Neutral Citation Number: [2005] EWHC 1342 (Qb)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 14th March, 2005

B e f o r e:

MR JUSTICE MORISON

YOUNG

CLAIMANT

-v-

KENT COUNTY COUNCIL

DEFENDANT

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(Official Shorthand Writers to the Court)

MR C UTLEY and MR S MATHEWSON (instructed by Hodge Jones & Allen) appeared on behalf of the CLAIMANT.

MR W NORRIS QC (instructed by Berrymans Lace Mawer) appeared on behalf of the DEFENDANT.

J U D G M E N T
(As approved by the Court)

J U D G M E N T

1. MR JUSTICE MORISON: This is a trial on liability only of a claim for damages for personal injuries brought on behalf of a young man, the claimant, who was born on 24th August 1988. The accident occurred on 15th February 2001, when the claimant was 12½ years old.

2. The claimant's pleaded case is that, on the evening of the day in question, he attended with friends a youth club held at a school in Edenbridge in Kent, which was owned, managed and occupied by the defendants. It is alleged that there was only one adult supervisor present, namely Mr Clive Richards. I reject that allegation, for reasons which will become apparent.

3. I now quote from the claimant's pleaded case.

> "At about 7.30 p.m. the claimant was playing football outside the youth club with other children. The football was kicked or thrown by one of the children onto the roof of the school building [the design and technology block which had a flat roof and a number of skylights set into it] and the claimant climbed onto the flat roof to retrieve it.
>
> Whilst the claimant was on the roof of the school building he fell through one of the skylights to the ground causing him serious personal injuries."

4. The claimant alleged in the claim that, as occupiers of the school premises, the defendants, Kent County Council, owed him duties, either under the Occupiers' Liability Act 1957 or under the Occupiers' Liability Act 1984. In support of their averment that the accident was caused by the defendants' negligence or breach of their statutory duty, the claimant contended that the defendants "caused or permitted the frame or other apparatus to be attached to the school building, thereby affording children easy access to the flat roof"; failed to prevent access to the flat roof by fencing; permitted the skylight to be open, defective and insufficiently strong; failed to provide a sufficient level of supervision for children attending the youth club or the school premises; failed to provide adequate warning to children as to the danger of climbing onto the roof of the design and technology block; and exposed the claimant to the danger or trap or hazard and a foreseeable risk of injury.

5. The defendants, in their pleading, admit that they permitted the youth club to be held within the school premises and that there was a school building near to the premises used by the youth club which had a flat roof and skylights. The defendants did not admit that "children were able to gain easy access to the roof by climbing up a metal frame or other apparatus", and they denied that the configuration of the frame and roof created a danger and that the defendants were aware of that and that it acted as an allurement to children including the claimant.

6. The defendants pleaded further as follows

> "The only facts currently known to the defendant at present are that the claimant entered the school premises on 15 February

> 2001, climbed onto the roof and jumped on the skylight, fell through and sustained serious personal injuries as a consequence. He did so when it was dark at about 7.30 p.m and in the knowledge that what he did would not have been permitted and was dangerous."

7. The defendants further plead that:
> "It is unlikely that there was a game of football played outside during the hours of dark, or that the events [as pleaded by the claimant] represent a true account of what occurred."

8. The defendants denied that the Occupiers' Liability Acts, or either of them, applied, as the premises to be used by the youth club were in the control and occupation of the youth club and not the defendants at the time of the accident. They asserted that the claimant was not a visitor, because he was not taking part in the activities of the youth club "or because he was a trespasser to the school building". The defendants contended that they were not aware of any danger, as alleged by the claimant, or that they had any reasonable grounds to believe that the claimant would come into the vicinity of the design and technology building. If there was a risk within the meaning of section 1(1) of the 1984 Act, it was not one against which it was reasonable, in all the circumstances of the case, to expect the defendants to offer some protection. They further allege that the claimant was to blame for the accident because he took part in unsanctioned play away from the premises being used by the youth club, he climbed onto the roof, he went onto the skylight and/or jumped on the skylight, he knowingly went into areas which he knew that he would not have been allowed to go, and he acted dangerously and without any regard to his own safety. Subsequently, the defendants admitted that, contrary to what they had asserted, they organised and ran the youth club.

