
# INSTITUTE OF LAW RESEARCH AND REFORM

## THE UNIVERSITY OF ALBERTA

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# OCCUPIERS' LIABILITY

## 1969

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# OCCUPIERS' LIABILITY

## I

## INTRODUCTION

In general, the law of negligence has developed so that instead of fixed categories of situations in which a duty of care exists, there is a broad principle that goes back to the dictum of the Master of the Rolls, Sir Baliol Brett in Heaven v. Pender (1883), 11 Q.B.D. 503:

> Whenever one person is by circumstances in such a position with regard to another that anyone of ordinary sense who did think would have at once recognized that, if he did not use ordinary skill and care in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

In Donoghue v. Stevenson, [1932] A.C. 562, Lord Atkin said that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure one's neighbour. A neighbour is a person so closely and directly affected by one's act that one ought reasonably to have him in contemplation.

However, the law governing the liability of an occupier of land for injuries to a person coming on the land has remained in large measure outside the influence of Donoghue v. Stevenson. This is because a rigid set of categories of entrant with a different duty owing to each had become fixed in the nineteenth century. The main classes of entrant with the respective duties are as follows:

Invitee - the occupier is liable for unusual dangers of which he should have known.

Licensee - the occupier is liable for traps of which he knows.

Trespasser - the occupier is liable for intentional or reckless harm.

We shall see that these categories are not exhaustive. There are also parties entering under contract and those entering as of right; and from time to time judgments speak of a licensee with an interest (who is really an invitee) and even a permittee who is really a licensee.

For reasons that appear below, we think the law is unsatisfactory and that legislation is needed. This report contains our recommendations. In formulating them, we received great help from the 1954 Report of the English Law Reform Committee, the Occupiers' Liability Act, 1957, the Scottish Occupiers' Liability Act, 1960, the New Zealand Act of 1962 and the 1969 Working Paper of the Law Reform Commission of New South Wales.

In examining this subject, we have also considered the law relating to the liability of a lessor in negligence for injuries on demised premises and also that relating to liability in negligence of the vendor of a house. Our work on these topics is well advanced but not complete. This report will not include them. We realize that the three above-mentioned Acts deal, to some extent, with the lessor's liability. We think, however, that it is preferable to deal separately with that subject and to confine this Report to liability of occupiers. Thus the only reference to leases or tenancies has to do with the liability of a landlord to visitors on those parts of the land which the

landlord has not demised and of which he remains occupant, such as walks, halls, stairs and elevators.

## II

## SUMMARY OF RECOMMENDATIONS

The detailed recommendations appear at appropriate places in the body of the Report and are collected together again at the end. They provide

(1) for a common duty of care to all entrants except trespassers;

(2) for preservation of the existing duty to trespassers except that a duty of reasonable care shall be owed to child trespassers of whose presence the occupier knows or has reason to know where there is a highly dangerous activity or condition on the land;

(3) for (a) laibility for negligence of independent contractors in specific circumstances,

(b) restriction of the duty of care by agreement or notice, such restrictions not to be binding on third parties,

(c) application of the common duty of care to structures,

(d) application of the common duty of care to damage to personal property.

## III

## THE MEANING OF OCCUPIER

An owner of land in possession and a lessee in possession clearly are occupiers. However, the test of occupation for purposes of real property law and taxation is not necessarily applicable here. The emphasis has been on control. It is true that one case speaks of "complete control" (Webber v. Toronto, [1955] O.W.N. 181)but modern cases show that control need not be exclusive to render a person an occupier for the purpose of the law of occupiers' liability.

Thus, a school board and a contractor engaged to repair the school were both held, or at least assumed to be, occupiers (Boryszko v. Board of Education (1962), 35 D.L.R. (2d) 529 (Ont. C.A.)). In another case, the owners were plaintiffs and their contractor was defendant. Had a third party been plaintiff it is possible that qua him both owners and contractor would have been treated as occupiers (Foster v. Johannsen, [1963] S.C.R. 637).

Cases have arisen where a municipality has arranged with another person or body to operate a park or recreation ground or the like, and the question arises as to who is occupier. In Finigan v. Calgary (1968), 62 W.W.R. 115 each defendant admitted occupation; in Mackinder v. London, [1953] 1 D.L.R. 452 (Ont. C.A.) the actual operator was held to be the agent of the city; in Marshall v. Industrial Exhibition Association (1901), 2 O.L.R. 62, the Association was held to be occupier and the city not to be, notwithstanding the city's covenant to repair.

Where an exhibition association gives a concession to another to operate rides on a midway, the same question arises. The House of Lords held in Humphreys v. Dreamland (1930), 100 L.J.K.B. 137 that the owner of the merry-go-round is occupier. On the other hand, in Flynn v. Toronto Industrial Exhibition Assoc. (1905), 9 O.L.R. 582 the Court of Appeal held that the agreement between the Association and the concessionaire was a license rather than a lease and that the Association was occupier. In Napier v. Ryan [1954] N.Z.L.R. 1234, a "squatter" arranged with the owner of the merry-go-round for the latter to operate it at a carnival. Using the test of possession and control, the Court found on the facts that the jury was justified in holding both parties to be occupiers.

Where an owner lets premises such as a hall or a theatre for short periods, the agreement is usually a license rather than a lease and the owner remains occupier. The High Court of Australia so held in Voli v. Inglewood (1963), 110 Comm. L.R. 74 where the shire "rented" its hall to the Tobacco Growers Association for its annual meeting. However, in Bentley v. Vancouver Exhibition Assoc., [1936] 1 W.W.R. 480, where the defendant allowed the Boy Scouts to have the use of a building for one day, the British Columbia Court of Appeal held that the Scouts "were in the position of lessees or something in legal effect equivalent thereto": and thus were the occupiers.

The English Act does not define "occupier" but says that he is an occupier at common law.

It is now quite clear that even apart from co-owners and co-tenants there can be more than one occupier. The judgment of the House of Lords in Wheat v. Lacon, [1966] A.C. 552

makes an important extension to the meaning of occupier. In that case the brewery which owned an inn was held to be occupier even though the agreement with its manager seemed to make him the occupier. Lord Denning said:

> In order to be an occupier it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be occupiers. And whenever this happens, each is under a duty to use care towards persons coming lawfully onto the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.

Lord Denning adds that while the person who says "come in" is an occupier, there are others who are as well. "If a person has any degree of control over the state of the premises, it is enough." And later he says "I ask myself whether the respondents had a sufficient degree of control over the premises to put them under a duty to a visitor."

In connection with a contractor there have been Canadian cases holding him not to be an occupier and others holding or at least implying him to be occupier. The answer should depend on the degree of control.

There are two recent English cases holding a contractor to be occupier for the purposes of the Occupiers' Liability Act. In Kearney v. Waller, [1965] 3 All E.R. 352 a sub-contractor who put up scaffolding and staging was held to be the occupier thereof. In Fisher v. C.H.T., [1966] 1 All E.R. 88 the owner of a private club and the person who ran the restaurant in the club both were held to be occupiers.

We think it desirable to define the term and to do so in a way that will embrace the decision in Wheat v. Lacon and the two decisions on contractors.

RECOMMENDATION

*THAT "OCCUPIER" BE DEFINED TO INCLUDE NOT ONLY A PERSON WHO IS IN POSSESSION OF PREMISES BUT ALSO TO INCLUDE A PERSON WHO THOUGH NOT IN POSSESSION IN THE STRICT SENSE, HAS A SUBSTANTIAL DEGREE OF CONTROL; AND THAT THE PROPOSED ACT MAKE CLEAR THAT THERE MAY BE MORE THAN ONE OCCUPIER.*

IV

CLASSES OF ENTRANT

(1) Persons Entering Under Contract;

(2) Invitees;

(3) Licensees;

(4) Entrants As of Right;

(5) Trespassers.

(1) Persons Entering Under Contract

Persons who pay to enter premises are put in the highest category. The commonest examples are persons who have tickets to sporting events, theatres, swimming pools and the like and also guests at a hotel. Thus the Supreme Court of Canada in Brown v. B.F.Theatres, [1947] S.C.R. 486 held that a person attending a moving picture show is in this

category and in Alberta the Appellate Division has held the guest of a hotel (Habkirk v. McCreight, [1949] 1 W.W.R. 937) and a person who paid to go into a park likewise to be (Finigan v. Calgary (1968), 62 W.W.R. 115). In Ontario a woman whose husband paid her admission to a dance was assumed to be (McPhail v. T and L Club (1969), 1 D.L.R. (3d) 43) and in Nova Scotia a lodger was held to be (Zervobeakos v. Zervobeakos (1969), 4 D.L.R. (3d) 603).

(2) Invitees

An invitee is generally stated to be one who comes on the premises pursuant to a business interest which concerns the occupier. Both the English Law Revision Committee which recommended the 1957 Act and Prosser on Torts (3rd ed. (1964), pp. 394-398) point out the difficulty in applying the test and the fact that some who might be thought to be invitees are in fact not. Prosser says that business interest or economic benefit to the occupier is not the true test.

> The basis of liability is not any economic benefit to the occupier, but a representation to be implied when he encourages others to enter to further a purpose of his own, that reasonable care has been exercised to make the place safe for those who come for that purpose (p. 398).

Had Prosser's test been applied in Hambourg v. Eaton, [1935] S.C.R. 430 then the musicians conducting a rehearsal in Eaton's store for a concert to be held there later surely would have been held to be invitees rather than licensees.

One class of plaintiff worthy of special mention is the school pupil. Some cases have been decided without reference to the law of occupiers' liability (e.g., Board of Education v. Higgs, [1960] S.C.R. 174). Others say

that the duty is higher than that to an invitee because the school authorities are in loco parentis (Brost v. Tilley (1955), 15 W.W.R. 241 (Alta. App. Div.)). Still others say he is an invitee (Portelance v. Trustees (1962), 32 D.L.R. (2d) 337 (Ont. C.A.)) even when the school is a boarding school (Scrimgeour v. Lutheran Church, [1947] 1 D.L.R. 677 (Sask. C.A.)).

In England it has been held that the Occupiers' Liability Act applies in an action by a pupil against the school and the standard of care is that of a reasonably careful father (Ward v. Hertfordshire, [1969] 1 W.L.R. 790).

Of course a child playing on the school grounds after hours or during vacation may be a licensee (Boryszko v. Board of Education (1962), 35 D.L.R. (2d) 529 (Ont. C.A.)) or even a trespasser (Storms v. Winnipeg (1964), 41 D.L.R. (2d) 216 (Man.)).

(3) Licensees

A licensee is in a lower category than an invitee, though his presence is lawful. One of the great issues has been whether a person on his way to visit a tenant is an invitee of the landlord when he is on areas of access such as walks, passages, stairs and elevators in the landlord's control. In spite of Fairman v. Perpetual Insurance, [1923] A.C. 74 holding the visitor to a residential suite to be a licensee of the landlord, Mr. Justice Taylor, in Saskatchewan held him to be an invitee (Lewis v. Toronto General Trusts Corp., [1941] 2 W.W.R. 65). At the same time in Haseldine v. Daw, [1941] 2 K.B. 343 Lord Justice Scott took a like view of a visitor to business premises. In the meantime, the Supreme Court of Canada in Greisman v. Gillingham, [1943]

S.C.R. 375 had held a worker engaged by a business tenant to remove rubbish which the tenant was obliged to remove to be the invitee of the landlord when using an elevator in the landlord's control. The Supreme Court termed the plaintiff a "licensee with an interest" as distinct from a "bare licensee" but the former category is the same as that of an invitee.

Subsequently the House of Lords in Jacobs v. London County Council, [1950] A.C. 361 dealt with a case where the Council rented out shops and retained possession of the forecourt. The plaintiff was held to be merely a licensee of the Council while walking on the forecourt on her way to one of the shops.

In Hillman v. McIntosh, [1959] S.C.R. 384 the plaintiff was a messenger on his way to pick up a package from a business tenant of the defendant. The latter relied on Fairman and Jacobs but the Supreme Court found a "common interest" and held the plaintiff to be an invitee. Whether this case overrules Wilson v. Institute of Applied Art, [1941] 4 D.L.R. 788 (Alta.) is not certain. There the plaintiff fell down unlighted stairs after leaving a beauty parlor operated by defendant's tenant.

Canadian cases in general have followed Fairman so far as visitors to tenants of houses and apartments and members of the tenant's family are concerned, in spite of the protest of Taylor J. in the case cited above and of O'Halloran J.A. in Power v. Hughes, [1938] 2 W.W.R. 359 (B.C.C.A.). For example, Ottawa v. Munroe, [1954] S.C.R. 756 held the child of a tenant who was playing in a common washroom in the apartment block to be a licensee of the landlord and an

Ontario case has recently applied Munroe to a social visitor (Fraser v. Ronsten (1969), 4 D.L.R. (3d) 475).

We note here another recent Ontario case in which a forecourt ran in front of shops A, B and C, each being in the possession of a different person. The plaintiff had made purchases in shops A and B, so was an invitee while on the portions of the forecourt in control of A and B. However, when she passed a few feet further on and was on the forecourt in front of shop C she was a mere licensee (Diamond v. Hazlett (1969), 3 D.L.R. (3d) 484).

Another type of visitor who is hard to classify is a member of the public who goes into a free public library, park, civic centre or lavatory. In one case an entrant to a park was held to enter as of right (Richardson v. Toronto, [1938] O.W.N. 46) while an entrant to a civic recreational centre has been held to be an invitee (Warren v. Lethbridge (1969), 68 W.W.R. 658) and in a case involving a public lavatory it is hard to tell the category into which the Manitoba Court of Appeal put the plaintiff (Arder v. Winnipeg (1914), 7 W.W.R. 294). The prevailing view in Canada, as it was in England, is that these persons are licensees. In Booth v. St. Catherines, [1948] S.C.R. 564 the plaintiff in attendance at a public celebration in a city park was held a licensee; and a person riding on a toboggan in a public park has been placed in the same category (Palmer v. St. John (1969), 3 D.L.R. (3d) 649 (N.B.C.A.)).

There have been several cases dealing with visitors who go on business premises to visit someone there on private matters that have nothing to do with the occupier. Generally they have been held to be licensees (e.g., Carlson v. C.P.R., [1921] 2 W.W.R. 938 (Alta. App. Div.)).

A social guest though to a layman an invitee is technically a licensee. There are few actions against the host. (Weremko v. Romak (1969), 2 D.L.R. (3d) 259 (Ont.) is a recent example.) It may be that there are few injuries or that guests prefer not to bring action against their hosts. If householders take out public liability insurance more frequently than in the past it may be that these actions will increase.

(4) Entrants As of Right

As far back as the Six Carpenters Case (1610), 77 E.R. 695 it was recognized that certain persons enter land "by license of law". In that case, the entrants were in a common inn. Another example is a person executing a search warrant. Much has been written as to who is within this category (e.g., Paton, Responsibility of an Occupier to Those who Enter as of Right (1941), 19 Can. Bar Rev. 1).

Fleming, Torts (3rd ed. (1965)) divides entrants as of right into two classes: (1) users of facilities open to the public, and (2) entrants on private premises for a purpose authorized by law (pp. 417-420). As far as Canada is concerned, persons in the first of these groups have generally been called licensees as already described. The second group includes policemen, firemen, various inspectors, meter readers, census takers, tax collectors, and in Alberta, a surveyor and in certain circumstances, a holder of mineral rights as provided in the Right of Entry Arbitration Act, R.S.A. 1955, c. 290.

The only Canadian case we have found is Shaw v. St. Thomas (1910-11), 2 O.W.N. 1467, where a sanitary inspector entering as of right was held to be in the same position as any other person having lawful business with the occupier.

In England, Great Central Railway v. Bates, [1921] 3 K.B. 578 held a policeman investigating an open door at night to be a trespasser.

In two other cases, Davis v. Lisle, [1936] 2 K.B. 434 and Robson v. Hallett, [1967] 2 Q.B. 939, police coming to the door pursuing investigations were held to be licensees thought it is clear that the occupier could terminate the license. These were cases of assault on police officers. Prosser points out (pp. 405-408) that the American Courts often try to apply the "business benefit" test which, if met, would make the entrant an invitee. He points out the difficulty of determining whether there is a business benefit. Prosser thinks that policemen and firemen should be treated as invitees even though they often enter at unforeseeable times. "A man who climbs in through a basement window in search of a fire or a thief cannot expect any assurance that he will not find a bull dog in the cellar" (p. 407).

(5) Trespassers

As to the trespasser, he has no permission to enter. In borderline cases it is often difficult to know whether there is permission. This applies to open fields, to walks leading to the door of a house and even to fenced fields. Sometimes courts have found the entrant to be present with the leave and license of the occupier in circumstances which make the "license" a simple fiction. The well-known case of Cooke v. Midland Railway, [1909] A.C. 229 (children on a turntable) is a good example; likewise Lowery v. Walker, [1911] A.C. 10.

The tendency to raise the category of a trespasser is particularly strong in the case of children, as illustrated by Acadia Coal Co. v. McNeil, [1927] S.C.R. 497. This was a case of children on a railway in spite of a prohibition against trespassing, supported by a penalty. In C.P.R. v. Kizlyk, [1944] S.C.R. 98, Davis J. thought that the question of license to children crossing railway tracks should have been put to the jury. There are, of course, cases in which the court has refused to raise the category of a child on railway tracks, such as Edwards v. Railway Executive, [1952] A.C. 737 and Pianosi v. C.N.R., [1944] 1 D.L.R. 161 (Ont. C.A.).

It should be noted that the plaintiff's category may change while he is on the land. Possibly it might rise from trespasser to licensee or from licensee to invitee. In most cases however it is lowered. The plaintiff may use the premises for a different purpose than that for which he was invited to enter or he may exceed the invitation in space or time and so change from invitee to licensee or trespasser. A good example of this is Knight v. G.T.P., [1926] S.C.R. 674. A person attending a banquet in a hotel opened the door of a service elevator while looking for a lavatory some time after the banquet was over and fell down the elevator well. Held, he was no longer an invitee.

## V

## ENTRANTS OUTSIDE THE CATEGORIES

### (1) Servants on Master's Premises

Today a master owes a higher duty to his servant than an occupier owes to his visitor under the English Occupiers'

Liability Act, as appears from Savory v. Holland, [1964] 3 All E.R. 18. The Court of Appeal held the plaintiff to be a "mere" visitor and not a servant so the only duty was one of reasonable care.

At one time however the duty of care of a master to his servant was at least as low as that to a licensee; and the defence of assumption of risk and the doctrine of common employment (which never did apply in Alberta because it was abolished in 1900 by the Territorial Legislature) operated to defeat many actions. However by the time the Supreme Court decided Regal Oil Co., v. Campbell, [1936] S.C.R. 309, a case from Alberta, it was the view of Duff C.J. that the employer's obligation is to take reasonable care to see that the plant and property are safe; and that the employer cannot divest himself of this obligation by employing competent delegates so far as the original installation is concerned though there is a difference of opinion on this point so far as maintenance is concerned.

