OCCUPIERS' LIABILITY LAW

Some Developments and Criticism

By M. C. ATKINSON*

It is now almost twelve years since the inception of the United Kingdom Occupiers' Liability Act,[1] and sixteen years since the presenting of the Law Reform Committee Third Report[2] on the need for statutory reform. This is a reasonable trial period and one should now ask what the Australian jurisdictions propose to do. The purpose of this article is to help counter the view that the common law in Australia is satisfactory as it is and that therefore nothing need be done. This aim will be pursued by an examination of liability criteria applied for each class of entrant together with those developments in the case law seeking to avoid or modify these. Although this approach will highlight only one area of dissatisfaction,[3] it is evident that any argument for retaining present occupiers' principles must fall within this area.

A The Rationale of a Different Treatment of Classes of Entrant

Most law students appreciate how closely Lord Atkin's generalized duty of care in *Donoghue* v. *Stevenson* is derived from the statement of Lord Esher in *Heaven* v. *Pender*[4] and also that Lord Esher's concern in that case was to present the occupier's liability as merely one instance of a broader liability formula, whereas his fellow judges were content to extend the occupier's duty to the supply of a chattel. Although both Lord Atkin and Lord Esher were concerned primarily with the conditions giving rise to a general tort duty and not to the standard of care, it nevertheless seems strange that neither should try to explain why the precise formula for discharge of the occupier's duty should not give way to the 'reasonable

* Lecturer, Law School, University of Tasmania. The author wishes to thank Michael Tate, LL.B. (Hons.), Commonwealth Scholar 1968, for research assistance in the preparation of this article, and Harold Luntz, Senior Lecturer at Melbourne University Law School, for helpful criticism.

1 Occupiers' Liability Act, 1957; followed in Scotland, with important variations, by the Occupiers' Liability (Scotland) Act, 1960, and in New Zealand by the Occupiers' Liability Act, 1962. Notes on the legislation include Payne, (1958) 21 *M.L.R.* 359; [1957] *Current Law Statutes* 31; [1960] *Current Law Statutes* 30;

2 *Cmd.* 9305. Noted by Heuston, (1955) 18 *M.L.R.* 271; Odgers, [1955] *C.L.J.* 1, [1957] *C.L.J.* 39; Gower (1956) *M.L.R.* 532; Newark, (1954) 17 *M.L.R.* 102.

3 Another important area is in the classification of entrants. The drastic modifications made by English Courts to equate the invitee and licensee duties have been said to result from their earlier classification of visitors on public recreation reserves as mere licensees: Fleming, *Law of Torts*, 3rd ed., p. 428.

4 (1883) 11 Q.B.D. 503, 509.

care in all the circumstances' that would satisfy the synthesized general duty. So far as Lord Atkin was concerned, it was not just a deference to the earlier cases that required the special standard. Its justification appears in his 1928 decision in *Coleshill* v. *Manchester Corporation* where, after conceding that the law compels distinctions which are 'subtle and apt to be confused,' he said,

> On the other hand they correspond to real differences in the nature of the user of property and in the reasonable claims to protection by those who are permitted such use.[5]

The same view has been put more recently by the then Mr. Kenneth Diplock in his *Minority Report* appended to the 1954 Law Reform Committee *Second Report* (U.K.), where he said,

> However imperfect in theory, the practical compromise which the common law has evolved of dividing persons who enter on land into these two categories seems to me still to work substantial justice.[6]

The plausibility of this viewpoint is hard to deny. The contractee entrant has given the occupier enforceable rights against himself, and perhaps been placed under a duty to be on the premises; the invitee similarly comes on for the occupier's benefit whilst the licensee comes merely for his own; the trespasser is an intruder and a nuisance at best. Why should their entitlement not be different? But the fact that one can concede this view and retain the principle of an individuated treatment of classes without agreeing with Lord Atkin and Diplock L.J., is easily overlooked, for what is in question is whether the nature of these classes bears any intelligible relation to their treatment. For instance, it is arguable that the substitution of a *Donoghue* v. *Stevenson* duty would allow not less but more flexible discrimination by allowing all the circumstances, including unusualness of the danger, trap, knowledge by either party *etc.*, to affect the issue of breach of duty. But it is hardly necessary to pursue such a difficult question of methodology in order to put a case for reform; the contention of this paper is that, both in their initiation and subsequent operation these class duties are so capricious and unsatisfactory that it is hardly surprising that neither Lord Atkin nor Mr. Kenneth Diplock should have tried to demonstrate as distinct from assert their value. Since the hub of this question is the distinctive treatment accorded invitees and licensees, this will be examined in some detail.