9. The injuries alleged are serious. There was a severe head injury, which, it is said, has severely compromised the claimant's capacity for learning, and "he has no capacity whatsoever for future paid employment as a result of the accident". He has no recollection of the accident or the circumstances leading up to it, and did not attend court or give a witness statement.

10. There are a number of issues of fact as I see them. (1) How did the claimant get onto the roof of the design and technology building where the accident happened; (2) what was he doing on the roof; (3) how many members of staff were on duty at the time; (4) were members of the staff or school aware that children used to get on the roof; and (5) what steps, if any, did the club or school take to stop children getting onto the roof.

11. The school where the accident happened is Eden Valley School, Edenbridge in Kent, and has now closed down. The claimant was in year 8, i.e. he had been in the school for one year and one term. He was, before the accident, a "complicated" child with a variety of behavioural problems. He has a hearing disability unrelated to the accident. He used to play truant and, as a result, he was selected as one of eight children to participate in a programme called the Kite Project – Kent Initiative Against Truancy – which was aimed at children

with behavioural problems. Mr Richards fairly summarises the result of this programme, so far as the claimant is concerned, as showing that the claimant "found it difficult to conform to school and peer rules, had a very limited attention span and short temper fuse". This course was for one day a week for 12 weeks. Mr Clive Richards was one of the facilitators on this course. It was not entirely successful, as the claimant misbehaved and was sent home for one of the days. I found it surprising that Mr Richards did not know that the claimant was 75% deaf, but it shows, I think, that the claimant was a boy who did not use his deafness as an excuse for his shortcomings. Because he has a complicated medical history with learning difficulties, he was, I think, more vulnerable than most other children to understanding the concepts of risk and danger. There is evidence that he did climb onto roofs, and to that extent showed little fear for his own safety, probably due to his lack of appreciation of the nature of the risks he was running.

12. The claimant was encouraged to become a member of the Aster Youth Club, which was held for children of the claimant's age on Thursdays in the environs of the school. The club were provided, within the school, a club hall, with two pool tables, table tennis, two basketball rings, a television lounge, a coffee bar, a computer suite and a games room, with an office for staff off the main hall. There was also a fenced area outside the club hall, where children attending the club could play. From there, the children could enter the school's grounds and obtain access to the design and technology building with its flat roof. At the time, the club was located immediately to the right of the main entrance as one entered. Further on, the entrance road widened out into a car park for staff. The club had no windows at ground level which could be looked out from, except for two windows at the end of the building, from which visibility was poor because they were set back from the southern flank wall. There were swing doors leading into the club on the east flank wall. The coffee bar area was then to the left off the main hall. There was a space for the children in that area and a space for the staff, who were serving snacks and drinks. There was a door leading from the bar area to the car park. Off the main hall on the west flank was a room for the computer suite and lounge area and to the left of that an emergency door leading to the playing fields. The small perimeter fence round the club was made of wood and was no doubt useful for people to sit on. It did not go right round the club and, therefore, the children had access to the school grounds and buildings if they chose to leave the club. The surface immediately around the club was grass. The design and technology building was located opposite the main entrance to the club on the other side of the entrance road. Because of the topography (the land slopes from the busy main road down to the car park), the building is set down in something of a hollow. Leaving aside any fencing, as there is an issue between the parties as to when that was introduced, one can walk from the entranceway onto a concrete path which runs alongside the design and technology building. On the bank above it was an area where there was room for the children to sit down on the fences that were there and on a small building housing the boiler, and it is common ground that on club nights the children used to congregate in that area.

13. I start with findings of fact relating to the night in question. In order to be admitted to the club, the children had to pay a membership fee of £1 and thereafter 50 pence per visit. Miss Jones, who was the only factual witness on behalf of the claimant, who is now aged 16, said that she thought the

membership fee was a one-off and she was never asked to pay it again. The club's evidence, given by Mr Richards, Mrs May and Mr Holland, was that the £1 fee was an annual membership fee, and certainly there are documents which suggest that that is so. I believe Miss Jones as to her own position and think it quite probable that people who attended regularly were never asked for a renewal fee. I accept that she was not.

