By NONSO ROBERT ATTOH

Have you ever wondered why big departmental shops like Shoprite, MTN et al always have cleaners at regular intervals mopping the floors of their stores? Maybe you had thought it was a waste of money which would have been put to other uses. But then you did not know that in certain circumstances, a person who slips and falls in such a shop because the floors are wet and injures himself may be able to bring an action under occupier's liability against the occupying company.

Our "Study Notes on Occupiers' Liability" is based on the lecture mimeographs of Professor Ifeoma Enemo of the University of Nigeria Nsukka, Enugu Campus and reflects the law on occupiers' liability with particular emphasis on the law as applicable in Enugu State. In the area of occupiers' liability there is a dearth of reported Nigerian cases. There have not been many remarkable changes in the law but there are myriad research issues within this area of law. As
usual, we stress the importance of attending your lectures and paying rapt attention to your
lecturers so as to stay updated on the current legal issues they expect you to pay attention to and
which they will examine you on.

1. OCCUPIERS' LIABILITY AT COMMON LAW

- **TO INVITEES** - a person who is on another person’s property because he was "invited" by the
  property owner either to conduct some kind of business, or because the property is public property
  and is made available to the public, examples, customers in a shop or persons visiting friends and
  relatives in a hospital. The occupier was liable for any injury to the occupier arising from unusual
danger which the occupier knew about or ought to have known about.

- **TO LICENSEES** - a person who has permission explicit or implicit from the property owner to
  be on the property, but who visits for her own purposes or amusement, rather than for business
  purposes, example, party guests, visitors to a tenant or church etc. The duty was to warn them of
  any concealed danger or trap which the occupier actually knew of.

- **TO UNINVITED PERSONS/TRESPASSERS** - the occupier owed them no duty except not to
  inflict deliberate or reckless injury on them.

  Note: **Occupiers' Liability Act 1957** - amended the law of England and Wales as to the liability
  of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or
  other property from dangers due to the state of the property or to things done or omitted to be done
  there. It provided for the common duty of care by an occupier for all his VISITORS without
  making any distinction between licensees and invitees.

- There was also the **Occupiers Liability Act of 1984** that recognized the duty of occupiers to
  persons other than their visitors (trespassers)

- **Law Reform Torts Law 1961 of Lagos State** reproduced the Occupiers' Liability Act of 1957

- Different states have their own Torts Law, while those who do not have any still rely on the
  principles of common law. For Enugu State, the Torts Law of Anambra State (ASTL) applies.
  (Corrigendum – Enugu state in 2004 passed the Enugu State Torts Law Cap 150 Revised Laws of
  Enugu State 2004. However, the discussion in this study note was predicated on the ASTL which
  was applicable in the state prior to the new law)

- **ASTL section 238(1)** - provides that an occupier owes the common duty of care to all his visitors
2. DEFINITIONS

A. OCCUPIER - "a person who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully upon the premises" - Lord Denning in Wheat v Lacon

- Occupational control is the foundation of occupiers' liability - Lord Pearson in Wheat v Lacon
- Degree of control over premises is sufficient for liability of occupier if the control is such that the occupier should know that failure to take care on his part may result in injury to a person on the premises - International Institute for Tropical Agriculture v. Amrani
- Control can exist with or without complete physical possession of the premises.
- An owner who has let his premises to a tenant and is no longer in possession is not an occupier but rather his tenant is
- Two or more persons could be occupiers of the same premises if they shared control, with the standard of care owed by each depending on the respective degree of control exercised by each person - Wheat v Lacon
- Absentee owner may occupy through his servant even though he may have contracted with a third party to have use of the premises.
- Determining who qualifies as an occupier depends on the particular facts of the case, the extent of the occupation and control over the premises.

B. PREMISES - does not include only lands and buildings but also any fixed or move-able structure including any vessel, vehicle or aircraft" (Note: Though students have not often been tested as to their knowledge of the true import of the definition of premises, for practical reasons you must remember that occupiers' liability also applies on ships, aircraft and other move-able structures. The authority for this is section 1(3)(a) Occupiers' Liability Act 1957

C. VISITORS - according to section 238(6) ASTL visitors are
1. those who would have been considered as invitees or licensees at common law (also the same provision in section 1(2) of the Occupiers Liability Act 1957)
2. those entering the premises with the express or implied permission of the occupier (section 1(2) of the Occupiers Liability Act 1957)
3. those who enter the premises for any purpose in the exercise of a right conferred by law (Section 2(6) Occupiers' Liability Act 1957), example a policeman entering to execute his duties, a bailiff entering the land to execute a court process, fireman entering to attend a fire, etc.

- **Implied permission or license** - applies to a person who enters the premises for purpose of communicating with the occupier unless he knows or ought to know that he has been forbidden to enter. For example, a hawker does not have an implied license in a premises having a notice "No Hawkers".