B The Duty to the Invitee

The fact that Willes J. is now regarded as the father of the liability to an invitee derives less from the fact that he first proposed a dis-

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5 [1928] 1 K.B. 776, 791.

6 *Cmd.* 9305, p. 44.

tinction between invitees and others[7] than that he had the confidence to propound a sophisticated formula for the occupier's liability to them. With respect to the visitor who comes 'on lawful business,' Willes J. said,

> . . . 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 . . .[8]

This decision in 1866 came at the most critical period of development in the law of torts. The idea of a negligence liability for defective products was still in question after *Langridge* v. *Levy*[9] and *Winterbottom* v. *Wright.*[10] The final endorsement of such a duty, by a sophistical rationalization in *George* v. *Skivington*[11] in 1869, was in fact carried through by a Bench three of the four members of which heard and affirmed the appeal from Willes J. and the Common Pleas in the Exchequer Chamber.[12] Two features appear to characterise the progressive decisions of this period. The first is a readiness to promote a fault liability outside traditional areas, the second is the deference that had to be paid to the floodgates argument in order to get such a liability on its feet. It is a plausible conjecture that in 1866 almost any dogmatic pronouncement of liability criteria might have been attached to a recognised class of plaintiffs if substantial judicial controls were written into it. It is not so surprising then, that no judge either in the Common Pleas or Exchequer Chamber should have questioned this somewhat complex innovation. The question arises what they might have said, both then and now, if called upon to justify it in detail.

(1) *The Unusual Danger*

The first question is why the invitee is to be protected only from an unusual danger. Is it because the invitee is expected to guard himself against such dangers as he is presumably accustomed to? If so, then it appears he is barred for what is in effect a case of contributory fault based on a highly artificial doctrine of notice. It is more sweeping than the *scienti non fit injuria* that arises from his actual knowledge of the danger, because he is treated as if he is aware of and can guard against the risk of dangers usual to his work however unreasonable this may be in the circumstances. So *Horton's* case[13] is in effect double-barrelled: not only does the plaintiff's know-

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7 Such a division was apparent after *Southcote* v. *Stanley* (1856) 1 H. & N. 247; *Chapman* v. *Rothwell* (1858) E. B. & E. 168 and the review of cases and conclusions by Lord Chief Baron Pigot in *Sullivan* v. *Waters* in 14 Ir. C.L.R. 460.

8 (1866) L.R. 1 C.P. 274, 288.

9 (1837) 2 M. & W. 519.

10 (1842) 10 M. & W. 109.

11 (1869) L.R. 5 Exch. 1.

12 (1867) L.R. 2 C.P. 311.

13 *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737.

ledge bar his recovery, but his lack of knowledge will not remove the bar if the type of danger is not uncommon to his calling; and this despite the occupier's negligence in failing to avert foreseeable injury. Viewing unusual danger in this light, one might decry the survival of such an artificial doctrine of notice where the courts have managed to outflank the knowledge bar in *Horton's* case when in fact the invitee's conduct was less than *volenti.*[14] However, because the House of Lords in *Horton's* case ruled that a knowledge by the invitee of the danger does not render it usual, it is nowadays impossible to regard it as a factor in any way indicative of the invitee's fault. On the other hand, 'unusual danger' is no more plausible as an index of the occupier's lack of fault; first, because it is unclear whether he must know that the danger is unusual to a type of invitee; secondly, because it could be only one factor among others relevant to the reasonableness of his conduct.

An interesting variant on the unusual danger doctrine, and one subject to the same objections in principle, can be seen in a recommendation by the Law Reform Committee itself. In order to give the courts 'greater freedom to decide each case according to its real merits,'[15] the Committee favoured omission of any reference to unusual danger in future. However, they recommended adoption of a distinct bar based on a test of a 'normal' use of the premises. The occupier might be liable to a window-cleaner, so they said, if the latter was injured by a defective staircase, but not if injured by a defective ledge or handhold on the exterior of the premises, for such use was not normal.[16] Although arguably an improvement on the previous law, the proposal is surprising in view of the Committee's rejection of the technical bars in unusual dangers, hidden traps and the invitee's knowledge. Whether or not the use be normal does not lessen the likelihood of injury resulting from the occupier's neglect, nor does it lessen a dependence the cleaner might reasonably have in the occupier's co-operation for his safety. It is normal both to employ window-cleaners and that they should derive support from the structure. If the occupier has reason to believe the ledge is faulty then he should be left with the responsibility either to repair it or take reasonable steps to warn the invitee. The proposal is bad not just because the occupier is the only person in a position to choose between the expense or trouble involved in maintaining the safe condition of his premises and insuring against liability in lieu; it may well leave a tradesman working on the premises (to take the most important class of invitee) without any common law remedy for injury due to their defective condition, despite this condition