14. On the evidence, it is clear, I think, that the claimant became a member of the club in February 2000, although he may have attended before then. His mother, who gave evidence, thought he had joined as soon as he had started at the secondary school. I have no difficulty in believing what she told me. Whether the claimant paid his joining fee straight away is less likely, having regard to such records as now exist which show his membership starting in February. It is possible to go to the club as a visitor when the fee is apparently 75 pence for each person attending. The object of the exercise, so far as the club workers were concerned, was to get the young people to come to the club rather than drive them away by requiring payments to be made on the spot. A child, for example, who turned up without money would be admitted but made to pay the next time. At the end of the day, nothing much turns on this issue. On the evening in question, the claimant was given 50 pence by his mother so that he could go to the club. In fact, she used to give him a bit more so that he could buy something from a takeaway on the way home.

15. Did the claimant go to the club that night? Had disclosure of documents been dealt with properly, this issue would have been much easier to resolve. I am told that the sheet which would have been filled in for that night and which would have shown who had signed in cannot now be found. The absence of this document was not formally disclosed until the Friday before the trial started on the Monday. I should simply say at this stage that I have never personally encountered such an absence of proper disclosure by a defendant in any case I have tried. It has been lamentable, and the defendants appear to have shown a reluctance to disclose documents which were manifestly relevant. The witness statements of the club's principal witnesses do not reveal what the system was for signing in, nor why the relevant documentation was unavailable. It appears that, when the children arrive at the club, their names are written down, and in a box there will be marked the amount that they have paid. It was the club's evidence that someone was on the door for the first hour or so after the club officially opened at 6.30 p.m, in order to ensure that people were correctly signed in and to record what they had paid. Because the relevant sheet has apparently been lost, it is not possible to say with certainty whether the claimant was signed in or not. The witness, Miss Jones, says that she was in the club with the claimant and left with him with a football. I believe her about this. Mr Holland thought he had seen the claimant buying a snack item. Mr Richards and Mrs May do not think he was there that evening. On balance, I am of the view that he was there and had paid up. Mrs May thought she knew him by sight, because she thought she may have taught him swimming at his primary school. That was not put to Mrs Young, the claimant's mother, and I think at the end of the day Mrs May was not confident that her recollection on this point was right. She said she was on the door on the night in question, with Mr Holland standing close by, as she had only just become an employed part-time worker there. I think it likely that, had the claimant entered the club, as I find he did, it was more probable than not that he would have been made to hand over his 50 pence

at the door. I think it is significant on this issue that Mr Richards did not say, in the statement he made about the incident which he prepared that night and which was a full statement, that the claimant had not signed into the club, or that he was not a member of it. If, as I think, the membership fee was technically for one year only, then the claimant's renewal was due in February. The evidence shows that discos at the club were an attraction to existing and new members and it was a good occasion for asking the children to start or renew their membership on such an occasion. The documents demonstrate that this is so. The day after the accident a disco was booked. We do not know if the claimant would have gone to it, but, had he done so, that would have been a good and natural occasion on which his membership could be put in order. On balance, I think it probable that the claimant was a member of the club and was treated as such at the relevant time, and doubts about his presence that night are based upon recollections which were only prompted some three or four months ago. For three busy members of staff to be expected to remember who signed in and who did not a long time ago seems to me to be unrealistic. I cannot think of any good reason why the relevant document was not retained, as the matter was reported to the police immediately the incident occurred. Had it been available, I would have expected the claimant's name to have been on it.

16. According to Miss Jones, she left the club with a group of people, having taken a football from the store cupboard located in the main hall. The club recognised that children did come and go. It was a problem for them, because attendance at the club is a voluntary process and the children could not be locked in. Some of them wanted to go out and smoke; an activity for people of their age group which was completely forbidden within the club. Further, club nights were occasions for outsiders to come to the school and hang out, waiting to meet club goers. It was an occasion to meet one's friends. Clearly, the staff wanted to keep the children amused inside the club, and from time to time they would go outside and seek to collect the wanderers and persuade them to return, especially in wintertime. The staff also wanted to know whether the children were getting up to no good whilst they were outside and beyond their vision. None of the three members of staff who were there on the night in question (and I accept that they were) could remember an exodus of a number of children at once on that night immediately before the accident, but I see no reason to doubt the truth of what I was told by Miss Jones on this point. Nor do I think it improbable that the children went outside to have a kick about. There would have been enough light from the two tall lamps outside to be able to see the ball, I think, and the ball was really just an excuse to enable a bit of shoving and tackling to take place, rather than anything more serious, as I understand from Miss Jones' evidence. There were at least three staff cars parked on the flat surface in the car park itself. The kick about being described by Miss Jones occurred where the driveway slopes down from the main road. The suggestion that football would not work on a slope seems to me to be an over-sophisticated view of what football actually involved.