Once the occupier refuses to deal with the entrant, the licence is withdrawn and the entrant must leave within a reasonable time or become a trespasser.

**D. 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 (section 2(2) Occupiers' Liability Act 1957 and section 238(2) ASTL).

**I. IN RELATION TO CHILDREN**

- **ASTL section 238(3)** - an occupier must be prepared for children to be less careful than adults.
- A lawful child visitor is owed the same common duty of care as an adult but reasonable care requires the occupier to take into consideration the characteristics of children which is their strong disposition to mischief.

**Glasgow Corporation v. Taylor** - a 7-year-old child was killed by eating poisonous berries he picked from a shrub in a public garden under the control of the Glasgow Corporation. The corporation knew about its poisonous nature but did not give any warning of that nor fence the
shrub properly. They were liable because the berries were an allurement to the child and so were tempting to him.

**Latham v. Johnson & Nephew Ltd.** - in the case of children there are moral as well as physical traps so the duty to children is not only not to dig pitfalls for them but not to lead them into temptation. However, an occupier is not liable to a child injured on a heap of stones on the premises because stones are not dangerous objects in themselves and it ought to be obvious to the child that he may be injured on the stones.

- Once the object does not constitute an allurement or trap for a child - there will be no liability for the occupier. This can be likened to the doctrine of attractive nuisance in American Tort Law
- In measuring the care to be taken by occupiers in relation to children, the habits of prudent parents should be taken into consideration on whom the primary responsibility for the safety of their children lies. Thus it is the duty of parents to see that
  1. children are not allowed to wander about by themselves or
  2. to satisfy themselves that where they allow their children to go unaccompanied are safe for them to go to - Per Devlin J in **Phipps v Rochester Corporation**
- It will not be socially desirable to permit parents to shift the burden of looking after their children to occupiers who have accessible pieces of land

**II. IN RELATION TO SKILLED WORKMEN**

- **section 238(3)(b) ASTL and section 2(3)(b) Occupiers' Liability Act 1957** - a person exercising a particular calling will guard against special risk ordinarily incidental to the particular calling and an occupier is entitled to assume so. This applies to skilled professional workmen like an electrician, a carpenter etc.

**Roles v. Nathan** - Chimney sweeps killed by carbon monoxide (CO) fumes while sealing up a "sweep hole" in the chimney of a coke-fired boiler were held to have known about the danger and
to have guarded against it as it was one of the dangers which could arise in the profession of chimney sweeping. As such the occupiers were not liable for not warning them of the danger.

**General Cleaning Contractors Ltd. v. Christmas** - a window cleaner injured by a window while cleaning could not succeed against the occupier because the court held that, as a trained workman, he should have exercised reasonable care against the hazards of his profession.

### 3. LIABILITY OF AN OCCUPIER FOR TORT COMMITTED BY AN INDEPENDENT CONTRACTOR RETAINED BY HIM

- Note the difference between the vicarious liability of the occupier for torts committed by his servants and that committed by an independent contractor employed by him in the course of his duties- Anambra State Tort Law (applicable in Enugu State, section 238(4)(b) and section 2(4)(b) Occupiers Liability Act 1957.
- The necessary questions to determine whether the occupier is liable for the tort committed by his independent contractor include;
  - Did the occupier act reasonably in entrusting the work to an independent contractor?
  - Did he select the independent contractor with reasonable care?
  - Did he supervise the independent contractor properly while the work was being done?
  - Did he check the work when it was completed?
- Distinguish between the decision in Haseldine v Daw and Woodward v. Mayor of Hastings, which touched upon the fact that where a work done by an independent contractor, like cleaning a snow-covered step, required no technical knowledge the occupier is under a duty to get a competent person to inspect the work, unlike the work of maintaining and repairing a lift which requires technical knowledge.
4. DUTY OF COMMON HUMANITY OWED TO A TRESPASSER - CHILD AND ADULT TRESPASSER

Define trespasser for this purpose - someone who enters another person’s land without his express or implied permission and his presence is not known to the occupier and if it were known would be objected to.

Distinguish between the old common law rule and the new duty of common humanity owed to a trespasser - The old common law rule was that an occupier was only liable to a trespasser where he had done an act intentionally to harm a trespasser, or had done an act with reckless disregard of the presence of the trespasser. There was no liability for ordinary dangers except they were deliberately or carelessly created in disregard of the safety of a trespasser.

Bird v Holbrook - liability was established in the case of a trespasser injured by a spring gun set with the intention of injuring intruders.

The new rule as laid down in Herrington v British Railways Board is the duty of common humanity or a duty to act "in accordance with common standards of civilized behaviour".

Sections 243, 244 and 245 of ASTL 1986 - duty of care to a trespasser whose presence is known or reasonably anticipated to the occupier. The duty is to

1. To give effective warning of any grave danger, if he has actual knowledge of the danger which a reasonable man would appreciate could cause serious injury to the trespasser.
2. Not to do anything on his land which is foreseeably likely to harm a trespasser whom he knows is on his land or likely to be on his land.