Soon after this decision, the House of Lords decided in Wilsons and Clyde Coal Co. v. English, [1938] A.C. 57 that the employer's obligation to provide a proper system of working is personal to him and is not discharged by delegating the task to others. Then in Marshmont v. Bergstrom, [1942] S.C.R. 374, where the employer had engaged an independent contractor to provide a power saw, the Supreme Court applied Wilsons, holding the employer liable. Later in Davie v. New Merton Mills, [1959] A.C. 604, it was held that the employer is not liable for injury from a tool made negligently by a firm of tool makers and supplied by an independent contractor. The significance of Davie for present purposes is a general observation of Viscount Simonds.

> Just as the law imposes a certain standard of care on an employer in relation to his workman, so it imposes on the occupier of land a certain standard of care in relation to those who enter on it, and in this regard there were refinements which may now be forgotten. It may well be that the standard of reasonable care in both relations is, in certain circumstances, the same. It may, too, be useful to argue by way of analogy from one to another. But I would deprecate any direct appeal to cases between invitor and invitee for the purpose of determining the measure of responsibility of an employer to his workman.

We do not think that any recommendations in this report should operate to affect the duties of a master to his servant which have developed outside the rules of occupiers' liability. It may be that the point is not of great practical importance in Alberta where most servants are under Workmen's Compensation. However, no doubt should be created as to the scope of our recommendations on occupiers' liability.

RECOMMENDATION

*NOTHING IN THE PROPOSED STATUTE DEROGATES FROM THE SPECIAL RIGHTS AND LIABILITIES INCIDENT TO THE MASTER-SERVANT RELATIONSHIP.*

(2) Highways, Private Roads and Rights of Way

In Alberta, highways are created under statutory authority. There may even be a question as to whether the common law of dedication is applicable in Alberta though Heiminck v. Edmonton (1897), 28 S.C.R. 501 assumed that it was. In any case, we know of no highway so created so need not concern ourselves with any question of liability of the owner of the fee simple as an occupier.

Highways are vested either in the Crown or a municipality. As to the former, the Public Highways Development Act, 1966, c. 79, says:

> Highways subject to the direction, control and management of the Minister shall be kept in a reasonable state of repair having regard to the character of the highway and the locality in which it is situated or through which it passes (s. 39(1)).

As to municipal roads, s. 176(1) of the Municipal Government Act 1968, c. 68, is to the same effect.

It was held long ago that this type of enactment creates liability for negligence (Jamieson v. Edmonton (1917), 54 S.C.R. 443) (with special provision for liability only for gross negligence in connection with injury from snow or ice); and rules of occupiers' liability have never with but one exception so far as we know, been applied under legislation such as Alberta's. Sometimes a person operating a vehicle without a vehicle license or driver's license is called a technical trespasser. However, this does not affect his right of action where he claims damages, e.g., for a defect in the highway (Halpin v. Smith (1920), 53 D.L.R. 381 (Alta.)) even where the defendant is the municipality which requires the license (Burchill v. Vancouver, [1932] S.C.R. 620).

There is, however, a curious Alberta case in which the plaintiff with a load heavier than permitted by law drove over a defective bridge which collapsed, damaging the truck. Sissons D.C.J. held the plaintiff to be a trespasser, but the defendant to have inadvertently set a trap. He found the parties equally at fault so the plaintiff recovered one-half of his damages (Atwood v. Cochrane, [1949] 1 W.W.R. 858).

The New South Wales report recommends a specific provision that its Act shall not affect liability relating to highways. We think such a provision desirable. However, the definition of highway in the Highway Traffic Act (as amended 1969, c. 46, s. 2) includes private land "which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles" and thus clearly includes parking lots provided by supermarkets and probably parking garages. These should remain with the law of occupiers' liability, as was the parking area in a shopping centre in Janes v. Triton Centres (1969), 4 D.L.R. (3d) 327 (N.S.).

RECOMMENDATION

*THE PROPOSED STATUTE SHOULD BE EXPRESSED NOT TO APPLY TO HIGHWAYS; AND HIGHWAYS FOR THIS PURPOSE MEANS ROADS UNDER THE MANAGEMENT DIRECTION AND CONTROL OF THE CROWN IN RIGHT OF ALBERTA AND CANADA AND OF A MUNICIPAL AUTHORITY AND DOES NOT INCLUDE ROADWAYS AND PARKING AREAS ON PRIVATE PROPERTY SUCH AS SHOPPING CENTRES OR PARKING GARAGES.*

We now make note of various statutes which deal with private or special roads. The Private Streets Act, R.S.A. 1955, c. 243, deals with private streets that serve ten or more separate dwellings, and provides that, for the purpose of visiting or transacting business with a person resident in one of those dwellings, a member of the public has full and free right to travel on foot and "for lawful purposes and upon a lawful occasion the same right extends to the persons resident on the private street".

Under the Public Lands Act (1966, c. 80), regulations provide for licenses of occupation which often are granted to companies for access roads to drilling sites and the like.

The license is to enter upon, possess and occupy the land for the specified purpose. It seems clear that the "licensee" becomes occupant of the access road and the regulations make him liable for damage to other persons and to property.

The Forests Act (1961, c. 32, ss. 53-55) provides for forestry roads and these extend for hundreds of miles along the slope of the Rockies. Section 53(3) (1962, c. 22, s. 19) says the Crown is not under any duty to repair forestry roads or to erect signs and is liable for injury to person or property only in the case of gross negligence.

Under the Right of Entry Arbitration Act (R.S.A., 1955, c. 290), the Right of Entry Arbitration Board may make an order pursuant to s. 12(b) permitting the applicant to use lands for a roadway in connection with drilling operations. The typical order gives "the right to enter upon, use and take the surface of the land required for a roadway." Sometimes another company is given the right to use the road in common with the applicant and the Minister of Lands and Forests is sometimes given the right to use it. The wording of these orders is adequate to grant possession to the applicant, but we know of no authority on the question whether the applicant is treated as an occupier for the purpose of occupiers' liability.

The Alberta Government Telephones Act gives to the AGT Commission power to enter upon and take or use land for its purposes (Telephones Act, 1958, c. 85, s. 18). Under this provision the Commission clearly becomes occupier.

We think it inappropriate to make the Act apply to streets under the Private Streets Act. Nor should it apply

to forestry roads, because the governing statute has its own special provision which should not be affected by rules relating to occupiers' liability. As to rights of entry under the Right of Entry Arbitration Act and the Telephones Act the proposed Act should apply to them.

RECOMMENDATION

*THE ACT SHALL NOT APPLY TO STREETS UNDER THE PRIVATE STREETS ACT OR TO FORESTRY ROADS, BUT SHALL APPLY TO RIGHTS OF ENTRY UNDER THE RIGHT OF ENTRY ARBITRATION ACT AND TO THE RIGHTS OF THE ALBERTA GOVERNMENT TELEPHONES COMMISSION UNDER s. 18 OF THE TELEPHONES ACT.*

It will be noted that this recommendation does not mention licenses of occupation under the Public Lands Act. From our understanding of these licenses we do not think it appropriate either to include or exclude them, but to leave it open to a court to decide on the facts whether the licensee is occupier under the proposed Act.

We turn now to rights of way for pipelines and power lines and the right of the Crown to use lands for intermediate aerodromes all pursuant to s. 71 of the Land Titles Act (R.S.A. 1955, c. 170). These are in the nature of easements in gross. They do not confer possession of the land but the holder of these rights may in light of the facts be an occupier under the definition we propose. As to the transmission lines, and works such as pumping stations which a power or pipeline company maintains on its right of way, the company is occupant of them.

As to rights of way generally, the holder of the right of way does not have possession and a person entering on the right of way is not a trespasser against him. The owner of

the servient tenement retains possession and the holder of the dominant tenement has a mere right of passage. It is true that in Sale v. Kootenay Power Co., [1931] S.C.R. 713 the Supreme Court held the power company to be in possession of its right of way but we do not think that this case overturns the general rule. However, the holder of a right of way though not in possession may on the facts be an occupier within the proposed Act. We note that in the absence of a covenant by the holder of the servient tenement he has no duty to repair (12 Hals. Laws (3rd ed. 579); English Occupiers' Liability Report para. 34).

In our opinion no special provision need be made for the statutory "easements in gross" under s. 71 of the Land Titles Act nor for the common law easement for a right of way. We conceive that the person having the right of way may be occupier on the facts of a given case and that the owner of the servient tenement is an occupier. Certainly he remains in possession under general principles of property law. However he is not under a duty to repair (unless he has covenanted to repair) as already stated and the Act will not operate to impose on him any such duty. This is Prof. Street's opinion in connection with the English Act (Street, Torts, 3rd ed. (1963) 189 f.n.2).

Before leaving this subject, we note Greenhalgh v. British Ry. Board, [1969] 2 All E.R. 114. The plaintiff was injured in crossing an accommodation bridge over a railway. This is a bridge which the railway company is obliged to build for the convenience of persons living nearby, and the plaintiff was not such a person. One might have thought that she entered on the bridge as of right and so was to be treated as a visitor by virtue of s. 2(b) of the English Act.

However the Court of Appeal rejected this argument. The Act did not change the common law rule that the owner of land over which a public right of way exists is not under a duty to repair. This common law rule has no relevance in Alberta as stated earlier. Moreover we know of no accommodation bridges. There are private railway crossings and the person in whose favour they exist is a visitor under our proposed Act, while a person not in that category would in crossing the railway be a trespasser as was the truck driver in Commr. for Railways v. Quinlan, [1964] A.C. 1054, which is later discussed at length.

(3) A third special category of entrants on land is a patient in a hospital. The liability of hospitals has never been based on rules of occupiers' liability so far as we know, and in three leading cases, two of them from Alberta, the question of liability was decided without any reference to the subject.

Vancouver General Hospital v. McDaniel, [1934] 4 D.L.R. 593 (P.C.)

Nyberg v. Provost Hospital, [1927] S.C.R. 226

University Hospital v. Lepine, [1966] S.C.R. 561

We envisage that our recommendations will not affect the principles of liability in this area.

## VI

## THE DUTY OF CARE

### (1) Persons Entering Under Contract

In Francis v. Cockrell (1870), L.R. 5 Q.B. 501 a grandstand collapsed, injuring the plaintiff who had paid for admission. "An occupier who allows a person to enter under a contract is under a duty to see that the premises are reasonably fit for the purpose intended, except for an unknown defect incapable of discovery by reasonable means." In Maclenan v. Segar, [1917] 2 K.B. 325, McCardie J. in dealing with an injury to a guest at a hotel, said that the contract "contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the party of anyone can make them." Under this rule the occupier is liable for the negligence of an independent contractor. In addition, it seems to us that, leaving aside the situation where an independent contractor is involved, the duty is higher than that owed to an invitee as stated in Indermaur v. Dames (1867), L.R. 1 C.P. 274. The Alberta Appellate Division took this view in Habkirk v. McCreight, [1949] 1 W.W.R. 937 and Finigan v. Calgary (1967), 62 W.W.R. 115. In Brown v. B.F. Theatres, [1947] S.C.R. 486, where a patron of the theatre was injured, the court applied the same rule. However, in Gillmore v. London County Council, [1938] 4 All E.R. 331 where the plaintiff paid to take part in physical training classes, the Court put the warranty as one of "reasonable care to see that the premises are in all respects reasonably safe for the purpose." The Court implies that the duty so formulated is lower than that prescribed by McCardie J. Bell v. Travco Hotels, [1953] 1 Q.B. 473 applied the Gillmore test rather than that of Maclenan where

a hotel guest slipped on a footpath outside the hotel. There appears too to be a distinction between the case where entry on the land is the main purpose of the contract and one where such entry is only incidental. In the latter case the plaintiff is an ordinary invitee.

We think that the common duty of care should apply to persons entering under contract. The English Act so provides in s. 5. The following recommendation embodies the main principle of s. 5(1) though it omits any reference to persons "who bring or send goods to any premises," and it makes some verbal changes.

RECOMMENDATION

*WHERE PERSONS ENTER OR USE ANY PREMISES IN EXERCISE OF A RIGHT CONFERRED BY CONTRACT WITH AN OCCUPIER OF PREMISES, THE DUTY HE OWES THEM INSOFAR AS THE DUTY DEPENDS ON A TERM TO BE IMPLIED IN THE CONTRACT BY REASON OF ITS CONFERRING THAT RIGHT, SHALL BE THE COMMON DUTY OF CARE.*

(2) Invitees

Since the rule laid down by Willes J. in Indermaur v. Dames (1867), L.R. 1 C.P. 274 has been said to have the binding effect of a statute, we shall quote it:

> And, with respect to such a visitor, at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know, and that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

There are cases in which the court has treated the duty as one of reasonable care. However, the emphasis of the House of Lords in London Graving Dock v. Horton, [1951] A.C. 737 on unusual danger has brought about a renewed concentration in Canadian courts on this subject. Since Horton there has been a steady stream of cases on patches of ice, snow, slush and water, objects on the ground including all manner of vegetable matter and small objects on the floors of stores. A bottle on the shelves (Nernberg v. Shop Easy (1966), 57 W.W.R. 162 (Sask. C.A.)), a display case that blocked one's view (Kaplan v. Safeway (1968), 68 D.L.R. (2d) 627 (Sask.)) and a six-inch circular depression in the floor (Boss v. Batcules (1962), 33 D.L.R. (2d) 544 (Ont. C.A.)). In Campbell v. The Royal Bank, [1964] S.C.R. 85 and Brandon v. Farley, [1968] S.C.R. 160, the Supreme Court found ice to be an unusual danger as did the Saskatchewan Court of Appeal in Joubert v. Davidner (1969), 3 D.L.R. (3d) 148. In four reported cases, the late Mr. Justice V. C. McDonald of Nova Scotia wrestled at length with the concept, including the issue as to whether the test is subjective or objective: Rafuse v. Eaton (1958), 11 D.L.R. (2d) 773 (baby stroller); MacNeil v. Sobey (1961), 29 D.L.R. (2d) 761 (strawberry on floor); Bennett v. Dominion Stores (1962), 30 D.L.R. (2d) 266 (onion from broken bottle); and Fiddes v. Rayner (1964), 45 D.L.R. (2d) 367 (C.A.) (falling rock in quarry). In Alberta the Appellate Division held by a majority that a defective unlighted stairway was not an unusual danger (Craig v. Lockhart (1967), 59 W.W.R. 73). The criticism of the concept by Professors Linden (45 Can. Bar Rev. 831 at 836-849) and Harris (41 Can. Bar Rev. 401 and 42 Can. Bar Rev. 607) are useful.

Even where an unusual danger is found, one must go back to Indermaur v. Dames to try to determine what steps the

occupier must take with respect to removing it or giving a warning. In London Graving Dock v. Horton, the House of Lords held that an effectively communicated warning is always sufficient, though Canadian courts had assumed since Letang v. Ottawa, [1926] A.C. 725 that unless there is a voluntary assumption of risk by the plaintiff, mere knowledge of the risk does not bar his action. The Supreme Court in Campbell v. Royal Bank and Brandon v. Farley has specifically refrained from ruling on the point. A finding that the plaintiff is not fully aware of the danger saves him from the application of Horton and such findings were made in the two Supreme Court cases. In our opinion, the dissent of Lord Reid in Horton's case is sound; that is to say, there are cases where warning may be sufficient, but in other cases such as Horton itself, where the workman was required to work on a dangerous scaffolding, a warning is not enough.

The English Act (s. 2(4)(a)) abolishes the rule in Horton. We favour such a provision.

RECOMMENDATION

*THAT A 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.*

The defence of voluntary assumption of risk should still be open. There is no need to examine in detail the nature of the defence. It is harder to establish than it was in Thomas v. Quartermaine (1887), 18 Q.B.D. 685 for the Supreme Court has accepted Prof. Glanville Williams' analysis that the Court must find an agreement that the plaintiff will bear the "legal risk" (Eid v. Dumas (1969), 5 D.L.R. (3d) 561 (S.C.C.)).

The English Act (s. 2(5)) preserves this defence. We think it should be available, recognizing its narrow scope. We note that in a recent English case (Simms v. Leigh Rugby Club, [1969] 2 All E.R. 923) where a rugby player was tackled and thrown against a wall outside the touchline, he was held to be volens under s. 2(5).

RECOMMENDATION

*THAT AN OCCUPIER BE NOT UNDER AN OBLIGATION OF CARE 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).*

Related to the matter of knowledge of the risk and volenti, but distinct therefrom, is contributory negligence. The rule of Indermaur v. Dames can be read as saying that contributory negligence bars the action. At that time, contributory negligence was a complete defence. Under the modern statutes, however, apportionment is called for. For some time there was doubt as to whether an invitee guilty of contributory negligence could recover anything under the Contributory Negligence Acts. Defendants advanced the view that once the plaintiff had been careless of his own safety, the defendant's duty, or at least his responsibility, was at an end. However, in the important case of Whitehead v. North Vancouver, [1939] 3 D.L.R. 83 the British Columbia Court of Appeal specifically held that contributory negligence did not completely bar the action. Since then there has been apportionment in many cases, of which Brown v. B.F. Theatres, [1947] S.C.R. 486 is an example. There are of course some in which contributory negligence was held fatal to the claim.

Although the Courts would in all probability apply the Contributory Negligence Act to an Occupiers' Liability Act as they now do in cases of occupiers' liability, it is better so to provide specifically, as does the New Zealand Occupiers' Liability Act (s. 4(8)). Where the plaintiff is a trespasser there are few cases in which the occupier has been found to be in breach of his duty and yet the trespasser has recovered only a portion of his damages because of his contributory negligence. The trial judgment in Stanton v. Milne, 52 D.L.R. (2d) 374 (rev'd on other grounds sub nom Stanton v. Taylor Pearson & Carson, 56 D.L.R. (2d) 240 and [1966] S.C.R. 641) is an example. It should be open to the Court under the proposed statute to make an apportionment in such a case. There is still another situation which should be specifically covered. It is that in which there is more than one occupier and each is held partly at fault. In these circumstances the Tortfeasors Act should apply.