17. Counsel for the defendant suggested that no one was playing football at all and that this was a pure invention. I reject that. Whilst on some issues I was not prepared to accept what Miss Jones told me, the general picture she painted as to what happened had, to me, the ring of truth about it. I accept that she may have a motive to help the claimant. She is a friend of his and was very upset when the accident happened, but her manner and demeanour was not that of a

basically dishonest person willing to say anything to help her friend. She displayed some courage in coming forward to give evidence, and clearly genuinely resented the fact that, having plucked up courage to come to court, she should then be accused of being a liar.

18. I accept that, during the football (if that is the right word for it), the ball went up onto the roof of the design and technology building. How did the claimant get up onto the roof? It seems to me to be very clear from the limited amount of documentation available to the court that, at the time of the accident, it was possible to walk down the passageway to the position of the extractor fan and climb up using the flue as the first step with two convenient steps thereafter, as shown on photograph 152. Looking at the photograph, it would have been an easy climb, since the equipment formed effectively a step ladder.

19. What happened thereafter is less easy. Miss Jones saw him on the roof, retrieving the ball. She turned away to light her cigarette, and the claimant had gone through the skylight. The skylights were in a brittle condition and could easily break if pressure was put on them. One boy, who also went onto the roof, told the police officer, who attended the scene and then visited his home, that the claimant jumped up and down on top of the skylight. The boy was not asked to give evidence. Miss Jones says that she did not see him jumping up and down on the skylight. Although there were apparently several witnesses to the accident, none has come forward to give evidence. I must make do with what I have got.

20. I think it is quite probable that the claimant did jump on the skylight. I doubt he would have had the chance to do so repeatedly, because of its condition, but I doubt that this was an accidental slipping over and through the skylight after he had got the ball. Mrs Young thinks that, as her son fell on his head (he suffered severe head injuries), it is unlikely that he was jumping up and down on the skylight because he would then have fallen feet first. I understand her point of view, but do not agree with it. If he had jumped on the skylight and fallen through, it is quite possible for him to land on his head. It would depend on the precise mechanics of the fall and at what angle he was and where his weight was distributed. Even had he landed mostly on his feet, he could well have cracked his head as he fell over.

21. Miss Jones told me that children frequently went up onto this roof and that the club staff knew of it, because Mr Richards was regularly calling them to come down. She said that she had got onto the roof herself once, but did not like the height and got down again.

22. There are two important questions: did children get onto the roof, and did the defendants know about it? The fact that the roof was readily accessible to children, as I have indicated, and the fact, as I believe it to be, that some children, perhaps even most children, will climb whatever is available to be climbed, makes it improbable that this was the only occasion on which two children have climbed onto the roof. Children whilst at the club had climbed onto the club roof. When he gave evidence, Mr Holland said that he himself had climbed onto the roof of the design and technology building when he was at the school. After the accident, there had been a visit from the Health and Safety Executive, who wrote:

> "It is clear that the school had been experiencing problems with trespass and vandalism and in particular access to the roof prior to this incident."

23. On the first question, I have no hesitation in concluding that Miss Jones is right when she says that children used to climb onto the roof. It was probably not just a problem that occurred on club nights. Who was aware of it? The school had obviously been experiencing problems in relation to access to this roof prior to the accident. Hence, the wording of the letter from the Health and Safety Executive. That must be what the inspector from the HSE was told by somebody from the school, but it does not necessarily follow that the club staff themselves were aware it was going on. The impression I have formed from the evidence is that Mr Richards regarded his area of responsibility as largely confined to the clubhouse and what went on there and in the immediate vicinity, and the school, for its part (see the evidence of the evening caretaker, the only school witness called by the defendants), regarded the school building as their affair and the children attending the club as the club's responsibility. Mr Richards was aware that some club children had climbed onto the roof of the clubhouse, and he had put up notices forbidding it. I accept this evidence. He said that he was not aware that children were climbing onto the design and technology building. Had he been aware, I would have expected him to have posted a similar notice in relation to that building. He struck me as an honest and conscientious man.

