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## Personal Injury and the Peril of Seagulls

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## Obligations Law Blog

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### Personal injury and the peril of seagulls

Posted on [May 20, 2014](#) by [mhogg](#)

It cannot be very often that a judge's discussion of a pertinent issue in litigation is summed up as being "whether the pursuer has established on the balance of probabilities that the seagull which attacked her" came from a building owned by the defenders in the case. Visions arise of seagull identity parades. Strange though an issue such as this might be, it was expressed to be the principal question at issue in the recent Outer House decision of [Kelly v Riverside Inverclyde \(Property Holdings\) Ltd](#). The pursuer had been exiting her workplace in Greenock when she was 'divebombed' by a seagull which had been nesting, she alleged, in the building (which was owned by the defenders). In an attempt to avoid being struck by the seagull, the pursuer had fallen and injured herself. She sued the defenders for damages, alleging that they were in breach of a duty care owed under section 2 of the Occupiers' Liability (Scotland) Act 1960 (and in breach of concurrent common law duties of reasonable care), and in breach of regulations 5 and 17 of the Workplace (Health, Safety and Welfare) Regulations 1992.

The pursuer's case was dismissed for the simple factual reason that the court considered there to be no evidence that the gull responsible had indeed been nesting in the defender's building, rather than in another building nearby on which there were other nesting gulls. So, the pursuer's case failed primarily for evidential problems. However, the court's consideration of whether, apart from this evidential problem, the pursuer would have had a good case is worthy of a few comments.

In relation to the case based on breach of the occupier's duty of care under the 1960 Act, the judge held that the case would have failed on the basis that there was no breach of the duty of care owed under section 2 of the Act. Why not? Because the injuries suffered by the pursuer were not reasonably foreseeable, there being no evidence that the defenders were aware of any previous incidents involving swooping gulls and thus of any danger of this nature which might be posed by the gulls. One might question, however, whether the absence of any prior reports of swooping gulls would really have been enough to exculpate the defenders from possible breach of their duty. If, for instance, there had been evidence that gulls *were* in fact nesting in the building (which there was not), and the defenders were aware of this, then arguably the defenders should have taken steps to have removed the gull's nests or to have taken some other protective measures, whether or not any incidents of swooping had been drawn to their attention. My point is that the problem of swooping gulls during nesting season is well known, so arguably the presence of such nesting gulls on specific premises would of itself be sufficient to make injuries sustained as a result of swooping gulls reasonably foreseeable.

In relation to the case based on the Workplace (Health, Safety and Welfare) Regulations 1992, the judge thought that neither regulation was applicable to the case at hand. Regulation 5 was thought inapplicable because it relates to maintaining (including cleaning as appropriate) the workplace in an efficient state, in efficient working order and in good repair. None of what the pursuer said ought to have been done in this case – the use of spiking, meshing and netting to prevent the gulls nesting – was thought to be relevant. One thought occurs, however, and that is that that cleaning of the building's guttering to remove any nests could surely be classed as maintenance (indeed cleaning is specifically mentioned in the Regulation), so perhaps an opportunity was missed to phrase the employer's failure to act in a fashion that might have brought it within the terms of Regulation 5. As for Regulation 17, that was thought inappropriate because it requires that "every workplace shall be organised in such a way that pedestrians and vehicles can circulate in a safe manner", and 'organisation' of the workplace was not relevant to the control of wild animals such as gulls (which seems a reasonable conclusion).

The decision seems right on the facts – given the failure to identify the source of the nesting gull – but it is suggested that occupiers of buildings nonetheless need to be vigilant in ensuring that they undertake reasonable steps to combat the problems caused by swooping gulls during nesting season. Regular inspection of buildings seems prudent, and the use of netting or spiking to avoid nesting would indeed seem sensible precautions in areas where gulls are known to be problematic. And, as argued above, this blogger takes the view that the very presence of nesting gulls on a building would of itself create a reasonable foreseeability of injury to persons entering or leaving the building, and thus impose on occupiers a duty to take proactive steps to combat the likelihood of such injuries occurring. Of course, the problem for any potential litigant remains: how do you identify the gull that attacked you, and where it was nesting? Rounding up the usual suspects for a gull identity parade is likely to be beyond the ability of even the most diligent firm of solicitors.

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### One Response to *Personal injury and the peril of seagulls*



**Hector MacQueen** says:

May 24, 2014 at 11:08 am

One wonders whether even the gulls having nests on the employer's building is a necessary condition of liability if in fact the approaches to and from the building were regularly subjected to swooping birds from whatever quarter (which is presumably a more readily provable fact). When I visited the Scottish Wildlife Trust's Handa Island a few years ago, the warden told us to walk either with open umbrellas or walking sticks/poles raised vertically above our heads; the swooping great skuas ("bonxies") which were bound to assail us as we passed close to their nesting ground would then peck at the top of the raised implement rather than at our craniums. This turned to be excellent advice from the warden, presumably based upon a reading of the occupiers' liability legislation by SWT's lawyers. The rush of the bird's passage by the stick made one very glad not have exposed one's skull to the same experience.

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