RECOMMENDATION

*WHERE THE OCCUPIER FAILS OR NEGLECTS TO DISCHARGE THE COMMON DUTY OF CARE TO A VISITOR AND THE VISITOR SUFFERS DAMAGE AS A RESULT PARTLY OF THAT FAULT AND PARTLY OF HIS OWN FAULT THE PROVISIONS OF THE CONTRIBUTORY NEGLIGENCE ACT SHALL APPLY; AND THE LATTER ACT SHALL APPLY AS BETWEEN A TRESPASSER AND OCCUPIER IN A PROPER CASE; AND WHERE THERE ARE TWO OR MORE OCCUPIERS EACH AT FAULT THE PROVISIONS OF THE TORTFEASORS ACT SHALL APPLY.*

In contrast to the flood of Canadian cases wrestling with almost every phrase in Mr. Justice Willes' formulation is the rule in the United States. There, the duty is simply expressed in terms of reasonable care (Prosser 402). As Prosser points out, this applies to the condition of the premises, to the defendant's activities thereon and to the

conduct of third parties on the premises. We mention this now to show that these three matters can all be subsumed under a general duty of care whereas, as we shall see later, they are sometimes treated separately in English, Canadian and Australian cases.

(3) Licensees

An oft-quoted statement of the rule is from the judgment of Lord Hailsham in Addie v. Dumbreck, [1929] A.C. 358.

> In the case of persons who are not there by invitation, but who are there by leave and license, express or implied, the duty is much less stringent--the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises which is not apparent to the visitor, but which is known--or ought to be known--to the occupier.

Controversy exists as to whether the phrase "or ought to be known" is accurate. Historically it is not and has been attributed to a slip. However, other cases hold that it is correct, which means that the duty to a licensee becomes very close to that to an invitee, even though there may be a distinction between an unusual danger and a trap or concealed danger.

There had been a strong trend in England prior to passage of the Occupiers' Liability Act, 1957, toward raising the duty of a licensor to that of an invitor. Knowledge of a trap has been found where it does not truly exist (Ellis v. Fulham, [1938] 1 K.B. 212); and the test for knowledge of a trap is objective (Hawkins v. Coulsdon, [1954] 1 Q.B. 319). This trend has had some acceptance in Canadian Courts but the Ontario Court of Appeal rejected it

White v. Imperial Optical Co. (1957), 7 D.L.R. (2d) 471. In Saskatchewan there is a recent case to the same effect (Mackniak v. Brown (1968), 62 W.W.R. 633).

Another development however has been of aid to licensees. It is the proposition that the rules apply only to the static condition of the premises and not to activities on the premises, so that in carrying out the latter an occupier is under a general duty of care. Thirty years ago, the British Columbia Court of Appeal in Hyatt v. Zien, [1940] 1 W.W.R. 283 accepted the distinction. The plaintiff was in the habit of turning around his truck on the defendant's vacant lot. One day an employee of the defendant backed up his truck and struck the plaintiff's, not having seen it. The trial judge held defendant liable even assuming plaintiff a trespasser. He thought the case within Mourton v. Poulter, [1930] 2 K.B. 183, which we discuss later. The Court of Appeal treated plaintiff as a licensee but supported the idea of an "activity duty" (see also Annotation, [1941] 3 D.L.R. 400).

In Booth v. St. Catherine's, [1948] S.C.R. 564, persons attending a public celebration in a City park were injured when youths climbed on a tower supporting a flag pole and caused it to topple. The judgment against the City was unanimous but the reasoning of Rand J. is of particular interest. He held that the defendant, having put on the celebration, was obliged to take reasonable precautions against unreasonable risks and lurking dangers. Kellock and Estey JJ. each took a similar position. Their reasons come close to espousal of "activity duty", though one can argue that the injury was not the result of the City's activities save in an indirect sense.

The Privy Council in Commissioner for Railways v. McDermott, [1967] 1 A.C. 169 supports the concept of "activity

duty" or something approaching it. While crossing railway tracks the plaintiff lost her footing because the crossing was defective. While she was lying on the tracks a train struck her. Lord Gardiner said that a duty of care is owed to the plaintiff as licensee. Then he goes on to say that there may be another relevant relationship which creates an additional duty of care and the two duties exist concurrently. In this case there was an additional relationship because

> . . . the appellant was carrying on the inherently dangerous activity of running express trains through a level crossing which was lawfully and necessarily used by the local inhabitants and their guests and persons visiting them on business. Such an activity was likely to cause serious accidents, unless it was carried on with all reasonable care. Therefore there was a duty for the appellant to use all reasonable care.

The danger in this case was not solely the result of the operation of the trains, but of the interaction of those operations and the static condition of the crossing. It will be noted that Lord Gardiner does not rest his judgment on breach of a "Donoghue v. Stevenson" duty. He bases it on "the two relations which give rise to duties of care owing by the appellant to the respondent (a) as occupier to licensee, and (b) as railway operator to a lawful user of this level crossing."

In Van Oudenhove v. D'Aoust ((1969), 70 W.W.R. 177 (Alta. App. Div.)), the defendant had a cabin set on blocks. He had an electrician make the connections necessary to enable him to take power from Calgary Power Co. instead of from a neighbour. The electrician did the work including the installation of a ground wire, but he had no ground rod.

The defendant later obtained one but had not installed it when the accident occurred.

Young children who were admittedly licensees were playing around the cabin and one of them while crawling beneath came in contact with the ground wire. The polarity of the circuit had been reversed, probably by the defendant, and the child was electrocuted.

The Court invoked McDermott for the proposition that liability could arise either from defendant's negligence or from the dangerous condition of the premises. As to the latter basis, there was a trap known to the defendant, so laibility attaches under the ordinary rules of occupiers' liability. As to the former, the court accepted it as settled that the distinction between lawful classes of entrants is irrelevant whether the injury is caused not by a static condition of the premises but by the current activities of the occupier. Thus the defendant should have taken steps to warn or protect the child against dangers of which he knew or ought to have known.

The distinction between conditions and activities is helpful to a licensee as McDermott shows. It is still more helpful to a trespasser for it means that he can claim a reasonable duty of care in respect of the occupiers' activities. He has become a neighbour in Lord Atkin's sense. We shall see later that the Privy Council in Commr. for Railways v. Quinlan, [1964] A.C. 1054 had rejected the distinction when a trespasser invoked it.

(4) Entrants As of Right

The duty owed to these persons depends upon whether they are classed as invitees or licensees. No separate duty

has been created for them at common law. They should be treated as visitors so that the occupier owes them the same duty of care.

RECOMMENDATION

*THAT ENTRANTS AS OF RIGHT BE INCLUDED IN THE CATEGORY OF VISITORS.*

(5) Trespassers

A leading statement of the duty appears in Grand Trunk Railway v. Barnett, [1911] A.C. 361 where the plaintiff was trespasser on a train. The Privy Council said that the occupier is under a duty not to injure the trespasser wilfully or to do a wilful act in reckless disregard of ordinary humanity towards him; but otherwise he trespasses at his own risk. In a later case (C.N.R. v. Diplock (1916), 53 S.C.R. 376), Anglin J. said that the trespasser "should not be wantonly or recklessly exposed to unnecessary risk by one who has reason to believe that his acts will have that effect"; and in Maritime Coal Co. v. Herdman (1919), 59 S.C.R. 127 Idington J. speaks of "gross negligence or wilful misconduct" and Mignault J. of "a reckless disregard of human life".

In the leading case of Addie v. Dumbreck, [1929] A.C. 358, the duty is expressed in similar terms. There is no ordinary duty of care; no obligation to protect trespassers against hazards on the land; no obligation to fence or to post watchmen to warn trespassers; and these rules apply to small children as well as adults.

In Excelsior Wire Rope Co. v. Callan, [1930] A.C. 404 the facts seem very similar to those of Addie (though technically

the defendant was not an occupier in Callan). In each case a steel cable was set in motion and a child was injured while playing on it. However, the action failed in Addie and succeeded in Callan. The distinction seems to rest on the higher likelihood of children being near the machinery in Callan than in Addie. The defendant's servants had checked a few minutes before starting the machinery but it would have been easy to check again.

In Mourton v. Poulter, [1930] 2 K.B. 183, decided the same month as Callan, the defendant (who again was not strictly an occupier) warned bystanders to move away while he felled a tree. A child trespasser stayed near and the defendant cut the last root. The tree fell on the child. In attempting to reconcile Addie and Callan Scrutton L.J. said that a person who changes the condition of land as by starting a wheel, felling a tree or setting off a blast when he knows trespassers are near is under a duty to warn. The inference is that failure so to do is recklessness, though one can suggest, as did the late Hon. Angus L. Macdonald, that the defendant's duty in these circumstances is the ordinary duty of care rather than a lower duty (7 Can. Bar Rev. 734 (1929); 8 Can. Bar Rev. 8 (1930)).

A recent judgment affirming that recklessness is a prerequisite to liability and illustrating the difference between recklessness and ordinary negligence is that of the British Columbia Court of Appeal in Stanton v. Taylor Pearson & Carson (1966), 56 D.L.R. (2d) 240 (affirmed by the Supreme Court). Strikers trespassed on the defendant's property to prevent defendant's truck driver from leaving the premises with a load. The strikers placed a beam 6" x 6" x 15' in front of the truck. In trying to drive over it the driver

knocked it ahead where it struck the plaintiff, one of the strikers. The trial judge had found the truck driver reckless but the Court of Appeal held that he had not shown an "unrestrained disregard of the consequences" or a "determination to drive away regardless of the consequences".

A difficult question is this: when is the trespasser's presence known or highly likely or "as good as known"? Many of the decisions against the trespasser have depended on the absence of knowledge of his presence or likelihood thereof, and the degree of likelihood varies much from case to case.

In Anderson v. C.P.R., [1936] S.C.R. 200 where the tracks were on a Winnipeg street, Duff C.J. found no reasonable likelihood of children on the defendant's freight cars.

The absence of a duty to fence or to stand watch is illustrated by three Alberta cases in all of which the action failed. In Haines v. Brewster, [1938] 3 D.L.R. 246, a child was playing on Sunday around an excavation made for the cellar of a house at Jasper. She fell between the wall of earth and the forms for the concrete and was asphyxiated. The Appellate Division applied Addie v. Dumbreck. In McEwen v. C.N.R. (1962), 34 D.L.R. (2d) 743 boys climbed on a tank car in the C.N.R. yards and dropped a lighted match through an open hatch cover causing an explosion and injury to one of them. Then in Dean v. Edmonton (1965), 51 W.W.R. 539 a thirteen year old boy playing hide and seek climbed a power pole though the lowest steps were about eight feet above the ground. He went up about twenty-five feet and received a shock. It was held that although the pole was on a large unfenced lot there was no duty to place warning signs around it.

Eastcrest Oil Co. v. The King, [1945] S.C.R. 191 is a criminal case from Alberta. The company's oil well had

been closed pursuant to a conservation order and a fence had been put around it and efforts made to keep children away. Children went over the fence and one fell into the well and was drowned. The company was charged under ss. 247 (failure to use care not to endanger life), and 284 (negligently causing grievous bodily harm), of the old Criminal Code. The trial judge acquitted but the Appellate Division reversed, invoking s. 287(b) (now s. 228(2)) which makes it an offence to leave excavations unguarded so as to fail to prevent a person from accidentally falling in. On appeal to the Supreme Court, the acquittal was restored.

Rand J. said:

> The trial Judge found the child to be a trespasser on the land and I do not see how he could have done otherwise. Trespass does not depend on intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own and this rule is as applicable to children as to adults. There was no evidence of license; that goes to the mind of the licensor either actual or as drawn from his actions. But here there was not only no willingness on the part of the owner that the children should play on his property but unequivocal demonstration to the contrary. Although children had, over the twelve years, played occasionally about the well, their numbers were few, they did not make a practice of it and, whenever seen by employees of the owners, they had been warned off, in one case somewhat vigorously. What was done made it perfectly clear that they were not being tolerated about the well.

Estey J. stated:

> It is sometimes suggested that a landowner is under an obligation to take special precautions with respect to children, but so long as the children remain trespassers the law seems to be settled that in principle there is no difference between a child and an adult.

> It is recognized that where, as in cases of licensees and invited guests a duty is placed upon a party in possession of land, from similar facts different inferences may be drawn where children rather than adults are involved, but the principle of legal responsibility is the same regardless of age.

We note now various doctrines or devices that the Courts have used to enable a trespasser to recover.

One is that the low duty is confined to the static condition of land and that so far as activities are concerned an ordinary duty of care is owed. We mentioned this above in connection with licensees.

In Videan v. B.T.C., [1963] 2 Q.B. 650, a case of a child trespasser on a railway, Lord Denning developed the concept at length. However, the Privy Council in Commr. for Railways v. Quinlan, [1964] A.C. 1054 rejected it. That was a case in which drivers of motor trucks used a private railway crossing without permission and one of them was struck by a train. Lord Radcliffe's judgment flatly denies any duty to a trespasser beyond the obligation not to injure wilfully or recklessly. Mourton v. Poulter prescribes the extent of the occupier's duty.

As to the merits of the distinction, we agree with Pearson L.J. in Videan that it is hard to apply. Hughes (68 Yale L.J. at 697-8) says that it is at first sight an attractive development but that "it is not acceptable as a mature solution of the difficulties. Its weakness derives from the basic antithesis between condition and activity as a criterion of duty or danger." The author points out that some conditions are more dangerous than some activities. Moreover, it may be as easy to abate a dangerous condition as to cease an activity. "The distinction between occupancy

duties and activity duties reflects a brave attempt by harassed tribunals to escape from the wanton-and-wilful doctrines, but it is unacceptable as a final solution."

Another device to help the trespasser is to say he is a licensee. This is particularly tempting in the case of small children. Acadia Coal Co. v. McNeil, [1927] S.C.R. 497 was a case of children on a railway in violation of a statute. The Court held them not bound by the Statute. In the later case of C.P.R. v. Kizlyk, [1944] S.C.R. 98 the Supreme Court ordered a new trial to determine whether the children had tacit permission to cross the tracks. However, Canadian Courts have in general not used the device of a fictional license to assist the injured child (e.g., Knight v. Martelle (1966), 53 D.L.R. (2d) 390 (Ont. C.A.)). (See also Brisson v. C.P.R. (1969), 70 W.W.R. 479 (Man. C.A.)). Indeed in Bettles v. C.N.R., [1929] 4 D.L.R. 175 the Ontario Court of Appeal went to some lengths to find the child a trespasser. She was accompanying her father on his rounds picking up empty bottles when his truck was struck by a freight car on defendant's premises. The child was sitting in the truck and was injured.

An "allurement" has sometimes been treated as creating a license in the case of children though Addie says that an allurement cannot create a license.

There is a trend toward relieving child trespassers in two factual situations.

(1) Where they are known to frequent a place with hidden dangers there may be liability for failure to warn or possibly to take other steps. The important case is Commissioner for Railways v. Cardy (1960-61), 104 C.L.R. 274. The railway had

500 acres containing buildings, various works and a rubbish tip or dump, which formed a large mound. The area was open and children and even adults went to the tip looking for things to find, or to play. From time to time the railway dumped hot ashes on the tip. A crust formed on the surface. The plaintiff was a barefoot 14-year-old whose feet went through the crust as he was scrambling down the side of the tip, and he was badly burned. The trial judge told the jury to decide whether the plaintiff was a licensee or trespasser. If the latter, he must fail. If the former, then the jury would have to decide whether the hot ashes constituted a trap known to the defendant. The jury found for the plaintiff and the defendant appealed to the full court of New South Wales and then to the High Court of Australia.

The upholding of the judgments below is of secondary importance. The reasons are most significant. Dixon C.J. said that it was unreal to say that the plaintiff had a license. Courts have created a fictional license to help out trespassers. In a case like the present, the plaintiff should be treated as a trespasser, but "a duty exists where, to the knowledge of the occupier, premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence." Later he says

> In principle, a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge.

McTiernan J. thought that there was justification for holding that the plaintiff had leave and license to be on

the land. The tip was an allurement to a boy of his age.

Fullagar J. agreed that the plaintiff was a trespasser. He says that the traditional duty owed to a trespasser has to do with the defendant's occupation or control of property and that there are cases in which the occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter becomes a neighbour within Lord Atkin's principle. The duty thus imposed is not confined to "positive acts of negligent misfeasance" but extends to omissions to take a reasonable precaution.

Windeyer J. points out three devices the Courts have used to assist trespassers.

(1) To find conduct to be reckless or malicious when it is not really so;

(2) To find some other category in the Law of Torts so as to impose liability, e.g., the hazardous operation by defendant as in Bankstown (discussed later). Lynch v. Nurdin (1841), 1 Q.B. 29 is another example. Thus in the present case, the defendant has no duty to exclude or to remove the danger, but he may have a duty to warn of hidden dangers. Windeyer J. thinks that the plaintiff might have succeeded on this basis;

(3) To find that the plaintiff was a licensee. His Lordship seems to say that the jury was entitled to find he was. There is a useful discussion of allurement. It is the invitation that creates the fictional license. Even if

> plaintiff was a trespasser, he should recover in the circumstances because there was a duty to warn.

The Privy Council in Quinlan rejected much of the reasoning in Cardy but did not demur to the actual decision. "The circumstances seemed to place the case squarely among those 'children's cases', in which an occupier who has placed a dangerous 'allurement' on his land is liable for injury caused by it to a straying child." The High Court was correct in refusing to call the boy a licensee; indeed the concept of license or permission is virtually without meaning as applied to small children. (The boy was 14.) The Judicial Committee thought that the defendant's conduct must have been presumed to be so callous as to be capable of constituting wanton or intentional harm, but the statements in Cardy that the trespasser can be a "neighbour" were rejected. The formula of Addie's case applies, though it may embrace an extensive and expanding interpretation of what is wanton or reckless conduct in a given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity.

We attempt to state the ratio of Cardy as limited by Quinlan: where there are constant trespassers and the occupier has created a dangerous condition on the land his failure to warn or protect children against the danger may constitute recklessness. It must be stressed that the hot ashes were a condition, not an activity. One could frame the ratio in terms of allurement; one could also express it in terms of a duty of reasonable care, but this the Judicial Committee specifically declined to do.

Taking Quinlan's explanation of Cardy as the law it probably would not affect the result in Koehler v. Pentecostal Assemblies (1957), 7 D.L.R. (2d) 616 (B.C.) where the defendant dumped hot ashes on a rough heavily-wooded part of unfenced land, nor a case like Bonne v. Toews (1968), 64 W.W.R. 1 (Man.) where the fire set by defendant was almost out and he had no reason to think children would come on the land.

(2) The second situation is where the defendant has under his control a highly dangerous agency such as electric power and the agency is near a public highway or other place to which trespassers have ready access.

The leading case is Thompson v. Bankstown (1952-53), 87 C.L.R. 619. The municipality had placed a power line on its highway. At one time lightning rods had been nailed to some of the poles, but they were in disuse. A 13-year-old boy going along the road saw a bird's nest about 10 feet up the pole. Standing on a friend's bicycle to try to reach it, and about to lose his balance, he put his arms around the pole, coming in contact with the wire. It had become charged with electricity from contact with the high voltage wires at the top of the pole. The boy received a shock. The jury found for the plaintiff on a general basis of negligence. On appeal the full court of New South Wales held the plaintiff to be a trespasser and reversed the decision. The High Court held that there are two competing categories of duty: the occupier's duty and the general duty respecting dangerous agencies, such as electricity. This case should not be treated as one of occupiers' liability based on the defendant's occupation of the pole and the plaintiff as a trespasser. The basis of liability is the failure of the defendant to take due precautions to prevent damage from an extremely

dangerous agency on a public highway.