24. It follows that, on this issue, I am not prepared to accept what Miss Jones told me. It is difficult to judge whether she or he were telling the truth about this. Each had a motivation to give the evidence the way they did. In Mr Richards' case, he is a professional youth worker who would not welcome a finding that reflected on his competence as such, but his evidence was supported by Mrs May and Mr Holland and, on balance, I am prepared to accept what they told me.

25. Therefore, on the evidence as a whole, it seems to me that it is probable that children were getting onto the roof of this building, as Miss Jones said, and that the school were aware that it was experiencing this problem. It may be that the club staff were not so aware, but overall, therefore, we have a position of a roof within a school boundary, which is readily climbable and is unfenced and where children are known to get onto it. As I have said, no one from the defendants who was concerned with the administration of the school has come forward to give evidence. Thus, the court has not heard from the school bursar or the school's health and safety advisor. There is no evidence that the defendants had ever carried out a risk assessment of the school buildings, or, despite knowing of the risk of children getting onto the roof, of trying to stop it. The information from the risk assessment, which the HSE suggested that the school carry out after the accident, shows that the school were aware of the access route to the roof and that a simple remedy of fencing in the passageway at either end was called for. They also recognise the desirability of using anti-climb paint, with warning notices, and the immediate repair, of course, of the broken skylight. For the sake of a few hundreds of pounds, the school were able to make the roof practically inaccessible to children who might be tempted to climb up. In my judgment, the school were aware of children climbing onto the roof and must have known how easy it was to gain access. Had they thought about it, they

would also have appreciated that children would congregate in the vicinity of the passageway leading to the roof on club nights. They surely would have known that children had got onto the club roof, as I assume that they would have been told that by Mr Richards. It is clear, I think, that, when the children climbed onto the roof, they would have known that they were not allowed to do it, they were somewhere where they ought not to have been, they were trespassing. I agree with both counsel in this case that this is not a case under the 1957 Act, which applies to people who are lawfully on property as visitors, but rather under the 1984 Act, which applies to those who are described as "trespassers" or are better described as "non-visitors".

26. What conclusions stem from these findings? On the evidence, I am prepared to infer that the school authorities were aware that children got onto the roof of the design and technology block. That is the natural reading of the letter, as I said, from the HSE, and is supported by the evidence of Miss Jones and, to a limited extent, by Mr Holland. The defendants have chosen to call no evidence from anyone in authority at the school, such as the former bursar or head teacher. It was not sufficient for them simply to rely on the evidence of the club workers and the evening caretaker, especially when only partial disclosure of documents had been given. I am satisfied that there must be a number of documents which either are, or had been, in the possession of the defendants relating to the issues in the case, such as a risk assessment which the school ought to have conducted in the past, details of discussions at the school and the local education authority as to the safety of the school buildings and the problem with trespassers, together with material relating to the steps taken to secure the site after the accident had happened. The initial approach of the defendants' insurers was simply to deny access to the HSE documentation on the basis that the claimant was a trespasser. That obviously was not right, and there has been what I regard as a reluctance on the defendants' part to deal with disclosure in a proper manner. Their initial list of documents was deficient and did not refer to the HSE documentation, which was disclosed, after pressure, the day before the trial. Difficult though it is, I must simply judge the case on the basis of the scant information made available to the court by the defendants.

27. I now turn to the terms of the 1984 Act in the light of the guidance given by the House of Lords in Tomlinson v Congleton Borough Council [2003] 3WLR 705. This is taken from the speech of Lord Hoffman.

> "6. The 1957 Act was passed to amend and codify the common law duties of occupiers to certain persons who came upon their land. The common law had distinguished between invitees, in whose visit the occupier had some material interest, and licensees, who came simply by express or implied permission. Different duties were owed to each class. The Act, on the recommendation of the Law Reform Committee (Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers (1954) (Cmd 9305)), amalgamated (without redefining) the two common law categories, designated the combined class "visitors" (section 1(2)) and provided that (subject to contrary agreement) all visitors should be owed a "common duty of care". That duty is set out in section 2(2), as refined by subsections (3) to (5):
>
> '(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.
(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).'

