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*Publication date:*  
2017

*Document Version*  
Peer reviewed version

[Link to publication in ResearchOnline](#)

*Citation for published version (Harvard):*

Russell, E 2017, 'Belladonna bushes, territorial terriers and gates giving way: revisiting the law on occupiers' liability', *Scots Law Times*, vol. 2017, no. 11, pp. 39-44. <<http://www.sweetandmaxwell.co.uk/wgreen/scots-law-times.htm>>

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# ARTICLES

## Belladonna bushes, territorial terriers and gates giving way: Revisiting the law on occupiers' liability

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*The author revisits the law on occupiers' liability under reference to the recent decision in Anderson v Imrie [2016] CSOH 171.*

### Introduction

The law of delict is replete with cases in which occupiers of premises have incurred liability in respect of a wide range of circumstances. Among some of the better known examples are those involving the death of a seven year old child who ate easily accessible poisonous berries from a belladonna shrub in a public park (*Taylor v Glasgow Corporation* [1922] 1 A.C. 44; [1921] All E.R. Rep. 1; 1922 S.C. (H.L.) 1; 1921 2 S.L.T. 254) and injuries to a receptionist who was bitten by a pugnacious West Highland terrier in the garden of a veterinary surgery (*Hill v Lovett*, 1992 S.L.T. 994). The latest addition to the jurisprudence in this area, *Anderson v Imrie* [2016] CSOH 171; 2017 Rep. L.R. 21; 2017 G.W.D. 1-11, relates to a heavy stock gate falling on a child on farmyard premises. It provides a useful reminder of the duty incumbent upon an occupier of premises to those *entering upon* the premises and, more specifically, it serves as a cautionary tale in relation to the potential for liability to be imposed upon an occupier in respect of the supervision of children.

### The law

The modern law on occupiers' liability is found in the Occupiers' Liability (Scotland) Act 1960. Liability under the Act is incurred only in respect of those *entering upon* the relevant premises. The duty imposed by the statutory scheme does not extend to neighbouring proprietors or passers by although liability may be incurred to such persons by other means, by way of the law of negligence or the law of nuisance, for example. The 1960 Act

requires the occupier of premises to take *reasonable care* in the circumstances in respect of persons entering upon the premises (see s.2(1) of the Act). Under the common law (which had been heavily influenced by English principles) the duty owed to a person entering upon property depended upon the status of that person, namely whether he or she was a licensee, invitee or trespasser. Liability was incurred to a trespasser, for example, only in respect of *deliberate* wrongdoing. The common law has been described as presenting a "complex situation" whereby "[t]he established need to identify categories of persons entering upon premises had led to fine distinctions which made little practical sense" (*Dawson v Page* [2013] CSIH 24; 2013 S.C. 432 at p.439 para.14 per Lord McGhie.) Those categories or classifications were however removed by the 1960 Act, '[t]he fundamental aim [of which] was to restore a broad test of reasonableness'. (*Dawson, supra*, at p.439 para.14). The mode of entry to the premises may, however, remain relevant to whether an occupier has taken reasonable care in terms of the 1960 Act. In *McGlone v British Railways Board*, 1966 S.C. (HL) 1, 1966 S.L.T. 2, Lord Reid stated (at p.11):

"The section [s.2(1)] applies both to trespassers and to persons entering property by invitation or licence, express or implied. But that does not mean that the occupier must always show equal care for the safety of all such persons. The care required is such care as is reasonable and it may be reasonable to require a greater degree of care in one such case than in another. In deciding what degree of care is required, in my view regard must be had both to the position of the occupier and to the position of the person entering his premises and it may often be reasonable to hold that an occupier must do more to protect a person whom he permits to be on his property than he need do to protect a person who enters his property without his permission."

In terms of the 1960 Act, the obligation is imposed upon the "occupier" of premises, that being the person "occupying or having control of land or other premises" (see s.1(1) of the 1960 Act). The person "occupying" the property does so if he is in possession of it- thus the owner of property may be its occupier but the occupier might, equally, be a tenant. Ownership is not therefore a

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precondition for liability. (It will be seen in the discussion which follows that, in *Anderson*, the defenders were held to be occupiers of the farm premises although they were not its owners). A person also satisfies the definition of occupier if he or she has *control* of land or other premises -i.e. is entitled to take the steps necessary to fulfil the statutory duty (see *Gallagher v Kleinwort Benson (Trustees) Ltd* 2003 S.C.L.R. 384 where Lord Reed stated (at para.124): "The "control" of premises which brings a person within the ambit of section 2(1) of the 1960 Act is such control of the premises as enables that person lawfully to take the steps which are necessary to fulfil the duty of care imposed by that section." This may apply, for example, to the owner of derelict property of which he is not actually *in possession*.