14 *Commissioner for Railways* (N.S.W.) v. *Anderson* (1961) 105 C.L.R. 42; *Edmonds* v. *Commonwealth of Australia* (1961) 78 W.N. (N.S.W.) 334.
15 *Cmd.* 9305, p. 32.
16 *Ibid.*, p. 33. Fleming appears to support this view: *Law of Torts*, 3rd ed., pp. 424, 425.

being the result of neglect.[17] It remains an instructive example of the superficial appeal of the type of technical bar under consideration, plausible because it is based on the occupier's being allowed to rely on the expert's skill, but superficial in defining the relation this reliance should bear to liability;[18] and particularly unsatisfactory in the context of apportionment provisions for contributory negligence.

The Act did not clearly incorporate the recommendation that no duty attach to a non-normal user. It did however, leave an ambiguity in that the occupier could 'in proper cases' expect tradesmen to guard against 'special risks ordinarily incident to'[19] their calling. It is a matter of note that one of the few major cases concerning the Act's interpretation saw a difference of opinion on whether, pursuant to the above statement, the occupier owed any duty of care to chimney-sweeps who, ignoring warnings, were overcome by fumes and killed. In *Roles* v. *Nathan*[20] Lord Denning M.R. ruled that no duty arose. However, both Harman L.J. and Pearson L.J. disagreed and based their judgments on a consideration whether the duty had been discharged. Lord Denning's view is in fact a reversion to the approach underlying the discarded doctrines, and it seems a pity that the Act should allow it. The unwisdom of this view is suggested by two matters relevant in that case. First, that it is not always realistic to explain such an abridged duty by reference to what may seem onerous for the 'ordinary householder.'[21] Secondly, not all those who exercise a calling can be assumed to be expert in the risks of their work. Despite doing this work all their lives, the facts showed that the adult sweeps did not appreciate the danger of gassing, and no defence of *volenti*[22] was argued. Consistently, Pearson L.J. dissented on the ground that the warnings given were not, in the circumstances, a sufficient discharge of the duty.

Without accepting all the trappings of a modern enterprise liability, it is possible to make out a strong case against the unusual danger doctrine where the invitee is a mere consumer on the premises of a commercial or industrial enterprise. In a Canadian decision,

17 *Wilson* v. *Tyneside Window Cleaning Co.* [1958] 2 Q.B. 110.

18 The Committee's proposal was an effective retention of the unusual danger bar for invitees who happen to be employees of a contractor. For the dangers typically associated with a tradesman's special use of premises were necessarily usual for him (*Christmas* v. *General Cleaning Contractors* [1952] 1 K.B. 141; *Bates* v. *Parker* [1953] 2 Q.B. 231). The proposal is in some ways less rational than the doctrine it would displace, for the bar arises with an unusual use of premises, however unusual the danger be to that use, and irrespective of the occupier's awareness of such danger.

19 Section 2 (3).

20 [1963] 1 W.L.R. 1117.

21 Fleming, *Law of Torts,* 3rd ed., pp. 424, 425. In the present case the defendant occupied the Manchester Assembly Rooms, a complex heated by a boiler with a 70 ft. horizontal flue and an 80 ft. chimney. After experiencing ventilation and lighting troubles, he called in boiler engineers for advice, and sweeps to clean out the flue. One of the engineers advised that it would be extremely dangerous to permit sweeps to work in the boiler room when the fires were lit.