The comments on this case in Quinlan are important.

> Their Lordships have no doubt that Thompson's case was correctly decided. It was one of those in which the Court, for sufficient reason, is able to hold that, as regards the accident and the injury caused, the relation of occupier and trespasser does not bear on the situation of the parties. The reason there held sufficient was that the corporation was maintaining on and over a public place a highly dangerous electric transmission system in a defective condition.

Then the judgment rejects those statements in Thompson which postulate a Donoghue v. Stevenson duty of care.

It is apparent then that there are situations in which the occupier-trespasser relationship is superseded by another. We attempt to state the principle of Thompson to the extent that Quinlan approved it: an occupier is under a duty of reasonable care to child trespassers when the occupier has a dangerous agency under its control in a public place. Whether one could add "or near a public place" may be debatable.

The Manitoba case of Lengyel v. Manitoba Power Commission (1958), 12 D.L.R. (2d) 126 is within the principle stated. Because of highway construction, the defendant had to move some of its poles and to install a portable substation (a transformer on a trailer). This equipment was placed in a ditch on the highway right-of-way and was encircled by a snow fence. The Manitoba Court of Appeal refused to hold the defendant to be occupier. The mere placing of this ineffective barrier does not enable the defendant to alter its liability which must be decided on negligence. This

equipment was an allurement on a public highway and highly dangerous. The fence and a red flag did not convey to a seven year old child a warning of the danger.

Another case within the same general principle is Jones v. Calgary (1969), 67 W.W.R. 589 where a nine-year old was injured when he passed near a large box containing a transformer, installed on a concrete base by the City in the back of a store where plaintiff was an invitee. Kirby J. refused to deal with the case against the City as one of occupiers' liability and found against the City, because it had a defective lock on the box, permitting the door to open.

There are, of course, other cases of electric shock in which the defendant has not been held liable, because the child had to go to extreme lengths to reach the danger area, e.g., Dean v. Edmonton, supra, Graham v. Eastern Woodworkers (1959), 18 D.L.R. (2d) 260 (N.S.C.A.) and McGlone v. British Railway Board, [1966] S.L.T. 1 in the House of Lords. The latter is a Scottish case decided under the Occupiers' Liability Act of Scotland which, unlike the English, extends to trespassers.

A case which may seem closer to Thompson, but which failed, is Partridge v. Etobicoke (1956), 1 D.L.R. (2d) 640 (Ont. C.A.). A guy wire was strung near a sidewalk and a fifteen-year-old boy jumped and grasped it above and below the insulator. His act brought the guy wire into contact with a live wire. The defendant was found not negligent in spite of the high duty of care imposed on it; besides the boy was a trespasser on the wire and defendant did nothing in reckless disregard of his presence. In contrast to the last case is Nixon v. Man. Power Comm. (1960), 21 D.L.R. (2d) 68 (Man.) in which Freedman J. refused to find children swinging on a guy wire to be trespassers.

## VII

## BASIC RECOMMENDATIONS FOR STATUTORY REFORM

In our opinion, the law which we have outlined is not satisfactory. It forces the Courts to concentrate on technicalities to the exclusion of principles. It does not give practical guidance to occupiers.

The Court must first select the category into which a person on real property falls. It must do so by rules which are highly artificial and based upon distinctions which have, in our opinion, no sufficiently rational basis. It must then decide, in some cases whether the circumstances constitute an unusual danger which the occupier knew or should have known about; in others whether there was a hidden trap; and so on. The issues to which the Court's attention must be directed do not, in our opinion, raise the question which should be decided, namely, whether A, in all the circumstances of the case, has acted with the due regard for the safety of B.

The occupier is told that he cannot know what he should do until he knows the legal status of those who will be coming onto his property. In determining whether or how carefully he should remove the ice from his sidewalk, he should take advice as to whether his social guest or his mailman is a licensee or an invitee; only then can he go on to decide whether he must guard against hidden traps or whether he must go on to guard against unusual dangers, or whether, in the extreme case, he must make the property as safe as reasonable care can make it.

It is our opinion that there should be a common duty of care to all "visitors" whom we define later. That duty

should be the duty to take such care as is reasonable under all the circumstances to see that visitors will be reasonably safe. This is the duty imposed by the English Act, though we would define "visitor" somewhat more broadly.

If this recommendation should be adopted, the Court would in most cases spend its time and energy in determining one question: did the occupier exercise reasonable care? This, in our opinion, should be the true issue between the occupier and the visitor; and we believe this opinion to be within the current of our modern law as exemplified by Donoghue v. Stevenson.

It will be seen that we do not recommend the extension of the duty to all trespassers and that there will therefore be some cases where the Courts will have to direct their minds toward categorization. However, we believe that our recommendations will cause this categorization to be carried out on rational grounds rather than the artificial ones which we have described.

It will be seen that we have left the determination of what is reasonable to the Courts. We believe this to be right. The law does this elsewhere in the field of negligence, and this field is one with which the Courts are familiar by training and experience. It may be argued that this recommendation will not solve anything because the Courts will develop new rules as to what does or does not constitute negligence under particular types of circumstances. They may do so, but we think that the recommendations which we have made will free them to have regard to the fundamental considerations which are obscured by the present artificial rules, and that the jurisprudence will develop along orderly and rational lines.

RECOMMENDATION

*THAT THE OCCUPIER OWES TO ALL VISITORS THE SAME DUTY OF CARE, AND THAT 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 A VISITOR WILL BE REASONABLY SAFE IN USING THE PREMISES FOR THE PURPOSES FOR WHICH HE IS INVITED OR PERMITTED BY THE OCCUPIER OR IS PERMITTED BY LAW TO BE THERE AND THIS DUTY APPLIES TO THE CONDITION OF THE PREMISES, ACTIVITIES ON THE PREMISES AND THE CONDUCT OF THIRD PARTIES.*

It will be noted that this recommendation follows closely England's s. 2(1) and (2) though the matter of extension, restriction, modification or exclusion of the duty we deal with later. It will be noted too that we include specifically persons entitled to be on the premises as of right, who are dealt with separately in England's s. 2(6).

In making this recommendation we have examined the reported cases on the English Act and conclude that it has worked well. Very few decisions have appeared in the major reports and they deal with two factual questions: Was the defendant an occuper? Was he negligent? As to Scotland and New Zealand we have found but one reported case from each country.

The only judicial comments we have found are favourable. In Roles v. Nathan, [1963] 2 All E.R. 908, Lord Denning said:

> This is the first time that we have had to consider that Act. It has been very beneficial. It has rid us of those two unpleasant characters, the invitee and the licensee, who haunted the courts for years, and it has replaced them by the attractive figure of a visitor, who has so far given no trouble at all. The Act has now been

> in force six years, and hardly any case has come before the courts in which its interpretation has had to be considered.

In Videan v. British Tpt. Comm., [1963] 2 All E.R. 860 Pearson L.J. remarked that since the Act was passed "there is no longer any need for this branch of the law to be encumbered with artificial distinctions and complexities."

Lord Diplock, who had been a member of the Law Reform Committee when it recommended the Act in 1954 and who had dissented from its main recommendations, in Savory v. Holland, [1964] 3 All E.R. 18 referred with satisfaction to the abolition of the "unattractive doctrines" of occupiers' liability.

One question that has been raised by commentators is whether the common duty extends to activities as well as to conditions. We agree with Salmond (15th ed. 337 f.n. 47) that on a proper interpretation it applies to both. We think it should and that it should extend, too, to a duty to see that the visitor will be reasonably safe in connection with acts of third parties (e.g., the youths on the flag pole in Booth v. St. Catherine's, or the boy in a store playing with an air pistol in Hanes v. Kennedy, [1941] S.C.R. 384, or the obstreperous patron in a night club in Lehnert v. Nelson, [1947] 4 D.L.R. 473 (B.C.)). Our recommendation is designed to ensure that the Act applies in these circumstances.

We turn now to the meaning of visitor. It embraces persons within the first four of the five categories described. We propose to cover too the person whose presence has become unlawful and who is taking reasonable steps to leave. We have

considered whether to include persons who have deviated slightly from the highway as in Barnes v. Ward (1850), 9 C.B. 392. We think it unnecessary, because the plaintiff claims in nuisance as the user of a highway.

We have also considered whether it is necessary in defining "visitor" to include a tenant of a part of a building, his family or his visitors in connection with the common areas. Under the common law the great issue as to members of the tenant's family and his invitees has been whether they are invitees or licensees of the landlord. Our proposal makes them visitors. As to the tenant himself, Dunster v. Hollis, [1918] 2 K.B. 795 holds that a lessor is under a duty to his tenant to take reasonable care to keep the common areas, such as steps, in a reasonably safe condition. The Ontario Court of Appeal in Sinclair v. Hudson Coal Co. (1966), 56 D.L.R. (2d) 484 applied Dunster where the tenant slipped on an icy footwalk though the Court thought that had the use the plaintiff was making of the common area been the main purpose of the letting, Maclenan v. Segar would have applied.

In a comparatively early Alberta case, Watts v. Adams Bros., [1927] 3 W.W.R. 580, the Appellate Division held that the premises need only be as safe as they appear to be. That was a case of an unlighted stairway. Later Alberta cases, though not criticizing Watts, apply Dunster:

> McPherson v. Credit Foncier, [1929] 3 W.W.R. 348 (App. Div.) (balcony railing giving way).
>
> Reid v. Brennan (1957), 21 W.W.R. 668 (broken clothes line coming in contact with power line).

A tenant as well as his family and visitors are visitors within the proposed definition and no special mention need be made of any of them.

RECOMMENDATION

*VISITOR MEANS:*

1. *A PERSON WHOSE PRESENCE ON REAL PROPERTY IS NOT UNLAWFUL.*

2. *A PERSON WHOSE PRESENCE ON PROPERTY HAS BECOME UNLAWFUL AND WHO IS TAKING REASONABLE STEPS TO LEAVE THAT PROPERTY.*

In making this recommendation we intend that it exclude trespassers (subject to a later recommendation about child trespassers), to the end that all entrants will be visitors or trespassers.

In connection with the English Act, the English Report had recommended abolition of the distinction between invitees and licensees (para. 95(2)). The Act does not effect this recommendation (s. 1(2)), though a common duty of care is created. Salmond (15th ed. p. 338) says "It is not yet settled whether it is the particular visitor or the class to which he belongs who must be made safe." The present recommendations abolish the classes so we see no problem.

A word in connection with the exclusion of trespassers from the common duty of care. We gave much consideration to the Scottish Act which includes all persons coming on land and to Prof. T. B. Smith's support of that Act (Full Circle: The Law of Occupiers' Liability in Scotland in "Studies Critical and Comparative" (1962)) and to the fact that Quebec does not have the rigid common law rules and also to the

views of Hughes in the article cited earlier and of Harper and James on Torts ((1956) Vol. 2 at 1435-1470) and to the New South Wales Working paper. We conclude that, subject to what is said later about child trespassers, that the present law relating to trespassers is satisfactory. That is to say the occupier should be liable to the trespasser for damage from wilfulness or recklessness. We are aware of the view that it is impossible to establish a dividing line between wilful harm on the one hand and ordinary negligence on the other. Sir Owen Dixon took this view in Tpt. Commrs. v. Barton (1933), 49 C.L.R. 114 at 131 and it has often been said that gross negligence, which is probably synonomous with recklessness, is only negligence with a vituperative epithet. We point out, however, that degrees of negligence go back at least to Coggs v. Bernard (1703), 2 Lord Raymond 909.

RECOMMENDATION

*THAT THE LIABILITY OF OCCUPIERS TO TRESPASSERS BE FOR WILFUL OR RECKLESS CONDUCT, SUBJECT TO THE SPECIAL PROVISION FOR CHILD TRESPASSERS.*

The account we have given of the law respecting child trespassers shows that from time to time substantial inroads have been made into the somewhat stern rule of Addie. Should they be expanded to give to the child trespasser the benefit of the common duty of care? We have already declined to impose this duty in favour of trespassers generally. While the argument for child trespassers is stronger, and indeed there is an element of unreality in calling a small child a trespasser, we are not prepared to recommend extension to them of a general duty of care under the principle of Donoghue v. Stevenson. We are aware that in dismissing the

action of a child trespasser in McGlone v. British Railways Board, [1966] S.C. 1, the House of Lords stressed that the Scottish Act does not make the occupier an insurer. In McGlone the measures taken to keep persons away from the transformer discharged the duty of care even though the plaintiff managed to get inside the fence.

Although McGlone gives support to those who say that a general duty of care to trespassers will not put an undue burden on occupiers we think there is a risk of this occurring and prefer not to create such a duty even in favour of child trespassers.

We think it appropriate, however, in specific circumstances, to impose a general duty of care in favour of child trespassers. In framing recommendations to embrance these circumstances we have found the provisions in the Restatement on Torts Second to be helpful. Sections 333-338 deal with trespassers generally and s. 339 with child trespassers. (The following is a summary.)

> General rule: The occupier owes no duty of reasonable care as to (a) conditions, (b) activities (s. 333).
>
> Exceptions:
>
> (1) Where there are constant trespassers in a limited area, highly dangerous activities must be carried on with reasonable care (s. 334), [quoted by Davis J. in Kizlyk]; and highly dangerous artificial conditions impose a duty of reasonable care to warn (s. 335).

(2) Where there are known trespassers, dangerous activities must be carried on with reasonable care (s. 336); and highly dangerous artificial conditions impose a duty of reasonable care to warn (s. 337); and dangerous controllable forces impose a duty of reasonable care to control or warn (s. 338).

(3) Where there are trespassing children, highly dangerous artificial conditions impose a duty of reasonable care (s. 339) provided -

(a) the occupier has reason to know children are likely to trespass (subpara. (a)),

(b) the children do not appreciate the risk (subpara. (c)),

(c) the utility of the condition and burden of eliminating it are slight compared to the risk to children (Subpara. (d)).

We favour the general principle of s. 339 save that it should not be restricted to artificial conditions. As Prosser says (p. 376): "It is difficult to see why the origin of the condition should in itself make all the difference, if the possessor could easily remove it or protect against it, and fails to do so." While s. 339 is stated in different terms from the rules in Cardy and Thompson v. Bankstown we think it covers them. However it does not extend to activities as distinct from conditions. This is doubtless because ss. 334 and 336, dealing with trespassers generally impose a duty of care in respect of activities in specific circumstances. We think that a combination of ss. 339 and 336 (confined to child trespassers) will serve the purpose of establishing a duty of reasonable care where

it should exist, and will do so without placing an undue burden on the occupier.

RECOMMENDATION

> *WHERE AN OCCUPIER KNOWS OR HAS REASON TO KNOW THAT THERE ARE TRESPASSING CHILDREN ON HIS PREMISES AND THAT CONDITIONS OR ACTIVITIES ON THE PREMISES CREATE A DANGER OF DEATH OR SERIOUS BODILY HARM TO THOSE CHILDREN, THE OCCUPIER IS UNDER THE COMMON DUTY OF CARE TOWARD THEM; IN DETERMINING WHETHER THE DUTY HAS BEEN DISCHARGED CONSIDERATION WILL BE GIVEN TO THE YOUTH OF THE CHILDREN AND THEIR INABILITY TO APPRECIATE THE RISK AND ALSO TO THE BURDEN OF ELIMINATING THE DANGER OR PROTECTING THE CHILDREN AS COMPARED TO THE RISK TO THEM.*

The phrase "reason to know" means that the occupier has knowledge of facts from which the average man would infer that children are present or that their presence is so highly probable that the occupier should conduct himself on the assumption that they are present (Rest. on Torts, (2d) s. 12). It imposes a slightly lighter burden on the occupier than would the phrase "should know". We suggest to the draftsman that it will be desirable to define "reason to know" in the sense of the definition of the phrase in the Restatement (s. 12(1)).

It will be noted that the recommendation avoids the term "allurement". It is an unsatisfactory concept. There is difficulty in knowing what is an allurement and there is great uncertainty as to its effect. The recommendation says consideration is to be given to the youth of the children and their inability to appreciate the risk. This enables the Court to take into consideration things that are attractive to a child without putting them into a specific category

and without requiring that they have "lured" the child onto the land.

## VIII

## GENERAL CONSIDERATIONS RELATING TO CHILDREN

We deal with these separately from the subject of duty to child trespassers because they apply to all children. For example the English Act, which does not cover trespassers, refers to children in connection with the proposition that "an occupier must be prepared for children to be less careful than adults."

The English Act does not define "child". We think it inadvisable to attempt a definition for much depends on the context. In connection with allurement, Farthing J. in McEwen v. C.N.R. (1962), 38 W.W.R. 76 thought that the concept only applies when the child is seven years or younger. The cases do not support such a rigid rule. In connection with contributory negligence the Supreme Court in McEllistrum v. Etches, [1956] S.C.R. 787 refused to say that a child of six could not be guilty of contributory negligence.

Sometimes an analogy is made to the criminal law (Code ss. 12, 13), so that a child under seven is held incapable of negligence or contributory negligence and one under fourteen is presumed so to be incapable until the contrary is shown. The Supreme Court used this analogy in Acadia Coal Co. v. McNeil, [1927] S.C.R. 497, in holding that children of seven and nine were not bound by an enactment which made the trespassing on railway tracks an offence. Prosser thinks the analogy a dubious one.

> The great majority of the courts have rejected any such fixed and arbitrary rules of delimitation, and have held that children well under the age of seven can be capable of some negligent conduct. Undoubtedly there is an irreducible minimum, probably somewhere in the neighborhood of four years of age, but it ought not to be fixed by rules laid down in advance without regard to the particular case. As the age decreases, there are simply fewer possibility of negligence, until finally, at some indeterminate point, there are none at all. There is even more reason to say that there is no arbitrary maximum age, beyond which a minor is to be held to the same standard as an adult (pp. 158-159).

