Ballyfermot through a breach in the wall was struck by a train as he was running down the track with the intention of chastising a boy who had ridden his horse without his consent. The Supreme Court held that there was no proximity of relationship between the parties, but was the defendant's alleged culpability its failure to repair the wall which exposed the plaintiff to danger resulting from its activities or, on the other hand, its operation of a fast train in circumstances where the presence of the trespasser was foreseeable?

It is hard, nevertheless, to see how s 4(1) can reach acts unconnected with dangers due to the state of the premises. This raises the question as to what rules apply to omissions by an occupier relating to dangers due to the state of the premises. The use of the word "act" in s 4(1) might reasonably indicate that omissions – even reckless ones – are not to generate liability. But that would involve such a retrogression that, unless the language of s 4(1) absolutely compels such a conclusion, it should be resisted by the courts. It would mean that occupiers would have no liability, however egregious their recklessness, for their culpable inaction relative to dangers due to the state of their premises. If an occupier let a ceiling, known to him to be highly unstable, fall on the heads of recreational users visiting a building of artistic importance, he would incur no liability. This is simply unacceptable; indeed it would raise a serious doubt as to the constitutional validity of the legislation in its failure to protect the rights to life and bodily integrity of such entrants. The courts would seem well entitled to interpret "act" broadly so as to include omissions. Any other course is likely to result in unconstitutionally draconian and anomalous outcomes.

If, therefore, s 4(1) is interpreted broadly, the question of what constitutes "recklessness" can be more easily addressed. It is respectfully suggested that, for the reasons stated above, it involves an objective rather than subjective test. As to the stringency of that objective test, s 4 is silent. It has to be acknowledged that all of the factors specifically set out (as a non-exhaustive list) in s 4 (2) are ones that a court would address when determining whether the occupier was guilty of *negligence* relative to the recreational user or trespasser. Could it possibly be the case that, again contrary to the understanding of the farming lobby, "recklessness" is really the same as negligence? In spite of the use of the expressions "reasonable" or "reasonably" in six of these nine factors, it may strongly be argued that "recklessness" must mean some degree of carelessness worse than negligence. It is used in contradicting the "common duty of care" which applies in respect of visitors; the Minister, in the Oireachtas Debates, represented the recklessness test as one less demanding than that of negligence; moreover, the term itself suggests conduct more egregious than negligence.

[10] Unreported, High Court, Herbert J, February 16, 2005.
[11] See Hepple, Howarth & Matthews, *Tort Cases and Materials* (5th ed, 2000), pp 556, 580–581; *Revill v Newbery* [1996] QB 567.

Assuming that "recklessness" involves conduct worse than mere negligence, how much worse is it? "Gross negligence" has a long common law pedigree as a term indicating seriously substandard conduct, in a range of contexts. Of course, there is no scientific way of calibrating gross negligence (or indeed negligence itself). The term is in the realm of values, derived from, but not reducible to facts. A court charged with the obligation of imposing liability only in cases of gross negligence will naturally hesitate longer before imposing liability than it would if negligence had been the test. If the use of the word "reckless" instils the same judicial hesitation, it will have achieved its goal. The court does not formally have to interpret s 4 as incorporating a "gross negligence" test, provided it does not require more than what gross negligence involves. If it were to interpret s 4 as actually involving conduct more egregious than gross negligence, it may be suggested that it would be going too far, for two principal reasons. First, nothing in the language of the Act itself requires such an interpretation. Indeed, the frequent use of the words "reasonable" or "reasonably" in s 4(2) contrasts strongly with it. Second, a grosser than gross negligence test would afford such scant protection to recreational users as to raise constitutional concerns. Would it be consonant with justice for an occupier whose grossly negligent act results in the collapse of a ceiling of a building of artistic importance to avoid any liability towards entrants permitted by him to be in the building without charge? Catering to lobbies must surely have some limits.

Weir Rodgers v SF Trust Ltd should not be regarded in isolation. Courts in a number of other common law jurisdictions have evinced increasing impatience with plaintiffs' claims against occupiers where the danger is obvious.[12] One must agree with the view expressed by Ray and Des Ryan that "[a]fter *Weir Rodgers*, one thing is certain: the philosophy of *McNamara* is now nothing more than the quaint vestige of an era long since past."[13]

[12] See *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, *Vairy v Wyong Shire Council* [2005] HCA 62 (October 21, 2005), *Mulligan v Coffs Harbour City Council* [2005] HCA 63 (October 21, 2005).

[13] Ray Ryan and Des Ryan "'Trespassers (and Recreational Users) Beware' – The Supreme Court Decision in *Weir Rodgers v SF Trust*", 23 ILT 59 (2005).