The occupier's duty is owed in respect of "land or other premises." Land includes open pieces of ground (see *Cairns v Butlins* 1989 G.W.D. 40-1879) as well as garden ground (see *Hill v Lovett*, *supra*) and open air markets (see *Mallon v Spook Erections Ltd* 1993 S.C.L.R. 845).

An occupier of land is not required to take active measures to protect others from dangers arising from obvious features of the landscape (whether natural or manmade): *Stevenson v Glasgow Corporation* 1908 S.C. 1034. Cliffs (see *Fegan v Highland Regional Council* 2007 S.C. 723) and rivers offer obvious examples of such features. In *Stevenson*, (which arose following the drowning of a child in the River Kelvin), Lord M'Laren stated (at p.1039):

"The situation of a town on the banks of a river is a familiar feature; and whether the stream be sluggish like the Clyde at Glasgow, or swift and variable like the Ness at Inverness, or the Tay at Perth, there is always danger to the individual who may be so unfortunate as to fall into the stream. But in none of these places has it been found necessary to fence the river to prevent children or careless persons from falling into the water."

As well as extending to land, the duty is also owed in respect of "other premises." The Act applied to nursery premises in *Porter v Strathclyde Regional Council* 1991 S.L.T. 446 in respect of a slipping incident following spillage of food. The term "other premises" also embraces, *inter alia*,

houses, shops and garages. The duty is not, however, limited to heritable property but extends, by virtue of s.1(3)(a) of the 1960 Act, to "any fixed or moveable structure, including any vessel, vehicle or aircraft." Oil rigs (see *Clark v Maersk Co Ltd* 2000 S.L.T. (Sh Ct) 9), ladders, scaffolds (see *Morton v Glasgow City Council* 2007 S.L.T. (Sh Ct) 81; 2007 Rep. L.R. 66), ferries, tractors and helicopters therefore come within the reach of the 1960 Act.

Section 2(1) of the 1960 Act provides as follows:

"The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall...be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger."

Dangers which are "due to the state of the premises" are aptly illustrated in *Taylor v Glasgow Corporation, supra*, where the poisonous berries of a belladonna shrub in Glasgow's Botanic Gardens constituted precisely such a danger (although that case predated the 1960 Act). The duty also extends to dangers due to "anything done or omitted to be done" on the premises-e.g. failing to ensure that territorial West Highland terriers were not present in a veterinary surgery garden when the receptionist was asked to go there to clean the surgery windows (*Hill v Lovett* 1992 S.L.T. 994). Having been bitten by one of the dogs, the pursuer underwent a partial amputation of her leg when the wound became infected. Liability was established in both *Taylor* and *Hill*.

The duty imposed by the 1960 Act is not of the most onerous nature. Some statutes impose absolute duties (see, for example the (now superseded) duty imposed by s.22 of the Factories Act 1937 which is discussed in *Millar v Galashiels Gas Co.*, 1949 S.C. (HL) 31. Other statutes impose strict liability (see the Consumer Protection Act 1987 and the Animals (Scotland) Act 1987). The 1960 Act, however, imposes a duty to take reasonable care only. It does not impose a duty of insurance (see *Kirkham v Link Housing Group* [2012] CSIH 58; 2012 Hous. L.R. 87 at p.92 para.34). An assessment

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of whether reasonable care has been taken will involve consideration of the nature of the danger, the defender's knowledge of the danger, the probability of injury, the extent of injury, the age and knowledge of the injured party (see *Titchener v British Railways Board* [1983] 1 W.L.R. 1427; [1983] 3 All E.R. 770; 1984 S.C. (H.L.) 34; 1984 S.L.T. 192 and *Devlin v Strathclyde Regional Council* 1993 S.L.T. 699), whether he or she was authorised to be on the premises (*McGlone, supra*) and the cost of eradicating the danger. In other words, a calculus of risk approach (which is also utilised in the law of negligence) is adopted — see *Phee v Gordon* [2013] CSIH 18; 2013 S.C. 379 at p.388; 2013 S.L.T. 439 at p.444. There, a golf club incurred liability under the Act in respect of its failure to provide warning notices at a “tight” part of the golf course. The pursuer, who was using a nearby path, lost an eye after being struck by another player's tee shot. Reasonableness is to be determined in the light of all the circumstances of the case: *McGlone, supra*, at p.15 per Lord Guest. There, a 12 year old boy climbed up an electricity transformer and sustained an electric shock and serious burns when he came into contact with a bare conductor. It was held that the fence which the British Railways Board, as occupier, had erected around the transformer was sufficient to fulfil its duty in terms of the 1960 Act.