- section 3 of the Occupier's Liability Act 1984 also recognizes the liability of an occupier 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 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 the other 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.

- Recognize the higher rights available to child trespassers even within the duty of common humanity
- The protection sufficient to protect an adult may not be sufficient protection for a child
- A person who is engaged in dangerous activities on his land where there is great likelihood of children trespassers who are too young to understand warning notices or to appreciate the danger or where there are hidden dangers on his land, may be required to provide an effective obstacle to the approach of children or provide warning adequate enough to be understood by even the youngest unaccompanied child
- The adequacy of the steps taken by the occupier is judged depending on the facts of the case and taking into consideration the financial means of the occupier especially where he did not create the danger. The erection of high and strong fences by the occupier may be sufficient to warn a child that going beyond the obstacle entails danger
- A child who is a licensee on a land cannot be considered a trespasser once there is an attractive moveable structure placed on the land or an object which constitutes an allurement to him

5. DEFENCES AVAILABLE TO AN OCCUPIER

I - WARNING - section 238(4)(a) ASTL and section 2(4)(a) Occupiers Liability Act 1957 - a warning without more does not absolve an occupier of liability for damage done to a visitor unless the warning was sufficient in all circumstances of the case to enable the visitor to be reasonably safe
A sufficient warning absolves of liability but an insufficient warning does not. Examples of insufficient warning

a. Warning in an unusual language

b. Warning placed in an unusual place

c. Warning not given in a serious manner

d. Warning appropriate to an adult but unintelligible to a child

Where there is no danger on the premises, the occupier is under no obligation to warn visitors to take care.

II - CONTRIBUTORY NEGLIGENCE - section 238(3) ASTL - a person cannot by, carelessness for his own safety, put the occupier in breach of his common duty of care

III - VOLUNTARY ASSUMPTION OF RISK - section 238(5) ASTL - consent is a defense - no duty is owed to a person who voluntarily assumes the risk with a full knowledge of the nature and extent of danger

IV - EXCLUSION OF LIABILITY - section 238(i) and section 2(i) Occupiers' Liability Act- the occupier by agreement or otherwise may modify, extend, restrict or exclude his duty to any visitor or visitors.

This could be done by putting up a caveat or notice at the entrance door to the premises that any one who enters enters at his own risk and would have no claim against the occupier for any injury no matter how caused. - Ashdown v. Samuel Williams & sons Ltd.

CONCLUSION
In closing the reported case of Ugochukwu v. Unipetrol (Nig.) Plc (2002) 7 NWLR (Pt.765) has often been criticized as a decision by the Supreme Court which is inconsistent with the English approach to Occupiers' Liability in the sense that the court insisted that the purported visitor injured while on the occupier's premises must prove that he was either a licensee or an invitee. In the words of Mohammed JSC

"If a visitor fails to prove that he is a licensee or invitee he is a trespasser. Having agreed that the appellant was neither a licensee nor an invitee at the filling station when the accident occurred it goes without saying that the respondent did not owe a duty of care to the appellant at the Marina filling station. See sections 7 and 8 of Law Reform (Torts) Law, the Laws of Lagos State of Nigeria, 1994. Even if the appellant was not held a trespasser it is plain that the appellant had not established that the respondents were in breach of their duty of care to their visitors when the explosion occurred. The learned trial Judge, quite correctly, found that the appellant had failed to prove that the respondent was negligent or had failed to provide firefighting equipment. On the contrary, the respondent's witnesses established that the respondent had always taken care and managed the filling station properly. The case of Ward v. Tesco Stores Ltd. (1976) 1 AELR 219 where it was held that it was the duty of the defendants and their servants to see that the floors of the store were kept clean and free from spillages so that accidents do not occur is not helpful to the appellant. No evidence was adduced to show the respondent's negligence. The evidence of D.W 3 clearly exonerated the respondent from allegation of negligent conduct. Ugochukwu v. Unipetrol (Nig.) Plc (2002) 7 NWLR (Pt.765) 1

The criticism of the above dictum is unfounded if one follows the reasoning of the court closely. The court simply affirmed the finding of the lower court that the purported visitor in his pleading set out facts that would have qualified him as an invitee purchasing petrol at a petrol dispensing station but under cross-examination adduced conflicting evidence that went contrary to his pleaded facts. As such he had failed to establish that he was either a licensee or an invitee.

It is our submission that the relevant issue should have rather been, "even if he were a trespasser did the petrol station owe him any duty of care"? Maybe the Law Reform Torts Law 1961 of Lagos State had not incorporated the provisions of the later 1984 Occupiers' Liability Law and
the decision would still have been correct based on the law which was modeled after the 1957 Act.

R.N.A