22 Section 2 (5).

Rafuse v. *T. Eaton Co. (Martimes) Ltd.*,[23] a customer was injured by falling over a baby stroller in the aisle of the defendant's store. McDonald J. dismissed the action on the ground that the stroller did not represent an unusual danger. The basis of his reasoning was that the presence of such strollers was very common in such a store, so that the danger must be regarded as usual. The case well illustrates the paradox that results where the danger is 'usual' because of its incidence or frequency on either these premises or this kind of premises. The repetition of the hazard establishes the occupier's immunity from a duty to take reasonable care. Baby strollers may be an unfortunate example, but the reasoning is clear if unsatisfactory; the occupier who takes precautions to lessen the incidence of danger is likely to be found liable by the odd accident, just because the danger is now unusual.[24] In these circumstances the law puts a premium on increasing risk and penalizes the occupier for his efforts to prevent it.[25] One should, of course, be permitted to argue that the high incidence of strollers constitutes on the premises an unusual danger; but the law has carefully kept separate these ideas of an unusual danger and premises unusually dangerous.[26] It is in circumstances like the above that the unusual danger test would be intelligible only as a doctrine of constructive notice. In view of the ruling in *Horton's* case that the invitee's knowledge has no relation to the question, and in view of the widespread acceptance of apportionment for non-discriminate contributory fault, it loses even this explanation.

The capricious nature of the liability control implicit in the unusual danger doctrine is brought out by considering the possibility that Willes J. may have lacked any conception of its subsequent use in classifying kinds of danger. He in fact referred to 'unusual danger'[27] not 'an unusual danger,' and it is at least likely that he intended only a *degree* of danger somewhat beyond what one would expect in the usual intercourse of life, having regard to the rudimentary conditions that determined prevailing standards. This makes for a better tie-up with the phrase 'of which the occupier knows or ought to know'; for what the occupier should realise is that his premises harbour a risk

23 (1957) 11 D.L.R. (2nd) 773.

24 In *Diederichs* v. *Metropolitan Stores Ltd.* (1956) 6 D.L.R. (2nd) 751 a customer recovered for injuries sustained after tripping over a plastic toy that had fallen onto the floor of the defendant's shop, due to being carelessly piled on a counter. These cases are discussed in Harris, 'Some Trends in the Law of Occupiers' Liability,' (1963) 41 *Can.B.Rev.* 401.

25 The objection can be pressed further. If the danger is usual because it characterises particular premises then this is surely an excellent reason for imposing a duty of proper supervision. A similar paradox is found in *Rylands* v. *Fletcher*: The fact that such hazards as ammunition and chemical factories, nuclear power plants and mental asylums, are both necessary and natural to a modern society, is the very reason why individual neighbours should not subsidise them by meeting the cost of damage which results without fault.

26 The latter requiring something in the order of a high voltage power line, as in *Thompson* v. *Bankstown Municipality* (1953) 26 A.L.J.R. 610, or perhaps a railway train, as in *Commissioner for Railways* v. *McDermott* [1967] A.C. 169.

27 (1866) L.R. 1 C.P. 274, 288, 289.

beyond what might be considered normal. On this interpretation the synonym would be 'unreasonable.' This would not have jettisoned control of the jury, because the court would still assess their classification of the danger; the result would be no more peculiar than the duplication of judge and jury determinations on foreseeability of harm in ordinary negligence cases. Nor is this interpretation unrealistic because the standard of care was also phrased in the reasonableness formula; for the fact that the contributory negligence defence was written into the duty formula of *Indemaur* v. *Dames* does not show that it would not, in any case, have been a relevant defence.[28]

(2) *Scienti Non Fit Injuria*

As most torts lawyers are aware, the initially draconic doctrine established in *Horton's* case,[29] that a full realisation of the danger is a complete bar to liability, has been much reduced in subsequent cases. *Smith* v. *Austin Lifts*[30] removed any doubts about the subjective requirement in establishing the plaintiff's knowledge and understanding of the risk; *Commissioner for Railways* v. *Anderson*,[31] the leading Australian decision, shows that what is in theory a *scienter* doctrine is well-nigh impossible to make out unless the circumstances exhibit an apparent consent to risk the injury. The plaintiff hit his head in bending below a stationary beam in broad daylight, whilst coming onto railway premises to meet a train. He fell and injured the base of his spine. The High Court did not regard this as constituting a *Horton* situation because, as Menzies J., put it, 'to know of the bar is not the same thing as appreciating the danger of forgetting it.'[32] Presumably, no better warning would arise from a sign attached to the top of the beam, warning of the danger of forgetting the risk involved in negotiating it, for the High Court was in reality holding that no amount of warning would suffice in such circumstances; the danger could and should have been removed by the Commissioner for Railways.