Contributory negligence and *volenti non fit iniuria* can operate as possible defences to an action proceeding under the 1960 Act. Thus, in *Porter v Strathclyde Regional Council, supra*, the nursery assistant who slipped upon food which had been spilled on the nursery floor was held to be 50% contributorily negligent. She knew that it was a common occurrence for food to be on the floor and ought to have been looking out for it. If she had done so, she would probably have been able to avoid standing on the food and slipping. In *Morton v Glasgow City Council*, a deduction of 25% was applied to an award of damages in respect of injuries sustained by a 14 year old boy who was capable of realising that climbing up scaffolding poles was a dangerous activity.

Although no breach of the statutory duty was established in *Titchener* or *Devlin*, the respective courts indicated that the defence of *volenti* would have applied had a breach been made out. In *Titchener*, the 15 year old pursuer had penetrated a fence with gaps in it in order to take a short cut

across a railway line and was struck by a train while, in *Devlin*, a 14 year old boy was killed after having deliberately jumped on a skylight cover on a school roof. The skylight shattered and the child fell through the aperture to the floor below.

***Anderson v Imrie* — the facts**

The key provisions of the 1960 Act having been identified, attention is now turned to the facts of *Anderson v Imrie*. The pursuer, Craig Anderson, sought damages in respect of injuries which he sustained in an accident at Hillhead Farm in East Dunbartonshire in June 2003. At the time, the pursuer was an eight year old schoolboy and was playing with his friend Ben, the five-year-old son of the defenders, John and Antoinette Imrie. The pursuer sustained injuries to his skull and brain when a heavy gate fell on him. It was alleged that the accident was caused by the failure of the defenders to take reasonable care for the pursuer's safety. The pursuer's action against the defenders proceeded on two grounds, namely alleged breach of the Occupiers' Liability (Scotland) Act 1960 and negligence at common law.

By the time the case came to proof before Lord Pentland, the pursuer was 21 years of age. The account given by the pursuer's mother as to how he came to be in Mrs. Imrie's care on the relevant day differed from that given by Mrs. Imrie. In the event, that discrepancy was of no moment as there was no dispute that Mrs. Imrie was responsible for looking after the pursuer at the time of the accident.

The layout of the farm premises was spoken to by Mr. Imrie. He explained that there were various farm buildings constructed around a central courtyard. Those buildings included the farmhouse itself and a stable. In front of the stable there was a small area used as a race or livestock crush. This was where the pursuer's accident occurred. The race was an enclosed area. There were gates at both its southern and northern ends. One could enter the race from the courtyard by means of the southern gate. The race had a barrier forming a wall on its west side. Mr. Imrie indicated that a heavy stock gate, which was to be used in the construction of a new pen, had been moved to the race four or five days before the accident. The gate had been left leaning against the barrier on the left hand side of the race but was secured to the barrier by means of a chain and pin. The gate was chained to the barrier

so that it did not fall over and injure either persons or livestock. The gate was on the opposite side of the race from the stable.

Mrs. Imrie gave evidence to the effect that she had told the boys that they could play in the farmhouse and in the courtyard, but that they must not go into the race or the midden. These were dirty and unpleasant areas which were not suitable play areas for young children. She ensured that the gate leading to the race from the courtyard was closed. She was going back and forth between the farmhouse and the courtyard. Her horse was in the courtyard and she was dressing it. This required her to go into the stable for items such as her tack box and brushes. Mrs. Imrie acknowledged that she had not been constantly watching the boys. Her recollection was that some minutes after she had gone into the stable, Ben exhorted her to come at once. She found the pursuer lying on his back on the ground in the race with the heavy stock gate on top of him. He was clearly injured.