It will be recalled that the recommendation respecting child trespassers provides that consideration be given to the youth of the children and their inability to appreciate the risk. The comment on the corresponding provision in the Restatement (s. 339(c)) reads:

> In the great majority of the cases in which the rule here stated has been applied, the plaintiff has been a child of not more than twelve years of age. The earliest decisions as to the turntables all involved children of the age of mischief between six and twelve. The later cases, however, have included a substantial number in which recovery has been permitted, under the rule stated, where the child is of high school age, ranging in a few instances as high as sixteen or seventeen years. The explanation no doubt lies in the fact that in our present hazardous civilization some types of danger have become common, which an immature adolescent may reasonably not appreciate, although an adult may be expected to do so. The rule stated in this Section is not limited to 'young' children, or to those 'of tender years' so long as the child is still too young to appreciate the danger, as stated in Clause (c).
>
> A few courts have attempted to state arbitrary age limits, setting a maximum age of fourteen for the possible application of the rule. This usually has been taken over from the rule, in these states,

> as to the presumed capacity of children over the age of fourteen for contributory negligence, which has in turn been derived from the rule of the criminal law as to their presumed capacity for crime. The great majority of the courts have rejected any such fixed age limit, and have held that there is no definite age beyond which the rule here stated does not apply. As the age of the child increases, conditions become fewer for which there can be recovery under this rule, until at some indeterminate point, probably beyond the age of sixteen, there are no longer any such conditions (pp. 198-9).

RECOMMENDATION

*THAT THE PROPOSED ACT CONTAIN NO PROVISION COMPARABLE TO ENGLAND'S s. 2(3)(a) AND THAT IT CONTAIN NO DEFINITION OF CHILD.*

In connection with the first part of this recommendation we do not disagree with the English provision but think it unnecessary.

Another point in connection with children is this: the occupier sometimes defends the action on the ground that the cause of the injury was the parents' failure to look after the child; that the duty to take care for the child should not be shifted onto the occupier. One can have sympathy with this argument. However we are not prepared to abolish the rule whereby a child is not identified with the contributory negligence of the person in whose charge he is (Oliver v. Birmingham Omnibus Co., [1933] 1 K.B. 35). In two Canadian cases the defendant raised this defence and indeed joined the parent as a third party. In Swan v. C.P.R. (1959), 19 D.L.R. (2d) 51 a child of two and a half years fell through the railing of a ramp

while leaving defendant's ship. The defendant joined the child's mother as a third party. She had accompanied the child, as the ticket required. The trial judge found the mother at fault to the extent of one-third. The Court of Appeal reversed this finding. Sheppard J.A. held that the presence of the mother has a bearing on the question as to whether the defendant has discharged its duty of care (the child was found to be an invitee) but once the defendant has been found negligent, the mother is not under a duty to protect the child against acts of wrongdoers. Davey J.A. did not go quite so far, but said that on the facts there was no evidence of any lack of care on the mother's part.

In Paulsen v. C.P.R. (1963), 43 W.W.R. 513 a child of 27 months lived across from the C.P.R. yards in Winnipeg. The child went onto the tracks in the yards which were unfenced, and a train struck him. The defendant was found liable because of breaches of the Railway Act. The defendant joined the mother as a third party but the trial judge dismissed the defendant's third party claim. The reasons do not appear. The railway did not appeal this ruling, but Guy J. A. who dissented on appeal and would have dismissed the action, quoted with approval a passage from Salmond (p. 367 in 15th ed.): "The duty of preventing babies from trespassing on a railway line should lie upon their parents and not upon the railway company." We are aware that in the case of a child licensee, Devlin J. held in Phipps v. Rochester, [1955] 1 Q.B. 450 that the occupier is entitled to assume that the child will be accompanied by an adult. A Manitoba case (Gwynne v. Dominion Stores (1964), 43 D.L.R. 290) applied Phipps to the case of a child invitee. On the other hand, a Saskatchewan case held the occupier liable to a child invitee though his mother was present and in spite

of a notice "Do not leave child unattended in carrier" (Kaplan v. Canada Safeway Ltd. (1968), 68 D.L.R. (2d) 627).

The expectation that parents will exercise care and control over their children may be a factor in determining whether the occupier has discharged his duty of care but we do not think it necessary to have a specific provision dealing with this point.

## IX

## LIABILITY OF A NON-OCCUPIER

Where a plaintiff is injured on the premises of A but brings an action against B, a non-occupier, B defends on the ground that plaintiff was a licensee or a trespasser on A's land. Can B step into A's shoes and obtain the benefit of the low duty of an occupier?

Putting the question another way, can the plaintiff escape the difficulties he faces when he brings action as licensee and a fortiori as trespasser? We shall see that he has had increasing success--that courts have denied to defendant B the defence that plaintiff was a trespasser against A. This development, like that of distinguishing between activity and occupation, is a means of evading the rules of occupiers' liability to the benefit of the plaintiff.

There are two factual situations: (1) the defendant is not on the premises on the occupier's behalf, and (2) he is on the premises on such behalf.

An example of the first category is a judgment of the Saskatchewan Court of Appeal in Coburn v. Saskatoon, [1935]

1 W.W.R. 392. The deceased was trespassing on the C.N.R. tracks. Overhead was a footbridge belonging to the City. A strong wind blew away the poorly secured roof on the footbridge and a portion of the roof fell on the deceased below. The action was against the City. The defendant invoked the fact that the deceased was a trespasser on the railway line, but the judgment specifically held that this defence was not open to the City.

In Buckland v. Guildford, [1949] 1 K.B. 410 a thirteen-year-old girl climbed a tree in a field near her camp. The defendant ran its power lines over the field and the wires were very close to the tree. The girl came into contact with the wire. The foliage was dense and perhaps she never saw the wire. There was no finding of fact that she was a trespasser on the land, but Morris J. held that even if she was, there remains the question whether defendant should have contemplated that trespassers might go on the land and climb the tree. Held, she was a "neighbour" and a duty of care was owed her. The judgment emphasized the high degree of danger from the high-voltage wires and the fact that they were concealed in the foliage.

In Nixon v. Manitoba Power Commission (1960), 21 D.L.R. (2d) 68 children trespassed on a railway to which the defendant supplied electricity. Its poles went along the railway line. A guy wire supporting one of the poles became detached from the ground and children sometimes swung on the guy wire. The plaintiff was swinging on the wire and in some manner it came in contact with the high-voltage wire. The plaintiff received a shock. Freedman J. ruled that the defendant was not in any sense an occupier of the premises and was under a duty of care toward these children. The

defendant should have known the children would play with the wire and was under a duty to make reasonable inspection which it did not do.

Moule v. New Brunswick E.P.C. (1960), 24 D.L.R. (2d) 305 (S.C.C.) can be compared to Buckland. The boy was very high in the tree when the branch on which he stood gave way and he came in contact with the wire. It was over thirty-three feet above the ground and the defendant had cut away the nearby branches. The Supreme Court held that the defendant should expect children would play around the trees and was under a duty of care to protect them from the dangerous wires. However, the Court distinguished Buckland on the facts and found no liability. The defendant is not "deemed to be endowed with provision of every harmful contingency to which the curiosity, agility and daring of active children may expose them."

In MacDonald v. Goderich, [1948] 1 D.L.R. 11, the child climbed a tree on the street and touched a wire. Although he was not a trespasser in the tree, his action failed. A majority of the Court of Appeal of Ontario simply held for the defendant on the basis of foreseeability.

One question that might be asked is this: suppose a child climbs a pole belonging to the defendant but situate on land belonging to another--would the defendant succeed in the argument that it is in occupation of the pole and that in climbing it the child was a trespasser against the defendant? Certainly the company is occupier of its poles and the child would be a trespasser whether or not he was a trespasser on the soil. Partridge v. Etobicoke held the plaintiff to be a trespasser when swinging on a guy wire,

though Nixon v. Man. P.C. refused so to hold. In Thompson v. Bankstown, the full court had dismissed the action because the boy was a trespasser on the pole. The judgments in the High Court concede he was a trespasser, but the majority holds it irrelevant (as did the Saskatchewan Court of Appeal long before in Mayer v. Prince Albert, [1926] 3 W.W.R. 662 esp. at 669).

In Laverdure v. Victoria (1952-53), 7 W.W.R. (N.S.) 333 (B.C.), the owner of land gave the defendant permission to dig a ditch across a field. The plaintiff was a ten-year-old licensee who fell into the ditch while playing. MacFarlane J. rejected the City's argument that it was in the same position as the occupier and the case fell to be decided on general principles of negligence.

We turn now to the second category of case, where the defendant is on the land on the occupier's behalf. The best example is the contractor. In a few cases it was to the plaintiff's interest to argue that the defendant owed the same duty to him as did the occupier. This was so in McGuire v. Bridger (1914), 49 S.C.R. 632. The occupier gave a plumbing contract to McGuire who gave a sub-contract to Robb. When Robb delivered heavy steel plates to the site, McGuire's servant placed them in an insecure position and one was accidently knocked over striking a workman. Duff J. held that the occupier owes a duty of care to those lawfully on the premises and that a contractor owes the same duty, at least as to his own positive acts.

Generally, however, the plaintiff wants to establish that the contractor owes to him a general duty of care which is higher than that owed to an invitee and a fortiori to a

licensee or trespasser. The trend has been toward accepting this argument.

In Davis v. St. Mary's Demolition Co., [1954] 1 All E.R. 578, the defendant was demolishing buildings under contract with the owner. Over a week-end the defendant left standing a crumbling wall. A twelve-year old was picking up odds and ends on the site and when he removed a few bricks from the wall, it fell on him. He was a trespasser. Ormerod J. found negligence. Had the action been against the occupier, it would have failed, but the Court applied Buckland. The presence of children was to be expected and the defendant was liable.

Then in Creed v. McGeoch, [1955] 3 All E.R. 123, the defendant was building roads and sewers for a city. On a week-end the defendant's servants left a two-wheeled trailer on an open lot ten feet off the highway. The plaintiff was one of several children playing with the trailer as though it were a teeter-totter and she was hurt. Her claim in nuisance failed for she was not injured in a slight deviation from the highway. On the claim in negligence, the Court rejected the defendant's argument that it was in occupation of the site of the accident. The children were not trespassers even vis-à-vis the City and, in any event, the defendant is liable under Lynch v. Nurdin. Even if the children were trespassers on the trailer as distinct from the land, it was an attractive and dangerous object.

In a recent case, Palmer v. Saint John (1969), 3 D.L.R. (3d) 649 (N.B.C.A.), the Horticultural Association was occupier of a park where the public used a toboggan slide. The City tended the park from time to time and in attempting to improve the slide made it dangerous. The Association was

held not liable and the City was liable in negligence as a non-occupier. The Court found the case analogous to Billings v. Riden, [1958] A.C. 240. In that case the defendant was a contractor repairing the front walk to a house. The plaintiff, a licensee of the occupier, had to make a detour over a hazardous route. In leaving the house after dark, she fell into an excavation. A main defence was the plaintiff's status as licensee. The House of Lords rejected this contention and held the contractor to be under "the ordinary duty to take such care as in all the circumstances was reasonable to ensure that visitors were not exposed to danger by their actions" (Lord Reid).

Fleming describes the development of the law on this topic as follows:

> On the other hand, the peculiar duties of occupiers do not define the responsibility of others who have actively created a source of danger on the premises. Not so long ago, it is true, contractors and builders were treated with exceptional leniency on the footing that duties of care in relation to dangers on land could be founded on occupancy or contract alone; but today far from enjoying even the limited shelter afforded to an occupier, they stand fully exposed to the bracing demands of the general duty of care (p. 407).

Several considerations arise at this point. There is much to be said for the view of Duff J. that a contractor should be treated as though he were occupier, at least in relation to his actions. As the editor of Salmond says, "Why should the contractor whom I employ to dig a hole in my field be liable when I am not?" (14th ed. 414, n. 69, omitted from 15th ed. 374, n. 69). Fleming says "A sounder solution would be to continue equating with the occupier all contractors acting on his behalf, as distinct from those who

use the premises for purposes of their own" (p. 439). He refers to s. 383 of the Restatement which says:

> One who does an act or carries on an activity upon land on behalf of the possessor is subject on the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

On balance we have decided against a recommendation that non-occupiers who are on the land on the occupier's behalf shall be under the same duty of care as the occupier. In many cases, though not all, contractors will be occupiers. In any event there will be no practical difference between the basis of liability of an occupier and a non-occupier save when the plaintiff is a trespasser. We have considered whether a servant of the occupier is in law a non-occupier and we think not (Fleming, Note, (1966), 82 L.Q.R. 25).

RECOMMENDATION

*THAT NO PROVISION BE MADE TO EQUATE THE DUTY OF A NON-OCCUPIER, WHETHER ON THE LAND ON THE OCCUPIER'S BEHALF OR NOT, TO THAT OF AN OCCUPIER.*

X

## LIABILITY OF OCCUPIER FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR

Since an independent contractor is not a servant, the employer is not liable for his negligence. However, exceptions which are both numerous and hard to apply leave doubt as to the scope of the original rule (See, e.g., Salsbury v. Woodland, [1969] 3 All E.R. 863). Sometimes a statute is construed as

creating a "personal" or "non-delegable" duty which means liability for the negligence of others including an independent contractor. Then there is liability for damage arising from a risk that is associated with the work itself but not for damage arising from a risk not so associated, the latter being called casual or collateral negligence.

Again, there is liability in the case of inherently dangerous or extra-hazardous activities. Thus an owner who engages a contractor to excavate near the boundary is liable when the contractor fails to support the adjoining land. Wilton v. Hansen (1969), 4 D.L.R. (3d) 167 (Man.) is a recent example. In Savage v. Wilby, [1954] S.C.R. 376 a tenant engaged an independent contractor to remove paint from the inside walls. The latter used inflammable remover as was customary and a fire occurred. The tenant was held liable on the ground that the work involved a special danger. It is conceded that the concept of dangerous operations, like that of intrinsically dangerous things, is hard to apply.

Turning to occupiers' liability, Maclenan v. Segar says that where the plaintiff has entered under contract the duty of care is non-delegable. As to invitees, the Manitoba Court of Appeal in Hammond v. Davidson, [1940] 1 W.W.R. 480, held a landlord not to be liable to the wife of a tenant when she stepped into an open air vent in the floor of a clothes closet. It had been left open by a contractor who had repaired the flooring. A majority held that the landlord had not reserved control over the workmen of the contractor and therefore was not liable because the tort was not one committed in the necessary conduct of the work. The dissent held that the landlord remained in control and that the case was not one of collateral negligence. Soon after this, in

Haseldine v. Daw, [1941] 2 K.B. 343, the Court of Appeal in England held an occupier not liable for the negligence of a contractor engaged to keep in repair an elevator. Lord Justice Scott stated:

> Having no technical skill, he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. If he did not, he would indeed be guilty of negligence. To hold him responsible for the misdeeds of his independent contractor would be to make him insure the safety of his lift. That duty can only arise out of contract, as in the case of an employer's duty toward his employed, which, in certain cases, may make him responsible for the structural fitness of the premises where they are to work. In the present case, Daw was ignorant of the mechanics of his hydraulic lifts, and it was his duty to choose a good expert, to trust him, and then to be guided by his advice. I think that he realized his duty and wholly discharged it, so far as the safety of others was concerned, for he chose a first-class firm of lift engineers and trusted them, and over a long period of years, and in connection with many lifts, he found them trustworthy.

Lord Justice Goddard's judgment on this point was to the same effect. (The contract in this case provided for a monthly inspection, check-up and report.)

Only three months before this decision was delivered, the Court of Appeal, which included Scott L.J., held in Wilkinson v. Rea, [1941] 2 All E.R. 50 that a ship owner was liable for the negligence of the servants of a supplier of coal who failed to give adequate warning of an open hatchway in the dark. Lord Justice Scott does not base his judgment on this point but Lord Justice Luxmoore does. He quotes Pickard v. Smith (1861), 10 C.B.N.S. 470 which says:

> If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. . . . That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty encumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned.

The reasoning of Luxmoore L.J. is that the owners hired the supplier to bring the coal and this required taking off the hatch cover and the owners were bound to take reasonable care to prevent mischief from this. They did nothing and the supplier did not do enough. Thus both were liable.

Then came Thomson v. Cremin in the House of Lords, also in 1941, and reported in [1953] 2 All E.R. 1185. A ship was provided with boards designed to prevent a cargo of grain from shifting. They were required by Australian regulations. The ship owner employed a contractor in Australia to instal them. A horizontal brace was not securely fastened and fell on the plaintiff while he was unloading the grain. Viscount Simon and Lord Wright directly approved Wilkinson v. Rea and held that the ship owner remains responsible to an invitee for the negligence of the independent contractor. Likewise, Lord Thankerton, though his discussion is very brief. The reasoning is not confined to the case of statutory duty. It will be noted, however, that counsel for the ship owner virtually conceded that if the contractor were negligent, then the ship owner would be liable.

In Davie v. New Merton Mills, [1959] A.C. 604, the action was by a servant against his employer where the negligence was that of a manufacturer of tools obtained from a supplier

under contract. Lord Reid emphasized the fact that the ship owner in Thomson had not contended he would not be liable for the negligence of an independent contractor so that any observations in the judgments are dicta. Lord Reid questions Lord Wright's statement that there is a warranty by the occupier which is broken if an independent contractor is negligent, at least if the work is done by a skilled tradesman and reasonable inspection would not disclose it.

Parenthetically we note the Employer's Liability (Defective Equipment) Act, 1969, c. 37. Where an employee is injured through defective equipment and the defect is attributable to the fault of a third party, the injury is also attributable to the employer.

In Riverstone v. Lancashire Shipping Co., [1961] A.C. 807, the House of Lords held that the Hague Rules impose liability for the negligence of an independent contractor but this case recognizes that there is no universal rule to that effect. In the meantime, the Supreme Court of Canada in Hillman v. McIntosh, [1959] S.C.R. 384 dealt with the case of an invitee injured on a defective elevator. One defence was that the occupier had engaged an elevator company to inspect the elevator. Martland J., speaking for four of the five members of the Court, held that this was not a defence. Here there was no standing arrangement for periodic inspections; in addition, the authority of Haseldine v. Daw "may be somewhat shaken" by Thomson v. Cremin. The Law Reform Committee, in recommending the English Statute, was of the same view. Its recommendation was that "the contractor's negligence should not necessarily be held to constitute a breach by the occupier of the common duty of care toward the visitor" and that material factors are (1) reasonableness in trusting the work to the contractor, and (2) the taking of

steps that are reasonably practicable to satisfy himself that the work was properly done. Section 2(4)(b) is designed to carry out this recommendation. It will be noted that it is confined to construction, maintenance or repair and that "the occupier is not to be treated without more as answerable for the danger", if he acted reasonably, and satisfied himself that the contractor was competent and that the work had been properly done. Glanville Williams criticizes this provision in 24 Mod. L.R. 112-115. He points out that demolition is not covered. He seems to favour a general exclusion of liability for independent contractors (see also his Liability for Independent Contractors, [1956] Camb. L.J. 180) and he criticizes the concept of extra-hazardous acts, as does Atiyah, Master & Servant (1967), c. 32.