The unsatisfactory nature of this sort of judicial reform is not just in its apparent lack of candour, but in the resulting uncertainty affecting occupiers and their lawful visitors. Presumably it is still possible to prove a constructive notice that will bring in *Horton's* case.[33] *Anderson's* case, in thus mitigating the notice doctrine, has in effect replaced it with a discretionary bar, because whether or not the notice was adequate may now depend more on circumstances of the relationship which engender sympathy for the plaintiff than on the clarity and effect of the warning. Would the result have been

28 *Butterfield* v. *Forrester* (1809) 11 East. 60.
29 *London Graving Dock* v. *Horton* [1951] A.C. 737.
30 [1959] 1 W.L.R. 100.
31 (1961) 105 C.L.R. 42.
32 *Ibid.*, p. 66.
33 *Eg., Black* v. *South Melbourne Corporation* [1965] A.L.R. 624.

the same, for instance, if the invitee was a salesman coming onto the premises of a private house-holder?

C THE DUTY TO THE LICENSEE

If the particular duty owed to invitees seems now to make sense only in a context in which a plaintiff's contributory negligence was always a bar, the corresponding duty to the licensee is even more of an historical accident. In *Indemaur* v. *Dames* Willes J. had endorsed and defined the duty to one who came 'on lawful business,' but was reluctant to venture further:

> It was also argued that the plaintiff was at best in the condition of a bare licencee or guest who it was argued, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him. See *Hounsell* v. *Smyth* 7 C.B. (N.S.) 731.[34]

Hardly a year had gone by before he was intimating a liability to this bare licensee, in a case which has subsequently been taken as the primary authority for this duty.[35] It is tempting to speculate that Willes J's confidence in proposing a further duty at this stage may have had something to do with the affirmation five days previously, in a strong Exchequer Chamber,[36] of the Common Pleas judgment in *Indemaur* v. *Dames*. *Gautret* v. *Edgerton* involved a demurrer that a declaration was defective for not alleging the relevant duty. In the course of so ruling, Willes J. listed a number of things that the declaration had not alleged as the basis for a duty, among them being that the intestate's death was due to '. . . any misrepresentation which might be equivalent to a trap.'[37] A little later, he said that, if the land at the time of the accident was in the same condition as when permission to use it was given, then,

> It would be necessary for the plaintiff, in order to make out a cause of action, to show that the intestate . . . did not know of the danger . . . but that the defendants did, when it might amount to a fraud or deception on their part.[38]

Keating J. also referred to the need to prove a trap.[39] The Law Times Report mentions neither fraud nor traps but the Law Reports, Common Pleas, of 1867 includes a passage which likened the liability to that of the transferor of a dangerous object, and continued,

> There must be something like fraud on the part of the giver before he can be made answerable . . . Every man is bound

34 (1866) L.R. 1 C.P. 274, 284. *Hounsell* v. *Smyth* disposed of the 'absurd' possibility that an owner who allowed another to walk over his land should have to fence off his cliff to protect him.
35 *Gautret* v. *Edgerton* (1867) 36 L.J.C.P. 191.
36 (1867) L.R. 2 C.P. 311.
37 (1867) 36 L.J.C.P. 191, 193.
38 *Ibid.*, p. 193.
39 *Ibid.*, p. 193.

> not wilfully to deceive others, or to do an act which may place them in danger.[40]

These passages support the view[41] that *Gautret* v. *Edgerton*, as an operation designed to rescue a further class of plaintiffs from the non-invitee residue of trespassers and others, could draw on no better doctrine than the action for deceit, an action which had already demonstrated its versatility in *Langridge* v. *Levy*[42] in 1837. The notion of a hidden trap was therefore relevant only to lend credibility to the allegation that the plaintiff was deceived. The same explanation is relevant to the limitation of the duty to the licensee expressed in the requirement of actual knowledge, as distinct from negligence in not knowing, of the presence of a hazard. For there seems to have been nothing more cogent in this division between invitees and licensees than that it was necessary to the conception of a deceit; if the occupier were merely careless in not knowing, there could be no basis for a claim of deceit, as *Derry* v. *Peek*[43] subsequently demonstrated.