Although the pursuer gave evidence as to how the accident occurred, the pursuer's account was not accepted by the Lord Ordinary. Preferring the evidence of the defenders, Lord Pentland concluded that the accident probably happened in the following manner. The two boys were playing together in the courtyard while Mrs. Imrie was grooming her horse. She went into the stable to get something and while she was there, the pursuer climbed over the gate separating the courtyard from the race. Once he was in the race, he climbed onto the stock gate attached to the barrier. He lifted the chain off the pin causing the gate to become detached from the barrier. The gate then over balanced on top of him. This caused him to fall back and strike his head against the concrete surface of the race. He ended up lying on his back on the ground with the gate on top of him.

Although Lord Pentland concluded (for various reasons) that the pursuer had not proved that the accident occurred in the way set out in his pleadings, it did not follow that the defenders necessarily escaped liability.

### The statutory case

The pursuer asserted that the defenders were the occupiers of the farm at the relevant time for the purposes of the Occupiers' Liability (Scotland) Act 1960 and were in breach of the duties they owed to him under the 1960 Act.

It has already been noted that ownership is not a precondition for liability to arise under the 1960 Act. Although the defenders lived on the farm, it was, in fact, owned by the first defender's late father. Lord Pentland held that the defenders were however the occupiers of the farm stating (at para.25) that "[a] person is likely to be treated as an occupier if he has a sufficient degree of control over premises to be able to ensure their safety and to appreciate that a failure on his part to use reasonable care may result in injury to persons coming onto the premises (*Wheat v E Lacon & Co Ltd* [1966] AC 552, per Lord Denning at pp.577 – 579)."

Lord Pentland went on to observe that the defenders had lived on Hillhead Farm as a family since 1992. There was no doubt that they occupied the farm in the sense that they lived there. At the time of the accident the first defender was employed by his father to work at the farm.

Lord Pentland observed (at para.27):

"His status as an employee does not, however, necessarily mean that he cannot at the same time have been an occupier of the farm for the purposes of the 1960 Act. There was ample evidence that the defenders had practical and effective control of the entire farm on a day to day basis. It was their family home and as such clearly far more than a mere place of work."

Members of the Anderson family gave evidence that they had been invited to visit the farm for social engagements and that the pursuer's elder brother had been allowed to play in all parts of the farm including the farm buildings and fields. The defenders certainly appeared to the Andersons to be in charge of what happened at the farm and were free to come and go as they pleased anywhere on the farm.

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Mr. Imrie gave evidence that he had authority to take decisions about practical matters affecting the farm, such as where gates should be positioned and where visitors should be allowed to go. He had the power to make changes for safety reasons; for example, by filling in holes or dealing with other potential dangers.

Mrs. Imrie accepted that on the day of the accident it was her responsibility to see that all the relevant gates were closed and that the boys were restricted to playing in parts of the farm where it was safe for them to do so. She instructed them that the race and the midden were out of bounds. She clearly regarded it as her duty to prevent the boys from venturing to any part of the farm that might be dangerous.

Given the evidence which was adduced, Lord Pentland concluded that both defenders were in a position to take whatever steps were necessary to ensure that the duty of care imposed under s.2(1) of the 1960 Act was fulfilled. Accordingly, both were "occupiers" at the material time for the purposes of the 1960 Act.

Lord Pentland proceeded to consider whether there had been a breach of the statutory duty by the defenders bearing in mind that the extent of the duty under the 1960 Act is to take reasonable care. In approaching this issue, Lord Pentland found it necessary to distinguish between the positions of the two defenders.

Dealing first with Mr. Imrie, Lord Pentland observed that, on the day of the accident, he was working about a mile away from the farmhouse. He did not return until after the accident had occurred. There was no evidence to suggest that he knew that the pursuer had come to play at the farm that day. His Lordship stated (at para.31):

"I consider that it was reasonable for Mr. Imrie to proceed on the basis that, having secured the stock gate to the barrier, there was no reason to suppose that it might topple over and injure someone. He had no reason to foresee that anyone might interfere with it. He had no reason to expect that the pursuer would be playing in the race."

Accordingly, Lord Pentland held that Mr. Imrie was not in breach of the duty he owed as an occupier of the farm to the pursuer.

As far as Mrs. Imrie was concerned the position was somewhat different. She had assumed responsibility for looking after the pursuer on the day of the accident. She was aware that the farm presented certain dangers to children and that it was important to keep a close watch on them to ensure that no accident occurred. She admitted in evidence however that she had gone into the stable at one point and that the boys were out of her sight for some time. Indeed Lord Pentland observed that there required to be sufficient time to enable the pursuer to approach and climb over the gate giving access to the race, clamber on to the stock gate, lift the chain off the pin and detach the stock gate from the barrier, thereby bringing the gate down upon himself. Mrs. Imrie saw none of this sequence of events.