In New South Wales, the Voli case says that an occupier is liable for the negligence of an independent contractor in connection with premises which are made available from time to time for public or limited use for short periods. The tentative recommendation of the New South Wales Law Reform Commission is to preserve this rule but otherwise it is declared that

> . . . where damage to an entrant is due to the negligence of an independent contractor employed by an occupier of premises, the occupier shall not, on that account, be answerable for the damage if he exercised whatever care was reasonable in the selection and supervision of the independent contractor.

The difference from the English Act will be noted. We favour the New South Wales recommendation.

Atiyah has questioned whether the English Act applies where the contractor has been engaged to carry out a "dangerous

operation" (p. 370). The phrase "without more" in the English Act does leave questions as to its meaning. Let us take Woodward v. Hastings, [1945] 1 K.B. 174. A pupil was injured when he slipped on icy steps. The defendant had engaged a caretaker. She was negligent in cleaning the steps. The Court of Appeal found the defendant liable, even assuming the caretaker was an independent contractor. A duty to clean the steps lay on the defendant, and it could not escape liability by delegating the duty. The Court thought that Haseldine was confined to acts which only an expert can carry out.

Is this decision no longer law since the statute? Salmond (15th ed. 653) says the Act "puts the matter almost beyond doubt." One can imagine however that a court might say that where a duty lies on defendant he remains liable when he engages an independent contractor. In other words the Court might find "more" under the "without more" phrase.

We think that the general rule should be one of non-liability for independent contractors. We recognize force in the argument that in a case like Francis v. Cockrell (1870), L.R. 5 Q.B. 50 liability should exist. However on balance we think the occupier should not be fixed with liability where he is careful in selecting the contractor. We do not think it desirable to preserve liability in the case of dangerous operations for the category is an unsatisfactory one. We think, however, that there may be cases where the mere entry on a given type of work in itself creates a substantial risk of harm to visitors and that in such cases liability should attach where an independent contractor does the work. The following recommendation is designed to cover this situation. There is the possibility too that a statute may provide that an occupier is liable for the negligence of an independent

contractor. We do not intend that the proposed Act shall supersede any such provision and so provide in the recommendation.

RECOMMENDATION

*WHERE DAMAGE TO A VISITOR IS DUE TO THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR EMPLOYED BY AN OCCUPIER, THE OCCUPIER SHALL NOT ON THAT ACCOUNT BE ANSWERABLE FOR THE DAMAGE IF HE EXERCISED WHATEVER CARE WAS REASONABLE IN THE SELECTION AND SUPERVISION OF THE INDEPENDENT CONTRACTOR, PROVIDED THAT THE IMMUNITY FROM LIABILITY SHALL EXIST ONLY IF IT IS REASONABLE IN ALL THE CIRCUMSTANCES THAT THE WORK FOR WHICH THE INDEPENDENT CONTRACTOR IS EMPLOYED SHOULD BE UNDERTAKEN: PROVIDED THAT THIS RECOMMENDATION DOES NOT AFFECT ANY STATUTORY PROVISION WHEREBY AN OCCUPIER IS LIABLE FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR.*

XI

ATTEMPTED REDUCTION OF DUTY BY AGREEMENT OR OTHERWISE

Section 2(1) of the English Act says that an occupier owes the common duty of care to all visitors "except insofar as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise." The subject now under consideration is a different one from that of the effect of warning notices which are put up in an attempt to discharge a duty of care. The latter topic has been dealt with in connection with the abolition of the Horton rule.

Scotland's s. 2(1) is generally the same as England's s. 2(1) but it omits the phrase "or otherwise". We note that

the Conference of Commissioners on Uniformity of Legislation in Canada has gone on record as favouring the omission of "or otherwise" (1967 Proc. 180).

In England, it was clear before Ashdown v. Williams, [1957] 1 Q.B. 409 that a contract could be effective to reduce the common law liability provided the existence of the special provision or condition had been called to the attention of the other party (Parker v. Southeastern Railway (1877), 2 C.P.D. 416). This applies not only to contracts but to a pass that is issued. If the person holding the pass knows of the condition, he is bound by it (Wilkie v. L.P.T.B., [1947] 1 All E.R. 258). However, in the case of a pass, there is a heavier burden on the person issuing it to show that the condition has been brought to the attention of the person to whom it is issued than in the case of a ticket issued under contract, particularly if it provides for a drastic reduction in common law rights (Henson v. London Railway, [1946] 1 All E.R. 653).

In Ashdown v. Williams defendant No. 1 had an area of 300 acres used as a coal yard and containing extensive railway spurs. It leased part of this land to defendant No. 2 for its wagon repair business. It also gave to No. 2 a right of way through the coal yards and over the railway tracks to the premises leased to No. 2. In addition to this right of way was a short cut across No. 1's land to the premises of No. 2. The plaintiff was an employee of No. 2 and was accustomed to taking the short cut. At the entrance to the short cut was a notice that every person is on the property at his own risk and takes it as he finds it and shall not make any claim for injury against No. 1 whether or not the injury is due to any negligent act on the part of No. 1 or its servants.

While taking the short cut on her return from work the plaintiff was struck by a railway car which was being shunted. She admitted to having read part of the notice. The Court of Appeal held that she had sufficient knowledge of it to remove her from the protection of Henson's case. She comes within Parker even though the limitation of liability is not contractual.

In Canada, there are many cases on exculpatory clauses in contracts and the effect of notices such as "cars stored at owner's risk". There are few, however, in connection with occupiers' liability. Richardson v. St. James Apartments (1963), 40 D.L.R. (2d) 297 (Ont. C.A.) deals with an exculpatory clause in a lease. It was in very wide terms. The judgment illustrates the tendency to construe such provisions narrowly; thus non-liability for snow did not cover ice on a sidewalk. In a recent case where a tenant complained of escape of carbon monoxide from his landlord's garage, the lease had an exculpatory clause, but in view of cases like Richardson the landlord did not rely on it (Federic v. Perpetual Inv. Co. (1969), 2 D.L.R. (3d) 50 (Ont.)).

In connection with notices, as distinct from provisions in a contract, the few Canadian cases construe them narrowly. In Beauchamp v. Consolidated Paper Corp., [1961] S.C.R. 664, a notice on a road leading to a lumber camp read "Private Road - At your Own risk", and further on was another notice "Private Road for Forest Operations: Forbidden to Pass Without Permission: Persons Using this Road do so at their Own Risk". A carload of men looking for work had a permit to use the road and on driving over it slipped off a primitive bridge on which was ice covered by snow. The defendant was found to be negligent. The Supreme Court said that notices of this kind must be interpreted narrowly. They could be

interpreted as being addressed to the public in general and not to persons who are invitees. The case is from Quebec but is not based on any principle peculiar to the Civil Law.

In Fox v. C.N. Telegraphs (1964), 47 D.L.R. (2d) 320, a county court judge in Ontario held that the notice on a parking lot of the C.N.R. and which said that vehicles are entirely at the risk of the owner as to any loss or damage, however caused, including negligence of the railway or its employees, did not apply to negligence by an employee of C.N. Telegraphs which was a subsidiary of the C.N.R.

We are impressed by the criticisms of Gower (19 Mod. L.R. 532) that Ashdown is a wrongdoer's charter in the sense that it enables the occupier easily to reduce his liability. On the other hand we know of no evidence of widespread use of exculpatory notices. New South Wales, on balance, favours a provision like England's, but proposes a specific provision that in order to limit liability the contract must make express provision or else must make implied provision in circumstances that make it clear that the parties directed their minds to the matter and intended to agree on the provision.

RECOMMENDATION

*LIABILITY MAY BE EXTENDED, RESTRICTED, MODIFIED OR EXCLUDED BY EXPRESS AGREEMENT OR EXPRESS STIPULATION, AND REASONABLE STEPS MUST BE TAKEN TO BRING TO THE ATTENTION OF VISITORS ANY RESTRICTION, MODIFICATION OR EXCLUSION OF LIABILITY.*

## XII

## CONTRACTUAL RESTRICTIONS AND THIRD PARTIES

Assuming that the law permits a contract whereby the occupier can restrict or exclude his liability, the question arises as to whether a third party is affected. He will, of course, be affected if, as in G.T.R. v. Robinson, [1915] A.C. 740, it is found that the purchaser of a ticket is agent of the injured person.

In Fosbroke-Hobbes v. Airwork Ltd., [1937] 1 All E.R. 108, Mr. Vickers chartered an airplane for a party of seven and the contract contained an exemption of liability. Goddard J. thought that the defendant could invoke this exemption as against Mr. Vickers' guests as well as against him; "the guest cannot be in any better position than his host." (The plane crashed because of the pilot's negligence and one of the guests was killed.) This ruling might be called a dictum, for His Lordship found that the restriction of liability was not binding even on Mr. Vickers because he received the ticket only when the flight began and his attention was not called to the restriction.

We have found no Canadian case raising the problem of Fosbroke-Hobbes. It has been held that where a carrier excludes himself from liability to passengers, the master and boatswain in the carrier's employ may not invoke the clause of exclusion when the passenger brings action against them for negligence (Adler v. Dickson, [1955] 1 Q.B. 158 and see Scruttons v. Midland Silicones, [1962] A.C. 446, holding that stevedores could not take advantage of a clause limiting liability in a bill of lading). If a stranger to a contract may not take advantage of it, then by the same

token he should not be bound by it.

If Fosbroke-Hobbes has the effect of rendering an occupier exempt from liability to B because he has a contract with A purporting to exempt him from liability then the law should be changed. We favour a provision to that effect and prefer the form of the New South Wales proposal over that of the English Act (the first half of s. 3(1)). We do not recommend a provision similar to that of the second half of England's s. 3(1) which gives to third parties the benefit of a duty imposed by the contract; here too we follow New South Wales. We see no need to enact subsections (2) - (5) of the English s. 3.

RECOMMENDATION

*LIABILITY OF AN OCCUPIER UNDER THE ACT TO THIRD PARTIES TO A CONTRACT OR TENANCY WILL NOT BE EXCLUDED BY ANY PROVISION OF THE CONTRACT OR TENANCY TO WHICH THEY WERE NOT PRIVY.*

It will be noted that we do not deal with the landlord-tenant relationship in this report except in connection with the landlord's liability to the tenant for injuries suffered on areas which remain in the landlord's control such as walks, stairs, passages and elevators.

## XIII

## STRUCTURES

The rules of occupiers' liability apply to real property. However one finds statements like this:

> To what property did the rules extend? They started no doubt with "premises" in the real property sense but they had been applied to a wide miscellany of chattels. Thus ships, stagings, scaffolds, lifts, trains, aircraft, electricity pylons, were all regarded as covered; even ladders and slings were treated as comparable. The law seemed ready to apply a principle derived from landed property in many circumstances where the comparable situation arose of one person making use of another person's plant, equipment, machinery, tackle or tools.

(Chapman Statutes on the Law of Torts (1962), p. 47; authorities omitted from quotation.)

Salmond (5th ed. 330) has a similar statement but says the principles applied to moveables such as ships, lifts and airplanes only insofar as the injury had arisen from the dangerous structural condition of the conveyance and not from an act of negligence in the course of transit.

In contrast to these statements is an article (Davis, What are "Premises"? [1965] N.Z.L.J. 135) submitting that "premises" should mean only land together with structures that are part of the land and that the occupier of chattels and also of structures such as power poles belonging to someone other than the occupier of the land should be outside the rules of occupiers' liability.

We agree with him that some of the statements in the texts are misleading. The case quoted for the proposition that a ladder is premises (Woodman v. Richardson, [1937] 3 All E. R. 866) was one in which the plaintiff, an invitee was working on a scaffold erected by the defendant, a contractor, in the course of building a theatre. In going down from the scaffolding he slipped on a defective ladder

which had been put up by an unknown person. The action was dismissed because the plaintiff did not prove that the defendant had failed in his duty to take reasonable steps to protect the plaintiff. The scaffolding clearly was treated as premises and MacKinnon L.J. (dissenting) says that a defendant supplying a defective ladder as part of the premises is liable. However, this is not to say that a ladder by itself is premises.

The case cited for the proposition that a sling is premises is Oliver v. Saddler, [1929] A.C. 584. Davis is correct when he says that it has nothing to do with occupiers' liability. Stevedores supplies ropes to wrap around bags in hoisting them from the hold to the deck. They left the ropes around the bags for the convenience of the porters whose task was to move the bags from the deck to the quay. While bags were being so moved, a rope broke, killing a porter. The stevedores were held under a duty to take reasonable care to see that the ropes were safe. It is hard to see how anyone could suggest that occupiers' liability had any relevance. Certainly their Lordships did not. Lord Atkin agreed that there was a bailment of the ropes and refused to find it a gratuitous bailment. All the judgments are based on a finding of a duty to take care, anticipating the neighbour concept of Donoghue v. Stevenson.

We agree that staging and scaffolding may be premises. Elevators, likewise are premises or at least a part of them. Cases like Haseldine v. Daw however are not authority for the proposition that occupiers' liability applies to chattels. An elevator in a building is not a chattel. It is a fixture just as an escalator is, or for that matter a staircase.

Structures such as power poles and pylons have been held to be premises and we see no difficulty with this, even when the pole belongs to a power company, and the land in which it is sited belongs to another.

As to ships, they do not pose a great problem in Alberta for there is only a modest amount of barge traffic from Waterways to Uranium City in Saskatchewan. Otherwise there is nothing larger than small motor launches. Many of the cases in which occupiers' liability applies have been ones in which the ship is in port (e.g., King v. Northern Navigation Co. (1913), 27 O.L.R. 79 and Tolfree v. Russell, [1943] 2 D.L.R. 234 (Ont. C.A.)), and some of the accidents have happened on gangplanks or on a wharf. One cannot say however that the rules of occupiers' liability have been confined to such cases. In Webber v. Toronto, [1955] O.W.N. 18, the ship was a ferry boat and the report does not say whether it was in port or en route.

As to aircraft, Fosbroke-Hobbes discussed earlier is sometimes quoted for the proposition that occupiers' liability applies to aircraft. Goddard J. said it was unnecessary to decide whether the passenger was an invitee or licensee, because he was entitled to expect a fit and proper aircraft and careful navigation.

As to trains, the rules of occupiers' liability were applied in Barnett and Diplock cited earlier (where the plaintiff was trespasser on a train); and in Gebbie v. Saskatoon, [1930] 4 D.L.R. 543 (Sask. C.A.) where the plaintiff was boarding a streetcar.

In Nightingale v. Union Colliery (1905), 35 S.C.R. 65 where the colliery allowed plaintiff to ride free on its train and he was injured when a bridge collapsed, the colliery was

held not liable because there was no gross negligence. This was a case of defective premises as distinct from negligent conduct in the actual operation of the train. It will be noted that the basis of liability is stated to be gross negligence and not that applicable to licensees, though Nesbitt J. did say "We think the doctrine of liability sufficiently extended already in the case of bare licensees."

As to motor vehicles Armand v. Carr, [1926] S.C.R. 575, is a leading case. The action was by a gratuitous passenger against the driver. The Supreme Court rejected the suggestion that Nightingale lays down a lower duty than that of reasonable care. The judgment makes no distinction between defective condition of the vehicle and negligent acts of the driver, a distinction which has sometimes been made. Moreover there is no **reference** to the law of occupiers' liability. The problem has not come up frequently in recent years, doubtless because of the prevalence of gratuitous passenger legislation which makes the driver liable for gross negligence in most provinces.

There is, however, a remarkable case from Ontario called Houweling v. Wesseler (1963), 40 D.L.R. (2d) 956. A four-year old child who was a gratuitous passenger in a motor car fell through the floor while the car was in motion. Ontario had a provision (since repealed) which excluded completely actions by gratuitous passengers. To save the plaintiff's cause of action, the Court of Appeal held that the common law of occupiers' liability applied. The cause of injury was not the negligent operation of the vehicle but the dangerous disrepair of the car. The judgment quotes Fleming for the proposition that the rules of occupiers' liability apply to motor cars and later says: "the Statute

does not provide exemption from the common law liability upon the owner of defective premises or in this case defective chattels, where injury arises from that defect known or which ought to be known to the owner of the chattel and where the person injured has been invited to enter into or on the chattel." The judgment does not say whether the plaintiff was a licensee or invitee but gives the benefit of the duty owed to an invitee.

Our motor vehicle law has grown up as a separate body of law outside of occupiers' liability. There is no point in complicating further the law of automobile accidents.

We note now two cases dealing with unusual "vehicles". In Bunker v. Brand, [1969] 2 W.L.R. 1392 the English Act was applied to a tunnelling machine, though in that case the defendant was occupier of the tunnel as well. In Redwell Servicing Co. v. Lane Wells (1955), 16 W.W.R. 615, the plaintiff was engaged by a drilling contractor to swab out an oil well. To do this the plaintiff used its portable derrick. The swabbing was to be followed by perforation which the defendant was to carry out. By agreement, the defendant used the plaintiff's derrick. When the defendant's servants were pulling the preforating gun from the hole, the derrick toppled over damaging both it and the defendant's equipment nearby. The defendant counterclaimed. The defendant argued that the plaintiff was occupant of the derrick and that the duty owed to the defendant was that owed to a "contractee" under Maclenan v. Segar. The plaintiff argued that the law of invitors and invitees did not apply to chattels. The Alberta Appellate Division held that it did. Thus the plaintiff would have been liable on the counterclaim had it known of the danger that the portable derrick would topple

over. However, the counterclaim was dismissed because it was found that the accident occurred from the defendant's improper use of the derrick. This ended any warranty to the defendant as "contractee". In our respectful opinion this case might have been decided without reference to occupiers' liability. However we treat the decision as deciding that the law of occupiers' liability applies to a mobile derrick.

The three commonwealth Acts have all dealt with this problem.

England:

> Section 1(3). The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply to regulate--(a) the obligation of a person occupying or having control over any fixed or moveable structure including any vessel, vehicle or aircraft. . . .

We omit subparagraph (b) which covers damage to property and which we consider in Part XIV. One author who finds this subsection hard to construe says "the task of giving a meaning to each phrase of this subsection seems almost insuperable" (Street, Torts, 3rd ed. 187, f.n. 3 (1963)).

New Zealand:

Section 3(3)(a) is the same. The words "including any vessel, vehicle or aircraft" are omitted but s. 2 defines "structure" to include them.

Scotland:

> Section 1(3). Those provisions shall apply in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon--(a) in relation to a person occupying or having control of any fixed or moveable structure, including any vessel, vehicle or aircraft and to persons entering thereon. . . .

Subparagraph (b) makes the basic provisions apply to the plaintiff's property.

An important difference from the English Act is that the Scottish does not make the basic provisions apply merely to the extent that the common law rules apply, but simply makes them apply, with no qualification.

Professor Walker says of the Scottish s. 1(3): "The interpretation of these words seems apt to give rise to many controversies. . . ." and adds that the wording of the English Act is much clearer. As we have noted, Street is not complimentary about the English section.