When *Gautret* v. *Edgerton* is taken together with *Indemaur* v. *Dames*, it is hardly unfair to conclude that the basic structure of this complex area of tort law is virtually the sole responsibility of this one man. But the achievements of Willes J. in 1867 have diminished in the course of time; the retention of doctrines so associated with the action for deceit being an obvious anachronism at the present day.[44] As concessions necessary to extend protection to non-invitees, they serve no purpose where the action has been subsumed within the *Donoghue* v. *Stevenson* model and the breach of duty turns on a question of reasonable care. The courts have shown some readiness to do what they can; not much of the 'actual knowledge' requirement is now left after cases such as *Pearson* v. *Lambeth Borough Council*[45] and *Hawkins* v. *Coulsdon and Purley U.D.C.*[46] In addition, the resort to overriding duties and the doctrine of current activities have been no less important for rescuing licensees and invitees than for trespassers. It remains only to complete these processes by legislation along the lines of the English Act.

Apart from deceit, it is possible that the ready acceptance of *Gautret* v. *Edgerton* was facilitated by its theoretical affinity to the minimum duty then recognized by the common law, that owed to trespassers.

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40 (1867) L.R. 2 C.P.

41 Marsh, 'The History and Comparative Law of Licensees, Invitees and Trespassers,' (1953) 69 *L.Q.R.* 182, 359. The language of deceit has persisted: *Lipman* v. *Clendinnen* (1932) 46 C.L.R. 550, 565 *per* Dixon J.

42 (1837) 2 M. & W. 519; 4 M. & W. 337.

43 (1889) 14 App. Cas. 337.

44 Particularly objectionable is the requirement of actual knowledge of facts giving rise to a hidden trap. The paradox resulting from this doctrine is the premium it puts on occupiers not inspecting their premises; the licensee may recover against the one who takes precautions to inspect his premises, he cannot recover against one who never inspects: *Cmd.* 9305, p. 31.

45 [1950] 2 K.B. 353.

46 [1953] 1 W.L.R. 882; [1954] 1 Q.B. 319 (C.A.).

Even the latter was obscure for, when *Bird* v. *Holbrook*[47] in 1828 decided that one was liable in tort for setting a spring-gun to shoot a trespasser, it was apparently not possible to put this liability, even at such a late date, on any precedent other than 'common humanity' and 'Christian Principle.' To state a liability to licensees on the basis of an occupier's actual knowledge of a hidden trap was at first sight little different from this duty not to wilfully or recklessly injure a poacher. The broader protection for the licensee was in two features. First, that the duty included traps which the defendant became apprised of in the course of his occupation; secondly, that the trap need not be designed to injure the entrant; it was enough that it have this effect whatever its purpose. In the absence of a general negligence doctrine, the difference would not have seemed so great; if in the one case a trap was set deliberately to injure, at least in the other one knew of the presence of the visitor and the high probability of injury in the absence of warning.

To conclude this brief survey of the duty to a licensee, it seems that the only present day basis for his discriminate treatment comes from the vague sense of fairness that he should get less than the invitee because he comes on the premises for his own benefit whereas the latter comes on for the occupier's benefit. But even this does not exclude his entitlement to reasonable care in all the circumstances as a bare minimum. And so far as the chosen means of discrimination is concerned, there is little to suggest that a statutory limitation of damages (say 75% for the invitee and 50% for the licensee), absurd as it might seem, would in the long run be either less beneficial or less fair.

D Conditional Licences and Invitations

A somewhat startling protection for occupiers is evident in the Court of Appeal's ruling in *Ashdown* v. *Samuel Williams*,[48] that an occupier's liability can be excluded by a notice to that effect, provided he has taken reasonable steps to bring the notice to the attention of the lawful entrant. The theory is that the licence is conditional, and the Court of Appeal followed their previous decision in *Wilkie* v. *L.P.T.B.*,[49] which concerned a contractual licence to travel on a vehicle; the court taking the view that the lack of a contract or vehicle did not affect the principle involved. Since at least two[50] of the Lord Justices in *Ashdown's* case were members of the Law Reform Committee, which three years previously had endorsed this conception of a limited licence,[51] it must be assumed to have had

47 (1828) 4 Bing. 628.
48 [1957] 1 Q.B. 409. The decision appears to be endorsed in the Occupiers' Liability Act. Section 2 (1) provides that the occupier may exclude his duty 'by agreement or otherwise.'
49 [1947] 1 All E.R. 258.
50 Jenkins and Parker L.JJ.
51 *Cmd.* 9305, para. 78 (iii).

ample consideration. The decision nevertheless reflects an artificial view of the way a licensee or invitee status in practice arises. These classes are identified by the application of general tort doctrines and rarely, in the absence of a contract, are they dependent on the words of some explicit communication by the occupier. The decision defeats the very point of an occupier's liability which, it is submitted, should be variable if at all only through a formal contractual bargain. One wonders why it would not be professional negligence for a solicitor to fail to advise occupier clients to exhibit a 'No Duty' notice[52] prominently over every entrance way. Insurance companies are presumably well aware of *Ashdown's* case and realise that it does not promise a windfall by suggesting such notices for all occupiers subject to a public liability policy. For it should be only a matter of time and a little publicity before occupiers questioned the value of insurance against a liability that could never arise.