Lord Pentland identified the "real question"(at para.32) as being "whether in the particular circumstances of a young child who might find the prospect of entering the race and playing on the gate to be irresistible, the gate presented a foreseeable risk of causing injury." In Lord Pentland's opinion, it did. His Lordship continued (at para.33):

"In my judgment, it is fair to conclude that Mrs. Imrie ought to have foreseen that if the pursuer managed to get into the race he might injure himself by interfering in some way with the heavy stock gate. It follows...that she had a duty to take reasonable care as an occupier to see that the pursuer did not get into the race. Like every other reasonable adult, Mrs. Imrie understood that young boys do not always abide by warnings and instructions. In my opinion, the evidence shows that Mrs. Imrie did not take sufficient care to ensure that the pursuer was not injured in the race. I conclude that she allowed him to be out of her sight and beyond her supervision for an unreasonably long period of time in the circumstances prevailing that day. In my judgment he must have been out of her sight for at least several minutes. For a child of eight in a potentially perilous environment, such as the farm occupied by the defenders, that was dangerously long. There was, in my view, a foreseeable risk that within such a timeframe the pursuer would suffer an accident in the race...There was a foreseeable danger that the pursuer would suffer injury on the farm if he

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was not sufficiently supervised by an adult. The evidence shows, in my opinion, that the accident happened because he was not properly supervised.”

Lord Pentland concluded that Mrs. Imrie had failed in the duty of care she owed to the pursuer in terms of s.2(1) of the 1960 Act.

### The case at common law

The pursuer asserted that the defenders were also in breach of the duties they owed to him at common law. Although this article is principally concerned with the position under the 1960 Act, the common law case is considered briefly here for the sake of completeness.

Lord Pentland acknowledged that courts should not be unduly critical of parents and those *in loco parentis* in regard to the exercise of their responsibilities towards children in their care. Nonetheless, his Lordship drew attention to the dictum of Lord Phillips of Worth Matravers CJ in *Harris v Perry and others* [2009] 1 WLR 19 (at para.34):

“Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance. Adults who expose children to such circumstances or activities are likely to be held responsible for ensuring that they are subject to such supervision or surveillance as they know, or ought to know, is necessary to restrict the risk to an acceptable level.”

Lord Pentland held that Mrs Imrie was negligent at common law because she failed to take reasonable care to supervise the pursuer adequately and to see that he did not get into the race and injure himself. There was however no basis on which the case of common law fault could be sustained against Mr Imrie who was accordingly assoilzied.

### Contributory negligence

It is well established that contributory negligence can operate as a defence in an action proceeding under the statutory scheme for the liability of occupiers (see, for example, *Porter, supra*). For Lord Pentland the matter of contributory negligence

in the instant case was “very much a matter of impression” (at para.39). His Lordship found no assistance in a number of decided cases involving children which had been cited to him, instead taking the view that the matter turned on the facts and circumstances of this particular case. His Lordship held that the pursuer was “partly to blame” for the accident. While recognising that the pursuer was only eight years old at the time, Lord Pentland considered that nonetheless he would have been aware that he should comply with Mrs. Imrie’s instructions not to leave the courtyard and, in particular, not to go into the race. He must have appreciated that the race was off limits and was not somewhere he was permitted to play. Lord Pentland considered also that the pursuer would have had sufficient understanding to realise that it was dangerous to climb onto and interfere with the heavy stock gate by detaching it from the barrier in the race. In the circumstances, Lord Pentland considered that the pursuer was 25% to blame for his injuries.

### Decision

Having assoilzied the first defender, Lord Pentland found the second defender liable to make reparation to the pursuer. The pursuer had suffered a complicated mild traumatic brain injury, persistent headaches and neuropsychological deficits as a result of the accident. His employment choices were reduced. Taking into account awards in respect of solatium, future loss of earnings, the cost of psychological therapy and services provided by his mother and making the appropriate reduction in respect of the pursuer’s contributory negligence, Lord Pentland found the second defender liable to make reparation to the pursuer in the total amount of £325,976.

### Conclusions

This case highlights the need for occupiers to be alert to dangers on their premises particularly where they have assumed responsibility for looking after young children on those premises. In particular, child minders who look after children in their own homes should take heed of this judgment, as should parents who have other children to their homes for “play days.” Adequate supervision is imperative. Any failure in this respect may have devastating and far reaching consequences.