The law of occupiers' liability applies to lands and premises in the legal sense, including buildings and things which are in law fixtures and therefore part of the land, all of which are included in our use of the words "land", "property" and "premises" throughout this report. We are of opinion that the law of occupiers' liability should as far as possible confine itself to real property and things which are really used as part of real property or in the way in which real property is used. For historical reasons, however, the delineation of its area of application gives

rise to problems which are difficult in theory though, we think, not too important in practice.

Section 1(3) of the English Act guards against "pockets" to which the old law might apply. The English Act applies to all "structures" to which the common law applies. We are not satisfied with this approach. The law of occupiers' liability would apply in areas where we think it unsuitable.

Section 1(3) of the Scottish Act, which we have also quoted, does not give the same protection against "pockets", and it applies the law of occupiers' liability to vessels, vehicles and aircraft where we think it inappropriate.

We think that the law of occupiers' liability should apply to staging, scaffolding and structures erected on land, whether fixtures or not, where used in conjunction with the land. We think that it should apply to poles, standards, pylons and wires such as those used for the carriage of electricity or telegraph or telephone signals or for the transportation of passengers, whether or not used in conjunction with the supporting land. We think that, for historical reasons, it will have to apply to railway trains, railway cars and ships. We think that it will also have to apply to trailers which are used as portable buildings, that is to say, for residences, shelters or offices, whether or not their occupiers are occupiers of the land upon which such trailers are temporarily located.

We are very strongly of the view that the law of occupiers' liability should not apply to motor vehicles as such; as we have said, the law of automobile accidents should not be further complicated. We do not think that it should apply to aircraft or to other vehicles or things such as the

tunnelling machine or the portable derrick which we have referred to; we think that the common law is capable of regulating the rights and duties of the parties in such cases without reference to rules appropriate to real property.

RECOMMENDATION

1. *THE RULES RECOMMENDED IN RELATION TO AN OCCUPIER OF PREMISES AND ENTRANTS ON THE PREMISES SHALL REGULATE THE OBLIGATIONS OF THE PERSON WHO IS IN POSSESSION OF OR HAS A SUBSTANTIAL DEGREE OF CONTROL OVER STAGING, SCAFFOLDING AND STRUCTURES ERECTED ON LAND, WHETHER FIXTURES OR NOT; POLES, STANDARDS, PYLONS AND WIRES SUCH AS THOSE USED FOR THE CARRIAGE OF ELECTRICITY OR TELEGRAPH OR TELEPHONE SIGNALS OR FOR THE TRANSPORTATION OF PASSENGERS, WHETHER OR NOT USED IN CONJUNCTION WITH THE SUPPORTING LAND; RAILWAY TRAINS, RAILWAY CARS AND SHIPS; TRAILERS WHICH ARE USED AS PORTABLE BUILDINGS, THAT IS TO SAY, FOR RESIDENCE, SHELTERS OR OFFICES, WHETHER OR NOT THEIR OCCUPIERS ARE OCCUPIERS OF THE LAND UPON WHICH SUCH TRAILERS ARE TEMPORARILY LOCATED.*

2. *THE RULES SHALL NOT REGULATE THE OBLIGATIONS OF A PERSON IN HIS CAPACITY OF OCCUPIER OF AN AIRCRAFT OR A MOTOR VEHICLE OR ANY VEHICLE OR THING OTHER THAN THOSE MENTIONED ABOVE, AND IN PARTICULAR OF PORTABLE DERRICKS AND OTHER EQUIPMENT; AND, EXCEPT AS PROVIDED, SHALL NOT EXTEND BEYOND REAL PROPERTY AND THINGS WHICH ARE USED AS PART OF OR IN CONJUNCTION WITH REAL PROPERTY.*

XIV

DAMAGE TO PROPERTY

At one time there seems to have been doubt as to whether the rules of occupiers' liability apply to damage to property as distinct from personal injuries. It seems now

to be generally agreed that they do. Damage to clothes or to an automobile must be common place. We have noted no Canadian case in which the defendant has argued that he is not liable for damage to property. On the other hand there are cases in which it has been held or assumed that he is. In Grossman v. The King, [1952] 1 S.C.R. 571 the claim was for damage to a plane as well as personal injuries. The claim was successful though Kellock J. was the only member of the Court who specifically based his judgment on occupiers' liability. In Redwell the claim was for property damage caused by the "occupier" of the portable derrick. It failed, but not on the ground that occupiers' liability is confined to personal injuries. The same is true of a recent Nova Scotia case, Janes v. Triton Centres Ltd. (1969), 4 D.L.R. (3d) 327, where the damage was to a vehicle. This authority is not persuasive by itself but is in keeping with the current of English cases prior to the Occupiers' Liability Act. It is true that Sir Raymond Evershed said in Tinsley v. Dudley, [1951] 2 K.B. 18 (a case of the theft of a bicycle from the yard of a public house) that the distinction between a licensee and invitee bears only "in matters of personal injury". However there are cases like The Cawood III, [1951] p. 270 in which the rules of occupiers' liability were applied to damage to a ship moored to a jetty. We think it proper to permit a visitor, or even a trespasser for that matter, to recover for damage to property not only where there is personal injury but even apart from it. Of course the visitor should not be able to recover for damage to property unless the occupier has been negligent. If the visitor drives his car onto another's premises and the vehicle of a third party runs into him, there is no liability on the occupier. There could be however, if he knew that the third party was driving recklessly and the occupier failed

to take reasonable steps to protect his visitor from the risk which the third party had created.

Compensation for damage does not literally cover loss. However we agree that if a chattel of a visitor is totally destroyed, for example by fire, he should not be in a poorer position than if it were merely damaged; and we think that loss of a chattel from the defendant's negligence should be covered too. Although unlikely, a visitor's glasses may fall into a lake or down a drain because of the occupiers' negligence and we see no reason to exclude a claim of this kind.

On this question of loss of property, one must note the difference between loss from the occupiers' negligence and loss from theft by a third party. Remembering that the occupier is not a bailee, he is not under a duty of care against theft, except in an action by a lodger against his boarding housekeeper (Olley v. Marlborough Court, [1949] 1 K.B. 532). Representative cases are: Ashby v. Tolhurst, [1937] 2 K.B. 242 (theft of car from parking lot); Tinsley v. Dudley, [1951] 2 K.B. 18 (theft of motor cycle from public house which was not an inn); Edwards v. West Herts Hospital, [1957] 1 All E.R. 541 (theft of house physician's clothes from hostel under hospital's control); Gumina v. Toronto General Hospital (1920), 19 O.W.N. 547 (theft of money from clothes of hospital patient).

It is important to stress that in these cases there was no bailment of the chattel. Bailment raises a higher duty than that of mere occupation of premises and should be excluded from the proposed statute, as should the law governing innkeepers' liability.

Assuming that the proposed statute makes provision for damage to or loss of property, a question arises where the property belongs not to the visitor but to a third party. Drive Yourself Ltd. v. Burnside (1959), 59 S.R. (N.S.W.) 390 is the leading case. In that case one Taylor rented a car from plaintiff. He drove it into a car park on the defendant's recreation ground. He paid the required fee and parked the car under a cliff. A boulder fell from the cliff and damaged the car. A preliminary question was whether damages for injury to goods can ever be claimed. Street C.J. and Owen J. examined the authorities carefully and concluded that they can where the invitation or license extends to the goods. Herron J. thought that historically much was to be said for the defendant's argument but that an invitee could now claim for property damage. He doubted however that property of a third person is within this rule.

The main question was whether the owner of the car, never having entered on the land, can be treated as an invitee, which Taylor was found to be. Street C.J. and Owen J. answered in the affirmative. Street C.J. says the invitation was extended to the car and Owen J. to the owner of the car. Herron J. agreed that the plaintiff could recover, but on the general principle of Donoghue v. Stevenson.

Mr. P. M. North, Damage to Property and the Occupiers' Liability Act, 1957, (1966) 30 Conveyancer 264 in a most helpful discussion of the whole subject, questions the judgments of Street C.J. and Owen J. as applied to the English Act. The plaintiff is not a visitor and difficult questions arise as to the effect

of a warning of danger by the occupier and of exculpatory provisions.

We turn now to the provisions of the three statutes.

England:

> Section 1(3). The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply to regulate. . . . (b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

New Zealand:

Section 3(3). The same as England's, save that the section is subject to s. 9 which excludes contracts of carriage and of bailment from the Act.

Scotland:

> Section 1(3). Those provisions shall apply in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon. . . . (b) in relation to an occupier of premises or a person occupying or having control of any such structure and to property thereon, including the property of persons who have not themselves entered on the premises or structure.

We have alluded to criticism of the English and Scottish provisions in connection with structures. The English provision respecting property is unsatisfactory

because it refers the right to claim for damage back to the common law, which is not completely clear; and it omits any reference to loss. Even if it did it would only import the common law rules which, as we have seen, in general preclude claims for loss by theft and probably preclude loss in the case of the spectacles falling into a lake or loss by total destruction. Chapman (pp. 50-51) thinks that in omitting any reference to loss the intent was to preserve the common law respecting loss by theft. He observes that the phrase "damage to property" is unnecessarily stringent, and gives the example of spectacles or a gold watch lost in the sea.

The defects in the Scottish provision which are discussed by Prof. Walker (Delict Vol. II, 592) are different. The Scottish provision simply makes the rules apply to property, saying nothing of damage or loss. We agree with Prof. Walker that taken literally they might affect the law of carriers, bailment and of innkeepers' liability, which are not mentioned in the Scottish Act. As already stated contracts of carriage and of bailment are excepted from the New Zealand Act. In England they are not excepted from the whole Act but are excepted from the operation of s. 5 which extends the common duty of care to a duty implied by contract to enter premises or to bring or send goods to premises.

We think the Act should clearly specify that it does not apply to contracts of carriage of goods or to any bailment or to liability of innkeepers. It should extend to damage to property and to loss save that it should not increase the occupiers' duty for loss from theft. One question not discussed previously is whether a trespasser, assuming he has a cause of action should be able to include a claim for

personal property on the same basis as a visitor. We think he should. The problem of property belonging to a third person is difficult. He is not a visitor and in addition there is the question of the effect on his claim of warning notices and restriction of liability. We think that he should be permitted to bring action even though not a visitor but that the occupier should have available the same defences that he would have against the visitor.

RECOMMENDATION

*(a) THAT WHERE AN ENTRANT BRINGS PERSONAL PROPERTY ON TO PREMISES AND THERE IS NO BAILMENT THE COMMON DUTY OF CARE BE EXTENDED TO THAT PERSONAL PROPERTY,*

*(b) THAT THE DUTY SHOULD APPLY IN CASE OF TOTAL DESTRUCTION OR LOSS OF PROPERTY AS IN THE CASE OF DAMAGE TO PROPERTY,*

*(c) THAT NOTHING IN THE ACT SHOULD AFFECT WHATEVER DUTY OF CARE THERE MAY BE WITH RESPECT TO LOSS BY THEFT,*

*(d) THAT WHERE THE PROPERTY IS THAT OF A THIRD PARTY HE SHOULD BE ENTITLED TO CLAIM, BUT THAT HIS CLAIM SHOULD BE SUBJECT TO ANY DEFENCE AVAILABLE TO THE OCCUPIER AGAINST THE ENTRANT, AND*

*(e) THAT THE PROVISIONS OF THE ACT SHOULD APPLY TO THE PROPERTY OF TRESPASSERS AS WELL AS TO THAT OF VISITORS.*

We have already mentioned the subjects of contracts of carriage, bailment and innkeepers. To ensure that the Act does not affect them it should specifically so state.

RECOMMENDATION

*THAT THE ACT DOES NOT AFFECT THE OBLIGATIONS IMPOSED ON A PERSON BY OR BY VIRTUE OF ANY CONTRACT OF CARRIAGE, ANY BAILMENT OR THE INNKEEPERS' ACT, R.S.A. 1955, c. 148.*

XV

THE CROWN AS OCCUPIER

At common law the Crown was not liable in negligence. However the Exchequer Court Act (R.S.C. 1952, c. 98) long had a provision imposing liability in certain circumstances for negligence of federal Crown servants (s. 18(1)(c)). There is no need to examine the history of this section which was repealed in 1952-53. Some claims against the Crown were based on the law of occupiers' liability, e.g.,

Brebner v. The King (1913), 14 D.L.R. 397 (invitee).

Northrup v. The King (1917), 37 D.L.R. 485 (trespasser).

Lajoie v. The King (1921), 69 D.L.R. 147 (trespasser).

MacDonald v. The King, [1951] Ex. 293 (trespasser).

England's Crown Proceedings Act, 1947, was the model for a Uniform Crown Proceedings Act adopted in 1950 by the Conference of Commissioners on Uniformity of Legislation in Canada. Alberta's Crown Proceedings Act, 1959, c. 63, and Canada's Crown Liability Act 1952-53, c. 30, are for relevant purposes the same as the English. Using the Alberta Act, s. 5(1) makes the Crown liable (a) "In respect of a

tort committed by any of its officers or agents" and (c) "In respect of any breach of the duties attaching to the ownership, obligation, possession or control of property". Subsection 2 says that no proceedings lie against the Crown under clause (a) in respect of any act or omission of an officer or agent of the Crown unless the act or omission would, apart from the Act, have given rise to a cause of action in tort against that officer or agent or his personal representative.

We know of no decision under any of the provincial Acts, including Alberta's, but there are a number under the Act of Canada. The most instructive are two decisions of Noel J. in the Exchequer Court.

In Deslauriers v. The Queen, [1963] Ex. 289 the suppliant had landed at an airport under the control of the Department of Transport. While walking from the aircraft into the terminal building she tripped on a step outside the building. The lights were out because of power failure. Noel J. found that it was not the duty of the officers of the Department of Transport to escort passengers from aircraft to the terminal so, therefore, the petitioner did not succeed under sub-paragraph (a), bearing in mind particularly the provisions of subsec. (2). However he turned to sub-paragraph (c) (Canada's 3(1)(b)). The Crown was in occupation and control of the airport. Liability under this sub-paragraph is direct and not vicarious. Hence the petitioner recovered.

In Nord-Deutsch v. The Queen, [1969] 1 Ex. 117, a pier carrying a navigation light in the St. Lawrence was shifted by ice and Noel J. found that the shifting caused a collision between two ships. He held that liability could attach for

non-repair of a public work (pp. 172-174, 193) and that the Crown was liable here under (c) (Canada's (b)) as occupier and probably also under (a) (pp. 199-201). The law of Quebec applies and for relevant purposes it is the same as the common law (pp. 201-205). (The relevant provision is article 1054 of the Civil Code.)

Other cases under the Act of Canada are:

Alexander v. The Queen (1960), 23 D.L.R. (2d) 369 (S.C.C.) - (defective elevator - guests at party in R.C.A.S.C. quarters - held licensees - no known trap).

Hendry v. The Queen, [1965] 1 Ex. 392 - (guest in sergeants' mess slipped on food on floor - held licensee - no known concealed danger).

Reg. v. Breton (1968), 65 D.L.R. (2d) 76 (S.C.C.) - (Quebec City by-law requiring owners to repair adjacent city sidewalks - R.C.M.P. failed to repair sidewalk - no liability under (c) (Canada's (b)) which deals with the duty of occupiers - Crown not occupier of sidewalk).

Kerr v. The Queen, [1968] 1 Ex. 220 - (Suppliant slipped on floor of Toronto airport while about to board plane - no unusual danger).

We think the Act should bind the Crown as do the three existing Acts (English Act s. 6). Dealing first with the Crown in right of Alberta, no constitutional problem arises. In Alberta one-half of all the land in the province is in the public domain in right of the province; to be precise 129,766 square miles out of 255,000. The Crown issues a variety of licenses and permits to enter Crown lands for

various commercial purposes, and without any license one may pass over Crown lands. We have considered whether the proposed Act if made applicable to the Crown in right of the province would impose an undue burden on the Crown. We think not. Under the Crown Proceedings Act, as already seen, the Crown is under liability in tort in respect of the duties attaching to ownership, occupation, possession or control of property. Assuming that a wayfarer travelling across country from Lesser Slave Lake to the North West Territories is a visitor, the common duty of care to him would be exceedingly low. In Cardy, Windeyer J. (104 C.L.R. at 317) said that where a rancher with 50,000 acres lets someone through his land there is an implied condition that the entrant is at his own risk. His Lordship asks: would he be obliged to warn the licensee of every hidden danger, natural or created by man, that the land might hold for him or his horse or his dog - of quicksand in the creek, of the bridge become rotten, of the coils of barbed wire hidden in the grass or of dingo traps? "Surely not." We realize this has reference to a licensee at common law but think it applicable to the Crown under the proposed Act, especially when one recalls the huge area and the fact that nearly every hazard is a natural one.

The province has 2,321 miles of provincial parks and a wilderness area and many roadside camp grounds. We do not foresee any special difficulty in applying the Act to these premises.

The same applies to lands held by the Crown in right of Canada. These include National Parks with 20,000 square miles, Indian Reserves with over 2,500 square miles and other lands totalling over 2,800 square miles (all figures supplied by Department of Lands & Forests, Edmonton). We

find nothing of relevance in the National Parks Act or Provincial Parks Act.

There may be a special problem in connection with the question, who is the occupier of Indian Reserves? In Brick Cartage Ltd. v. The Queen, [1965] Ex. 102 a vehicle owned by the suppliant was crossing a bridge on an Indian Reserve when it collapsed and the vehicle was damaged. Held that the Indian Council was not a servant of the Crown and the Crown did not, as a matter of law, own, occupy, possess or control the bridge. By virtue of the Royal Proclamation of 1763 the Crown had a bare legal title in Indian lands in Ontario.

The question whether the Royal Proclamation of 1763 extends to the part of Canada that includes Alberta has been considered in a number of cases dealing with Indians' right to hunt game. We know of no authoritative decision holding it does apply. Yet it may be that even in Alberta a Reserve is not in possession of the Crown. R. v. Gingrich (1958), 29 W.W.R. 471 was a charge of trespass under the Indian Act against a missionary who visited a member of the band on invitation. The Alberta Appellate Division held that although the Indian Act gives the band Council power to punish trespassers it does not give the Council power to say who is a trespasser. Gingrich was not a trespasser because a member of the band had invited him onto the Reserve. Thus there seems doubt as to who is occupier of an Indian Reserve. No provincial statute could resolve this problem.

A special question arises in connection with the applicability of an Occupiers' Liability Act to the federal Crown. When Parliament provides for a new liability in the Crown, as it did long ago in the Exchequer Court Act and

later in the Crown Liability Act, the general provincial law applies, as we have seen. However, the provincial law which applies is that in effect when Parliament made the Crown in right of Canada liable, and the leading case of Gauthier v. The King (1918), 56 S.C.R. 176 holds that a subsequent provincial Act cannot increase that liability. (Gauthier held inapplicable to the Crown a provincial statute making irrevocable a submission to arbitration.)

