In relation to 'character' in the second exception the cases do not draw the distinction, drawn in the instant case, between evidence of character which is relevant to the issue, and evidence of character going purely to a witness's credit. It is true that early cases upon the proviso, such as *R. v. Rouse*[12] and *R. v. Bridgwater*,[13] indicated that denials of prosecution evidence, and allegations that the prosecution's evidence is fabricated, should not be regarded as involving imputations upon the character of the prosecution's witnesses. And in *R. v. Preston*[14] it was said that unless the questions asked of a prosecution witness went right outside the issues in the case, and were solely directed to his credit, they could not amount to 'imputations on character' within the meaning of proviso (ii). This is, of course, consistent with the High Court's present interpretation of 'bad character' in the beginning of proviso (e). But later cases on proviso (ii), such as *R. v. Hudson*[15] and *Curwood v. R.*,[16] have rejected this interpretation in favour of one based on 'ordinary and natural meaning'. The result is that any questions asked of a prosecution witness (apart from a few special cases)[17] which reflect on the witness's good character are treated as imputations on his character, even if they are plainly relevant to the issue of guilt.[18]

There is thus some confusion and one can perhaps hope that a new appraisal of the interpretation of exception (ii) may be made, and that the much criticized decision in *Curwood v. R.*[19] might be reconsidered.

In the result, the High Court considered that those questions which involved bad character, but which had some aspect of relevancy, were permissible, while those that could not be considered relevant were improper; these latter, however, though not permissible, did not give rise to such a miscarriage of justice as to justify the Court exercising its discretion in A's favour. Consequently, the application for special leave was refused.

D. GRAHAM

THE COMMISSIONER FOR RAILWAYS (N.S.W.) v. CARDY[1]

Occupier's liability—Licensees—Duty to trespassers

The Commissioner for Railways (N.S.W.) v. Cardy[1] is a most important case in the law of torts. Its more immediate effects concern the duty of care owed to trespassers, but it is by no means true to say that this part of the law has been left very clear: similarly, the effect that the decision will have upon the law of occupier's liability as a whole is very uncertain.

Whereas the tort of negligence has not been worked out until recently, the law of occupier's liability was well settled by the last part of the nineteenth century. It is therefore not surprising that, instead of the occupier's duty being couched in wide terms, using the criterion of reasonable care, his liability depends upon the application of a number of strict tests; the particular test that is to be applied depends upon whether the injured person is an invitee, a licensee or a trespasser. A licensee is a person who enters with the leave of the owner. If he and the

[12] [1904] 1 K.B. 184. [13] [1905] 1 K.B. 131. [14] [1909] 1 K.B. 568.
[15] [1912] 2 K.B. 464. [16] (1944) 69 C.L.R. 561.
[17] *E.g. R. v. Turner* [1944] 1 K.B. 463.
[18] But *cf. R. v. Brown* [1960] V.R. 382. [19] *Supra*, n. 16.
[1] (1960) 34 A.L.J.R. 134. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.

owner also have a common interest he will be an invitee: what is a common interest is not easy to determine, but probably some pecuniary relationship is required. But if the owner's leave has not been obtained, the entrant is a trespasser. For each of these categories, there is a separate test. Towards an invitee the owner must use reasonable care to prevent damage from unusual danger, provided that the invitee does not have knowledge of the danger. It is important to note that apart from the proviso this test is in practice one of reasonable care. If the entrant is a licensee, the owner need only warn him of dangerous hidden situation of which the owner knows or has special cause to know. In two respects, this is less onerous than a general duty to take reasonable care: first, the danger must be a hidden one or else the injured licensee has no claim; secondly, the duty of care only extends to dangers of which the occupier knows or has special cause to know. It was soon accepted that towards a trespasser, the third class of entrant, the owner has no duty of care, although he cannot set traps.

These strict formulae represent the practical approach of English law. For all of them the justification can be found that in particular circumstances it would be unjust to make the owner liable in negligence. They represent solutions to problems of social responsibility. Thus, it is reasonable that a person who has mere permission to enter cannot expect that the owner must search the premises for traps and dangers. Similarly, a trespasser cannot expect that once on the land, even to the knowledge of the owner, he is entitled to require that the owner take the same steps with regard to dangerous premises as he would for a person who enters with permission. This does not mean that he is, to quote Salmond, '*caput lupinum*' and, therefore, loses all protection: it only means that he cannot insist on the occupier taking more than limited precautions. Because of this strict rule, hard cases have necessarily arisen. It is not surprising that the harshest cases, which have caused the most discontent, have concerned children-trespassers. For a child has a less clear sense of what is right or wrong, he is also perhaps more tempted to trespass, and as a child he is better able to excite sympathy. It is fair to say that the strict rules above were thrown out of joint by the child-trespasser.