7. At first Mr Tomlinson claimed that the council was in breach of its common duty of care under section 2(2). His complaint was that the premises were not reasonably safe because diving into the water was dangerous and the council had not given adequate warning of this fact or taken sufficient steps to prevent or discourage him from doing it. But then a difficulty emerged. The county council, as manager of the park, had for many years pursued a policy of prohibiting swimming or the use of inflatable dinghies or mattresses. Canoeing and windsurfing were allowed in one area of the lake and angling in another. But not swimming; except, I suppose, by capsized canoeists or windsurfers. Notices had been erected at the entrance and elsewhere saying "Dangerous Water. No Swimming". The policy had not been altogether effective because many people, particularly rowdy teenagers, ignored the notices. They were sometimes rude to the Rangers who tried to get them out of the water. Nevertheless, it was hard to say that swimming or diving was, in the language of section 2(2), one of the purposes "for which [Mr Tomlinson was] invited or permitted by the occupier to be there". The council went further

and said that once he entered the lake to swim, he was no longer a "visitor" at all. He became a trespasser, to whom no duty under the 1957 Act is owed. The council cited a famous bon mot of Scrutton LJ in *The Calgarth* [1927] P 93, 110: "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters". This quip was used by Lord Atkin in *Hillen v ICI (Alkali) Ltd* [1936] AC 65, 69 to explain why stevedores who were lawfully on a barge for the purpose of discharging it nevertheless became trespassers when they went on to an inadequately supported hatch cover in order to unload some of the cargo. They knew, said Lord Atkin, at pp 69-70, that they ought not to use the covered hatch for this purpose; "for them for such a purpose it was out of bounds; they were trespassers". So the stevedores could not complain that the barge owners should have warned them that the hatch cover was not adequately supported. Similarly, says the council, Mr Tomlinson became a trespasser and took himself outside the 1957 Act when he entered the water to swim.

8. Mr Tomlinson's advisers, having reflected on the matter, decided to concede that he was indeed a trespasser when he went into the water. Although that took him outside the 1957 Act, it did not necessarily mean that the council owed him no duty. At common law the only duty to trespassers was not to cause them deliberate or reckless injury, but after an inconclusive attempt by the House of Lords to modify this rule in *Herrington v British Railways Board* [1972] AC 877, the Law Commission recommended the creation of a statutory duty to trespassers: see its Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (1976) (Law Com No 75) (Cmnd 6428). The recommendation was given effect by the 1984 Act. Section 1(1) describes the purpose of the Act:

‘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.’

9. The circumstances in which a duty may arise are then defined in sub-section (3) and the content of the duty is described in subsections (4) to (6):

‘(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 he 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).'"

28. In that case, their Lordships specifically approved a judgment given by the Master of the Rolls in John Simon Donoghue v Folkestone Properties Limited, which was given on 27th February 2003, case number B3/2002/1920. There, the Master of the Rolls said this:

"31. The duty of care identified by Lord Diplock and imposed under the 1984 Act is significantly less exacting than the common duty of care imposed under the 1957 Act, as a comparison of the two statutes readily demonstrates.

32. The 1984 Act imposes a duty on an occupier where (1) the state of the premises poses a danger and (2) the danger is one that poses a risk of causing injury to a trespasser (it is convenient, though not always accurate, so to describe the "non-visitor") if he comes into the vicinity of the danger and (3) there are reasonable grounds for believing that the trespasser is or may come into the vicinity of the danger and (4) in all the circumstances of the case it is reasonable to afford the trespasser some protection against the risk.

33. The obvious situation where a duty under the 1984 Act is likely to arise is where the occupier knows that a trespasser may come upon a danger that is latent. In such a case the trespasser may be exposed to the risk of injury without realising that the danger exists. Where the state of the premises constitutes a danger that is perfectly obvious, and there is no reason for a trespasser observing it to go near it, a duty under the 1984 Act is unlikely to arise for at least two reasons. The first is that because the danger can readily be avoided, it is unlikely to pose a risk of injuring the trespasser whose presence on the premises is envisaged.