In Schwella v. The Queen, [1957] Ex. 226, Thurlow J., referring to the operative section of the Crown Liability Act said: "Under this section, the law applicable for determining when the Crown is liable in the case of tort committed in the Province of Ontario is the law of that province and includes the provisions of the Negligence Act, which was in force when the Crown Liability Act came into effect."

It is true that where the Crown is plaintiff it has been held that an amendment to the provincial Negligence Act whereby a passenger is in effect identified with his driver's negligence operates against the Crown, the action being for loss of services of a serviceman who was a passenger. When Her Majesty avails herself of the provincial law she must accept it as it exists when Her claim arises (The Queen v. Murray, [1965] 2 Ex. 663, aff'd [1967] S.C.R. 262).

The rule of Gauthier has been the subject of criticism (e.g., Gibson, Interjurisdictional Immunity, (1969) 47 Can. Bar Rev. 40 at 47). Prof. Gibson argues:

> If federal legislation establishing Crown liability can be interpreted as impliedly adopting provincial law as of the date of the federal legislation, there is no reason why the implication could not be stretched to include incorporation of future provincial laws as well.

If the federal Crown is not bound by a provincial Occupiers' Liability Act enacted subsequent to 1953 then there remains a "pocket". In any proceeding against the Crown under the Crown Liability Act (Canada), the Crown could raise the defence, for example, that it is only liable to a licensee for known traps. This would be unfortunate. For this reason we propose to invite the attention of the Department of Justice to this problem and to recommend federal legislation to make it clear that the Occupiers' Liability Act shall apply to claims against the Crown.

RECOMMENDATION

*THAT THE ACT APPLY TO THE CROWN IN RIGHT OF ALBERTA.*

RECOMMENDATION

*THAT THE GOVERNMENT OF ALBERTA REQUEST THE GOVERNMENT OF CANADA TO PROPOSE TO PARLIAMENT AN AMENDMENT TO THE CROWN LIABILITY ACT WHEREBY THE ALBERTA OCCUPIERS' LIABILITY ACT SHALL APPLY TO PETITIONS AGAINST THE CROWN IN RIGHT OF CANADA UNDER THE CROWN LIABILITY ACT (CANADA).*

## XVI

## RECOMMENDATIONS

The Institute recommends an Occupiers' Liability Act to provide:

1. That the occupier of premises should owe to all visitors the same duty of care; and that the common duty of care should be a duty to take such care as in all

the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier or is permitted by law to be there; and this duty should apply to the condition of the premises, activities on the premises and the conduct of third parties (p. 47).

2. That "Occupier" should be defined to include not only a person who is in possession of premises but also to include a person who though not in possession in the strict sense, has a substantial degree of control; and that the proposed Act should make clear that there may be more than one occupier (p.6 ).

3. That visitor should be defined as:

(1) A person whose presence on premises is not unlawful.

(2) A person whose presence on premises has become unlawful and who is taking reasonable steps to leave those premises (p. 50).

4. That entrants as of right should be included in the category of visitors (p. 33).

5. That a warning should not be treated without more as absolving the occupier from liability, unless in all the circumstances it is enough to enable the visitor to be reasonably safe (p. 26).

6. That an occupier should not be under an obligation of care 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) (p. 27).

7. That where the occupier fails or neglects to discharge the common duty of care to a visitor and the visitor suffers damage as a result partly of that fault and partly of his own fault the provisions of the Contributory Negligence Act should apply; and the latter Act should apply as between a trespasser and occupier in a proper case; and where there are two or more occupiers each at fault the provisions of the Tortfeasors Act should apply (p. 28).

8. That where persons enter or use any premises in exercise of a right conferred by contract with an occupier of premises, the duty he owes them insofar as the duty depends on a term to be implied in the contract by reason of its conferring that right, should be the common duty of care (p. 24).

9. That nothing in the proposed statute should derogate from the special rights and liability incident to the master-servant relationship (p. 16).

10. That liability may be extended, restricted, modified or excluded by express agreement or express stipulation, and reasonable steps must be taken to bring to the attention of visitors any restriction, modification or exclusion of liability (p. 75).

11. That liability of an occupier under the Act to third parties to a contract or tenancy should not be excluded by any provision of the contract or tenancy to which they were not privy (p. 77).

12. That where damage to a visitor is due to the negligence of an independent contractor employed by an occupier, the occupier should not on that account be answerable for the damage if he has exercised whatever care is reasonable in the selection and supervision of the independent contractor, provided that the immunity from liability should exist only if it is reasonable in all the circumstances that the work for which the independent contractor is employed should be undertaken; provided that this recommendation should not affect any statutory provision whereby an occupier is liable for the negligence of an independent contractor (p. 72).

13. That the liability of occupiers to trespassers should be for wilful or reckless conduct, subject to the special provision for child trespassers (p. 51).

14. That where an occupier knows or has reason to know that there are trespassing children on his premises and that conditions or activities on the premises create a danger of death or serious bodily harm to those children, the occupier should be under the common duty of care toward them; in determining whether the duty has been discharged consideration should be given to the youth of the children and their inability to appreciate the risk and also to the burden of eliminating the danger or protecting the children as compared to the risk to them (p. 54).

15. That the proposed Act should contain no provision comparable to England's s. 2(3)(a) and that it should contain no definition of child (p. 57).

16. (1) That the rules recommended in relation to an occupier of premises and entrants on the premises should regulate the obligations of the person who is in possession of or has a substantial degree of control over

(a) staging, scaffolding and structures erected on land, whether fixtures or not,

(b) poles, standards, pylons and wires such as those used for the carriage of electricity or telegraph or telephone signals or for the transportation of passengers, whether or nor used in conjunction with the supporting land,

(c) railway trains, railway cars and ships,

(d) trailers which are used as portable buildings, that is to say, for residences, shelters or offices, whether or not their occupiers are occupiers of the land upon which such trailers are temporarily located.

(2) That the rules should not regulate the obligations of a person in his capacity of occupier of an aircraft or a motor vehicle or any vehicle or thing other than those mentioned above, and in particular of portable derricks and other equipment; and, except as provided, should not extend beyond real property and things which are used as part of or in conjunction with real property (p. 86).

17. (a) That where an entrant brings personal property on to premises and there is no bailment the common duty of care should be extended to that person's property,

(b) that the duty should apply in case of total destruction or loss of property as in the case of damage to property,

(c) that nothing in the Act should affect whatever duty of care there may be with respect to loss by theft,

(d) that where the property is that of a third party he should be entitled to claim, but that his claim should be subject to any defence available to the occupier against the entrant, and

(e) that the provisions of the Act should apply to the property of trespassers as well as to that of visitors (p. 92).

18. That the Act should not affect the obligations imposed on a person by or by virtue of any contract of carriage, any bailment or the Innkeepers' Act, R.S.A. 1955, c. 148 (p. 93).

19. That the proposed Act should be expressed not to apply to highways; and highways for this purpose means roads under the management direction and control of the Crown in right of Alberta and Canada and of a municipal authority and does not include roadways and parking areas on private property such as shopping centres or parking garages (p. 18).

20. That the Act should not apply to streets under the Private Streets Act or to Forestry Roads, but should apply to rights of entry under the Right of Entry Arbitration Act and to the rights of the Alberta Government Telephones Commission under s. 18 of the Telephones Act (p. 20).

21. That no provision should be made to equate the duty of a non-occupier, whether on the land on the occupier's behalf or not, to that of an occupier (p. 65).

22. That the Act should apply to the Crown in right of Alberta (p. 99).

23. That the Government of Alberta request the Government of Canada to propose to Parliament an amendment to the Crown Liability Act whereby the Alberta Occupiers' Liability Act shall apply to petitions against the Crown in right of Canada under the Crown Liability Act (Canada) (p. 99).

NOTE: The above recommendations contain some minor verbal changes from those in the body of the Report.

D. T. Anderson

W. F. Bowker

H. G. Field

S. A. Friedman

W. H. Hurlburt

J. S. Palmer

W. A. Stevenson

A. G. McCalla

by _____
Chairman

_____
Director

December 23, 1969

NOTE: Dr. McCalla is not a lawyer but is a member of the Board of the Institute. He has no responsibility for nor did he participate in the preparation of this Report.

APPENDIX A

# OCCUPIERS' LIABILITY ACT, 1957

## ARRANGEMENT OF SECTIONS



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An Act to amend 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, to make provision as to the operation in relation to the Crown of laws made by the Parliament of Northern Ireland for similar purposes or otherwise amending the law of tort, and for purposes connected therewith.

[6th June, 1957]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

## Liability in tort

1.—— (1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate --

(a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and

(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

(4) A person entering any premises in exercise of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not, for the purposes of this Act, a visitor of the occupier of those premises.

2.——— (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(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).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

3.—— (1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, maintenance or repair or other like operation by persons other than himself, his servants and persons acting under his direction and control.

(3) In this section "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as to those entered into or created after its commencement; but, in so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement or which are renewed by agreement (whether express or implied) after that commencement.

4.———(1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract).

(2) Where premises are occupied under a sub-tenancy, the foregoing subsection shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way or of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949.

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

## Liability in contract

5.—— (1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

(2) The foregoing subsection shall apply to fixed and moveable structures as it applies to premises.

(3) This section does not affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

(4) This section does not apply to contracts entered into before the commencement of this Act.

General

6.——— This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act, 1947, and that Act and in particular section two of it shall apply in relation to duties under sections two to four of this Act as statutory duties.

7.——— The limitation imposed by paragraph (1) of section four of the Government of Ireland Act, 1920, precluding the Parliament of Northern Ireland from making laws in respect of the Crown or property of the Crown (including foreshore vested in the Crown) shall not extend to prevent that Parliament from amending the law of tort, or enacting provisions similar to section five of this Act, so as to bind the Crown in common with private persons; but as regards the Crown's liability in tort, no such amendments shall bind the Crown further than the Crown is made liable in tort under the law of Northern Ireland by Orders in Council under section fifty-three of the Crown Proceedings Act, 1947.

8.——— (1) This Act may be cited as the Occupiers' Liability Act, 1957.

(2) This Act shall not extend to Scotland, nor to Northern Ireland except in so far as it extends the powers of the Parliament of Northern Ireland.

(3) This Act shall come into force on the first day of January, nineteen hundred and fifty-eight.

# APPENDIX B

## OCCUPIERS' LIABILITY (SCOTLAND) ACT, 1960

An Act to amend the law of Scotland as to the liability of occupiers and others for injury or damage occasioned to persons or property on any land or other premises by reason of the state of the premises or of anything done or omitted to be done thereon; and for purposes connected with the matter aforesaid.

[2nd June, 1960]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1.—— (1) The provisions of the next following sections of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land or other premises (in this Act referred to as an "occupier of premises") is required, by reason of such occupation or control, to show towards persons entering on the premises 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 he is in law responsible.

(2) Nothing in those provisions shall be taken to alter the rules of the common law which determine the person on whom in relation to any premises a duty to show care as aforesaid towards persons entering thereon is incumbent.

(3) Those provisions shall apply, in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon,--

(a) in relation to a person occupying or having control of any fixed or moveable structure, including any vessel, vehicle or aircraft, and to persons entering thereon; and

(b) in relation to an occupier of premises or a person occupying or having control of any such structure and any property thereon, including the property of persons who have not themselves entered on the premises or structure.

2.——— (1) 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 by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, 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.

(2) Nothing in the foregoing subsection shall relieve an occupier of premises of any duty to show in any particular case any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

(3) Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.

3.——— (1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility aforesaid as is required by virtue of the foregoing provisions of this Act to be shown by an occupier of premises towards persons entering on them.

(2) Where premises are occupied or used by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.

(3) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(4) For the purposes of this section, any obligation imposed on a landlord by any enactment by reason of the premises being subject to a tenancy shall be treated as if it were an obligation imposed on him by the tenancy, "tenancy" includes a statutory tenancy which does not in law amount to a tenancy and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.

(5) This section shall apply to tenancies created before the commencement of this Act as well as to tenancies created after its commencement.

4.—— This Act shall bind the Crown, but as regards the liability of the Crown for any wrongful or negligent act or omission giving rise to liability in reparation shall not bind the Crown any further than the Crown is made liable in respect of such acts or omissions by the Crown Proceedings Act, 1947, and that Act and in particular section two thereof shall apply in relation to duties under section two or section three of this Act as statutory duties.

5.—— (1) This Act may be cited as the Occupiers' Liability (Scotland) Act, 1960, and shall extend to Scotland only.

(2) This Act shall come into operation at the end of the period of three months beginning with the day on which it is passed.

# APPENDIX C

## OCCUPIERS' LIABILITY

### ANALYSIS

Title



---

1962, No. 31

An Act to amend the law relating 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

[28 November 1962]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement---(1) This Act may be cited as the Occupiers' Liability Act 1962.

(2) This Act shall come into force on the first day of January, nineteen hundred and sixty-three.

2. Interpretation---In this Act, unless the context otherwise requires,---

"Premises" includes land:

"Structure" includes any vessel, vehicle, or aircraft.

Cf. Occupiers' Liability Act 1957, s. 1 (3) (a) (U.K.)

3, Application of next two succeeding sections---(1) The rules enacted by sections 4 and 5 of this Act shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in his capacity as an occupier in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives, or is to be treated as giving, to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) Subject to the provisions of section 9 of this Act, the rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate--

(a) The obligations of a person occupying or having control over any fixed or movable structure; and

(b) The obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

Cf. Occupiers' Liability Act 1957, s. 1 (U.K.)

4. Extent of occupier's ordinary duty--(1) An occupier of premises owes the same duty (in this Act referred to as the common duty of care) to all his visitors, except so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise.

(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

(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.

(5) 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.

(6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation 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.

(7) 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.

(8) Where the occupier fails or neglects to discharge the common duty of care to a visitor, and the visitor suffers damage as the result partly of that fault and partly of his own fault, the provisions of the Contributory Negligence Act 1947 shall apply.

(9) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

Cf. Occupiers' Liability Act 1957, s. 2 (U.K.)

5. Effect of contract on occupier's liability to third party---

(1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the common duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, so far as those obligations go beyond the obligations otherwise involved in the common duty of care.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.

(3) In this section the expression "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the date of the commencement of this Act, as well as to those entered into or created on or after that date; but, so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken on or after that date or which are renewed by agreement (whether expressed or implied) on or after that date.

Cf. Occupiers' Liability Act 1957, s. 3 (U.K.)

6. Contribution between landlord and tenant as joint tortfeasors---

(1) Where a landlord is the occupier of any part of any premises that is used by a tenant, and damage is suffered by a visitor to that part of the premises as a result of the fault of the landlord and of the tenant, and the tenant would, if sued, have been liable to the visitor in respect of the damage, the landlord shall have the same right to recover contribution, under paragraph (c) of subsection (1) of section 17 of the Law Reform Act 1936, from the tenant as if the tenant were a joint occupier of that part of the premises.

(2) Where a tenant is the occupier of any part of any premises, and damage is suffered by a visitor to that part of the premises as a result of the fault of the tenant and of the landlord, and the landlord would, if sued, have been liable to the visitor in respect of the damage, the tenant shall have the same right to recover contribution, under paragraph (c) of subsection (1) of section 17 of the Law Reform Act 1936, from the landlord as if the landlord were a joint occupier of that part of the premises.

(3) For the purposes of this section---
"Landlord" includes both an immediate and a superior landlord:
"Tenant" includes a person occupying premises under a statutory tenancy which does not in law amount to a tenancy, or under any contract conferring a right of occupation; and also includes a subtenant.

7. Occupier's duty to contractual visitors--(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred on them by contract with a person occupying or having control of the premises, the duty he owes them, in his capacity as occupier, in respect of dangers due to the state of the premises or to things done or omitted to be done on them shall be the common duty of care, except so far as a contrary intention is expressed in the contract; and the provisions of subsections (2) to (8) of section 4 of this Act shall apply accordingly.

(2) In determining whether in any such case the occupier has discharged the common duty of care, so far as it is applicable, the existence and nature of the contract shall be included in the circumstances to which regard is to be had under section 4 of this Act.

(3) Subject to the provisions of section 9 of this Act, this section shall apply to fixed and movable structures as it applies to premises.

(4) This section does not apply to contracts entered into before the commencement of this Act.

Cf. Occupiers' Liability Act 1957, s. 5 (1), (2), (4) (U.K.)

8. Landlord's liability in virtue of obligation to repair---

(1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission but without any contract.

(2) Where premises are occupied under a subtenancy, subsection (1) of this section shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the subtenancy, and for that purpose any obligation to the occupier which the subtenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a subtenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully

on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way.

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from his section.

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy; and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation; and "landlord" shall be construed accordingly.

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

Cf. Occupiers' Liability Act 1957, s. 4 (U.K.)

9. Act not to apply to certain contracts of hire or carriage, etc.---

This Act shall not apply to the obligations of any person under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft, or other means of transport, or under or by virtue of any contract of bailment.

Cf. Occupiers' Liability Act 1957, s. 5 (3) (U.K.)

10. Act to bind the Crown---

This Act shall bind the Crown.

Cf. Occupiers' Liability Act 1957, s. 6 (U.K.)

This Act is administered in the Department of Justice.

# APPENDIX D

## SELECTIONS FROM "RESTATEMENT OF THE LAW OF TORTS 2d" (1965)

s.333 General Rule

Except as stated in ss. 334-339, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care

(a) to put the land in a condition reasonably safe for their reception, or

(b) to carry on his activities so as not to endanger them.

s.334 Activities Highly Dangerous to Constant Trespassers on Limited Area

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

s.335 Artificial Conditions Highly Dangerous to constant Trespassers on Limited Area

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if

(a) the condition
  (i) is one which the possessor has created or maintains and
  (ii) is, to his knowledge, likely to cause death or seriously bodily harm to such trespassers and
  (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and

(b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

s.336 Activities Dangerous to Known Trespassers

A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.

s.337 Artificial Conditions Highly Dangerous to Known Trespassers

A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if

(a) the possessor knows or has reason to know of their presence in dangerous proximity to the conditions, and

(b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved.

s.338 Controllable Forces Dangerous to Known Trespassers

A possessor of land who is in immediate control of a force, and knows or has reason to know of the presence of trespassers in dangerous proximity to it, is subject to liability for physical harm thereby caused to them by his failure to exercise reasonable care

(a) so to control the force as to prevent it from doing harm to them, or

(b) to give a warning which is reasonably adequate to enable them to protect themselves.

s.339 Artificial Conditions Highly Dangerous to Trespassing Children

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) The children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

# APPENDIX E

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