Two ways were found out of the difficulty. The first makes use of a legal principle quite unconnected with the law of occupier's liability. If the injury is not caused by the condition of the premises, but by negligent activity by the owner, the fact that he is the owner will not save him from liability in negligence. The second way of increasing the occupier's liability is by promoting a trespasser to the class of licensees, so that a higher duty of care can be applied: for instance, if wandering children are tolerated, or if only half-hearted attempts have been made to keep them off, or even where insufficient trouble has been taken to keep them off, then the trespassers are found to be licensees, and the duty of the occupier becomes higher.

In *The Commissioner for Railways (N.S.W.) v. Cardy,* these were the facts. A boy aged fourteen trespassed upon railway land. He was barefooted, and when he was climbing over a tip on the land, his feet sank down into hot smouldering ashes. A path which passed close to the tip was used by the public for crossing the land. From time to time these pedestrians would be warned off the land, but this was fairly rare. Sometimes the public, particularly children, would be seen on the tip itself, and if a railway officer was present he would order them away.

The trial judge refused to hold that there was no evidence to support a finding that the plaintiff was on the land as a licensee. The jury eventually found for the plaintiff, and there was an appeal to the New South Wales Supreme Court, which was dismissed,[2] and there was now a further appeal to the High Court. The appeal was dismissed, Menzies J. dissenting on the ground that there was no evidence to support the finding that the boy was on the dump as a licensee. He considered that the only issue revealed in the pleadings was whether there was a breach of duty to the plaintiff as a licensee, and that as the old system of pleadings had not been displaced in New South Wales, this was an end to the matter.[3] In His Honour's opinion, the children were certainly not on the dump as licensees: he echoed the words of the House of Lords in *Edwards v. Railway Executive*[4] that assent was not lightly to be inferred.

McTiernan J. took a different view.[5] Of the majority judges he alone followed what might be called the standard approach to these questions, as outlined above. He considered that there was in fact evidence to support the jury's finding that the plaintiff was on the tip as a licensee, particularly since the heap of ashes and rubbish could be an allurement to a boy of that age. If he was a licensee, there was clearly a breach of duty towards him.

The three other majority judges each adopted a view of the law that was different from the accepted approach, as set out above. Furthermore, each of the learned judges adopted a view different from those of his brothers.

Dixon C.J. began by stressing that the foundation of the principle on which a licensor's liability was erected was his own voluntary act in giving his consent. He considered that in recent cases this principle had not been looked to, and that not merely were licences being implied, but they were being imputed in such a way that the licence became merely fictional. It could be said that the course of development fell into several phases in His Honour's opinion. First, there were the cases which lead up to *Excelsior Wire Rope Co. v. Callan*,[6] which include the House of Lords' decisions, *Cooke v. Midland Great Western Railway of Ireland*[7] and *Lowery v. Walker*,[8] where, although the owner of premises resented the trespassing, and had shown this resentment, great trouble was nevertheless taken to find that an implied licence could be spelled out. The second phase would be complete with the realization that the licence can often be based on a consent which is fictional. In the words of a most learned past Lord Chief Justice, Lord Goddard, 'Now, to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it'.[9] It appeared to Dixon C.J. that, at this stage, the want of a satisfactory rationalization had caused great confusion, and

[2] *Cardy v. Commissioner for Railways (N.S.W.)* [1959] 59 S.R. (N.S.W.) 230; 76 W.N. (N.S.W.) 166.

[3] *The Commissioner for Railways (N.S.W.) v. Cardy* (1960) 34 A.L.J.R. 134, 146. On this procedural question the views of Windeyer J., at p. 150, and Dixon C.J., at p. 138, may be compared. The Chief Justice decided after hesitation that a new trial should not be directed, despite the fact that the pleadings did not set in issue what he considered the vital matter, since 'a new trial is not granted where justice does not require it', and in the present case the liability of the Commissioner was satisfactorily made out.