34. There are, however, circumstances in which it may be foreseeable that a trespasser will appreciate that a dangerous

> feature of premises poses a risk of injury, but will nevertheless deliberately court the danger and risk the injury. It seems to me that, at least where the individual is an adult, it will be rare that those circumstances will be such that the occupier can reasonably be expected to offer some protection to the trespasser against the risk.
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> 35. There are some features of land that are not inherently dangerous but which may tempt a person on the land to indulge in an activity which carries a risk of injury. Such activities include cliff-climbing, mountaineering, skiing, and hang-gliding by way of example. It does not seem to me that a person carrying on such an activity can ascribe to the "state of the premises" an injury sustained as a result of a mishap in the course of carrying on the activity--provided of course that the mishap is not caused by an unusual or latent feature of the landscape. I do not consider that the 1984 Act imposes any duty on an occupier to protect a trespasser from making use of a particular feature of the premises in order to carry on an activity simply because that activity carries with it an inherent risk of injury."

29. Question 1: did the state of the premises in this case pose a danger? Answer: yes, they did. The roof was an inherently dangerous place for a child, particularly having regard to the brittle nature of the skylight. The state of the premises did pose a risk in the sense that children could fall off or be hurt by going through the skylight.

30. Question 2: is the danger one that poses a risk of causing injury to a non-visitor? The answer is yes. Had the claimant not been a child but rather an adult, then he would have recovered nothing.

31. Question 3: were there reasonable grounds for believing that the non-visitor (the children) would come into the vicinity of the danger? On the evidence, plainly yes, they congregated there and that was known to be a meeting place.

32. Question 4: are trespassing children, who had lawfully come into the school grounds but knowingly strayed from the part they were allowed to be in, entitled to any protection from the defendants? Were the defendants under any obligation to protect the children from the consequences of their own mischievous behaviour? I take the view that the claimant would have known that he was misbehaving when he went onto the roof, although he had a reason for being up there. He was retrieving a ball and not simply going on the roof for fun, although I am sure that children who went onto the roof normally did so because it was fun, as Miss Jones explained in her evidence. He would have known that he was in a place that was forbidden to him. He would have been aware of the notices about the club roof warning the children off it. Once he was up on the roof, he would also have known that it was not appropriate and would be regarded as an act of vandalism if he were to step on, jump on, or break the skylight. I cannot rule out the possibility that he missed his footing and fell, but, for the reasons already explained, on a balance of probabilities, I think it more likely that he jumped on the skylight. He would have known that that was

dangerous, although he probably would have been unaware of the fragility of the skylight and probably would not have jumped on it had he known of the danger. Although he was rightly described as "complicated", with a hearing and learning disability, I do not think that this provides any satisfactory explanation for his behaviour. I accept that he may have been slightly less aware of the dangers than a child who was not complicated and who did not have a learning disability, and I take this into account when looking at his blameworthiness.

33. From the perspective of the school, they would have known that, if children got onto the roof, there was a danger that they would hurt or kill themselves, whether by falling off the roof or falling through a skylight. The school would have known, if they had thought about it, that children congregated just inside the school gates. The club staff certainly knew that, and that the children congregated in the vicinity of and close proximity to the passageway leading to the easy, ready access to the roof of the design and technology building. The school also would or should have known that, if there was a roof to climb, children were likely to climb it. The school would also have known that access to the roof could readily be denied by the erection of two short fences at either end of the passageway, with a gate in one to permit authorised access. This was a low-cost solution to a danger which was, or should have been, apparent to them. Thus, the danger of serious injury to a child, albeit a trespasser, was or should have been apparent to the school, and the prevention of accident was cheap. In my view, any school such as this one ought to have carried out a risk assessment of their premises and, if they had done so, they would have come to the conclusion that there was a risk of children getting onto the roof and suffering injury or death, and their failure to fence off the access point was negligent. Having invited children onto their property, they did owe a duty to ensure that the wandering child, the non-visitor, the trespasser, was not allowed to encounter this danger. In my judgment, the defendants were in breach of their duty under the 1984 Act.

34. Contributory negligence is assessed on the basis of blame. To what extent was the claimant to blame for what happened? On one view, he was the author of his own misfortune, but once it is accepted that the defendants were under a duty to protect trespassers from injury, that may not be a complete answer. One way of testing the blameworthiness of the claimant is to ask the question: who was more to blame for what happened? Can I say that the claimant himself was more to blame for what occurred than the school, which failed to protect the site, or the converse? I have come to the conclusion that the claimant was as much to blame as the defendants. In other words, his damages must be reduced by 50% to reflect the blame for the accident which must be attached to him.

35. In the result, therefore, I give judgment for the claimant and hold that he is entitled to 50% of any damages that might hereafter be awarded to him.

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