[4] [1952] A.C. 737.

[5] *The Commissioner for Railways (N.S.W.) v. Cardy* (1960) 34 A.L.J.R. 134, 138, 139.

[6] [1930] A.C. 404.

[7] [1909] A.C. 229.

[8] [1911] A.C. 10.

[9] *Edwards v. Railway Executive* [1952] A.C. 737, 747.

much dissatisfaction existed as to the state of the law.[10] Therefore, in order to confine the duties of licensors to its true province whilst yet taking account of the change in the law over the last half century, the Chief Justice put forward a restatement of the duty to trespassers:

> The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognizes that nevertheless 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.[11]

First, it should be observed that the occupier must have some knowledge that trespasses are taking place. Secondly, the phrase describing the type of peril contemplated is ambiguous ('. . . and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence'). Thirdly, the peril must be an unusual one.

The difference between the views of Dixon C.J. and Fullagar J. is very great, and it is no less important in that the tests they set out will generally lead to the same result. Throughout his judgment the learned Chief Justice limits himself to tests of the type which have been used for the last century in the law of occupier's liability; even when he is rephrasing the law this is done by means of a formula, not a simple test based on the duty to take reasonable care, and he does not so much as mention *Donoghue v. Stevenson*.[12] The result is less a rationalizing of the law of occupier's liability than a remoulding of one part of it.

With Fullagar J. it is different. After discussing the difficulties of reconciling *Cooke's* case,[13] the *Addie Collieries* case,[14] and *Excelsior Wire Rope Works Ltd v. Callan*,[15] His Honour stated that it was of still greater importance to remember that a little more than two years after the *Addie Collieries* case the House of Lords decided the leading case of *Donoghue v. Stevenson*, which 'in a sense reoriented the whole law of negligence, and left perhaps few cases which went to the root of that subject and which were not liable to be re-examined and tested in the light of it'.[16] Therefore, he went on to hold, although the plaintiff in the present case could not be a licensee in the proper sense of the term, as no leave had been given, yet there are circumstances where the occupier, in addition to being an occupier, stands in some other relation to the entrant. As has been mentioned above, this principle has in the past only been made use of where the occupier acted negligently after the trespasser's entry, or continued the action during his entry, and caused damage to the trespasser: such a duty would, of course, not concern the rules of occupier's liability. Fullagar J., however, in the present judgment, now extends this formula to cover cases which properly fall within the principles concerning duties with regard to premises, where the occupier's liability rules should abrogate the application of general law principles of negligence. It should be noted that he was alone in adopting

[10] *The Commissioner for Railways (N.S.W.) v. Cardy* (1960) 34 A.L.J.R. 134, 137.
[11] *Loc. cit.* [12] [1932] A.C. 562.
[13] [1909] A.C. 229. [14] [1929] A.C. 358.
[15] [1930] A.C. 404.
[16] *The Commissioner for Railways (N.S.W.) v. Cardy* (1960) 34 A.L.J.R. 134, 140.

this approach. In His Honour's eyes, such a breach of duty could arise in circumstances various and manifold: so far as trespassers were concerned, the question of duty and breach generally arose (and perhaps could only arise) where the occupier or his servants knew that a trespasser was on the land, or that trespassers were in the habit of entering upon the land, and in a high proportion of cases the plaintiff trespasser was a child. The fact that the plaintiff was a trespasser would itself be a relevant factor, as also would be the seriousness of the risk and the difficulty of taking precautions. But it would be hardly possible to classify all the relevant factors.[17]

Windeyer J., too, came to the conclusion that the state of the authorities was not satisfactory. He considered that many of the cases could not depend upon an implication of consent, for the facts showed that consent, even if asked for, would have been withheld. His Honour expressed himself very lucidly:

> The time has come to discard this fictional sense; for in cases like the present the liability of the defendant does not in true principle depend upon determining as the first and critical question whether or not the plaintiff was a trespasser. The true question is rather has he been adopted by the defendant as a neighbour?[18]

For the purposes of convenience, due to the restricted issue in the pleadings, this could be expressed in the conventional fictional basis; that is, that there was evidence to support a finding that the plaintiff was a licensee at the place of injury, and that there was a breach of duty to him.

By his use of the word 'neighbour', it could be thought that Windeyer J. followed Fullagar J. in setting up a broad *Donoghue v. Stevenson* duty which would extend to this type of case. However, the excerpt above must be read in the light of what Windeyer J. had said before,[19] where he stated what the duty was which was owed to trespassers as 'neighbours'. Like Dixon C.J., His Honour set out a specific formula, although it is not the same as that of the Chief Justice. His Honour considered that the requisite duty was, in appropriate circumstances which include the likelihood of people coming there, to warn persons coming upon premises of hidden dangers they may encounter there, when those dangers are not natural features of the land but arise from conditions created by the occupier.[20]

The important qualification in the last clause, that the dangers be non-natural ones, recalls the more ambiguous term of the Chief Justice, referred to earlier; '. . . and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence'. It is possible that the Chief Justice intends the same limitation.

It also must be noticed that Windeyer J. speaks only of a duty to warn; this must be noticed because such a duty would be fulfilled in cases where a warning would not discharge a more general duty of care. His Honour did not claim that there were no authorities against his views, but he considered that owing to the confusion of authorities he could concern himself more with *dicta* that supported the existence of a duty to warn. If it is remembered that a warning may in some cases

[17] *Ibid.* 143. [18] *Ibid.* 154. [19] *Ibid.* 152-153. [20] *Loc. cit.*

discharge a wider duty of care, then some of the *dicta* His Honour cited may be regarded as ambiguous and compatible with the types of duty indicated by Dixon C.J. and Fullagar J.; for example, the *dicta* of Bankes L.J., in *Kimber's* case,[21] and of Denning L.J., in *A. C. Billings and Sons v. Riden;*[22] also, the *dicta* in *Bird v. Holbrook*[23] and *Ilott v. Wilkes*[24] may be explicable on a different principle.

In short, it will be seen that in the last three judgments discussed, views of the law were put forward different from what might be called the standard approach. Although the two remaining judges adopted the standard approach, their attitude is not clear due to a complicating factor, the pleadings. However, since the other three judgments express the careful reasoning of a majority of the High Court, it is submitted that the law has been changed.

It appears, first, that to be a licensee an entrant must in fact have the assent of the owner; this can be given expressly, it can be given by implication, but it will not be imputed to the occupier when he has not given it.

Secondly, the duty of care owing to trespassers is increased. As before, traps cannot be set and if a trespasser is present the owner must not act negligently towards him. But if the presence of trespassers is likely and there is a hidden danger (Windeyer J.) or an unlikely danger (Dixon C.J.) which arises from a condition created by the occupier, then there is a duty of care (according to Windeyer J., a duty to warn only). This is now the minimum duty owed to trespassers, and according to Fullagar J. the duty is much higher. Whether a duty will be imposed which is as high as that advocated by Fullagar J. will depend upon future authority.

It is submitted that the law has not been changed to a great extent by the adoption of the proposition above. The rephrasing of the duty to trespassers will not in practice increase the duties of the owner of premises much, if at all, when it is remembered how extensive had been the use of fictions to put an entrant into the higher ranking category of licensees. However, the previous use of fictions was more concerned with the trespasses of children than those of adults, for with children the temptation was greater to take a lenient view. But with the proposed formulation it will be less practicable to distinguish between children and adults, and this will be to the benefit of adults.

The final question is, to what extent, if any, *The Commissioner for Railways (N.S.W.) v. Cardy* will affect the law of occupier's liability generally. For the time being this can only be a matter of speculation. It is true that some of the *dicta* of Fullagar J. leave a pathway open,[25] but His Honour seems to accept elsewhere that there exist different formulae for ascertaining the duty to invitees and licensees. Nor can anything specific be pointed to in the other judgments which foretells a change. Probably *Cardy's* case may be regarded as merely dealing with one specific area of the law where the state of authorities could be considered unsatisfactory.

I. C. F. SPRY

[21] *Kimber v. Gas Light and Coke Co.* [1918] 1 K.B. 439.
[22] [1957] 1 Q.B. 46.
[23] (1828) 4 Bing. 628.
[24] (1820) 3 B. & Ald. 304.
[25] *The Commissioner for Railways (N.S.W.) v. Cardy* (1960) 34 A.L.J.R. 134, 140, as to the importance of *Donoghue v. Stevenson.*