The limiting of a licence (or business use for an invitee) to certain boundaries of or activities on the premises must be taken seriously given the present common law division of entrants. But to attach a 'No Duty' condition to any licence is not so much the exercise of a non-contractual bargaining freedom as the attribution of a fictional trespasser status to one who is obviously not.[53] Even stranger is the application of the doctrine to positive negligent conduct by the occupier as was the case in *Ashdown* v. *Samuel Williams* itself. Presumably he can drive his car without care where such licensees are on his premises?

An interesting conjecture affecting licensees is the possible application of certain invitee principles for their benefit, where the latter principles are not derived from the status of the invitee as such. Most important would be the application of *Commissioner for Railways* v. *Anderson*[54] in its implication that an appellate court may rule that an obvious danger may nevertheless fail to carry an adequate warning. How that decision sidestepped *Horton's* case in a return to the original formula of *Indemaur* v. *Dames* is well known. What is conjectural is whether the adequacy of the warning, whether express or constructive, should be any less to protect a licensee against a trap than an invitee against an unusual danger. Would the plaintiff have recovered in *Anderson's* case as a licensee, assuming the unlikelihood that the beam constituted a trap? The point of this is that the traditional limiting of the licensor's duty to the provision of a warning can be sidestepped in the same way as

52 To be on the safe side he should add the usual incomprehensible-to-the-layman type of total exclusion condition. Once the plaintiff has been apprised that a notice affects her rights it matters not whether she should be expected to or does read it. This proposition, derived from a classic 'ticket case,' was affirmed in the present decision.

53 Since his resort to legal proceedings shows that he disregarded the condition governing his entry, the permission to enter must have been void.

54 (1961) 105 C.L.R. 42.

the notice bar to invitees established in *Horton's* case. Perhaps the licensor should, in order to provide adequate protection, avert a danger altogether, because otherwise the licensee might not fully appreciate 'the risk of forgetting it.' To avoid this result one would have to assume that a lesser warning to a licensee may suffice, *e.g.*, a warning that merely tells him to expect a danger.

The above conjecture is pointless if the licensee's knowledge of the danger would, in any case, defeat its classification as a trap. This depends upon whether the second doctrine from *Horton's* case is applicable; that is, can a trap—no less than an unusual danger—remain such despite the plaintiff's awareness of it? In *Fairman* v. *Perpetual Building Society*[55] there are dicta in the majority judgment which suggest that it cannot, and Lord Wrenbury undoubtedly takes this view. But *Fairman's* case was decided many years before *Horton's* case and there is no reason why the method of approach adopted in the latter might not be suited to the former. Of course, this would remove the last vestige of deceit from the liability, but that would seem no great loss.

E The Avoidance of Occupiers' Doctrines

If the above summary of the duties to invitees and licensees is by itself unconvincing as an argument for their replacement by a general tort duty, further support can be derived from established and recent judicial developments designed to achieve that end. These include three distinct ideas. The first is the extension given the general duty attached to particular acts of negligent misfeasance; the second is to treat the occupier as vicariously liable for the breach of a general tort duty by his servant; the third is a bold dismissal of the whole structure of occupiers' duties, by arguing that they are in any case either additional to, or merely factual applications of, a *Donoghue* v. *Stevenson* duty. These developments suggest that courts are becoming increasingly disenchanted with the special protections now afforded occupiers, quite apart from the nuisance value of having to work within a system of categories that has produced much complexity and uncertainty. The question of principle is perhaps best illustrated by comparing the position of a builder or contractor who may in effect occupy part of premises without being their tort 'occupier.' Although he generally has less control over the comings and goings of visitors and might often have less ability to determine the condition of an access route than the owner-occupier, he is placed under a more onerous (because general) duty, than the owner in occupation.[56] The fact that such a licensee owes an affirmative duty for static conditions

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55 [1923] A.C. 74.

56 *A. C. Billings* v. *Riden* [1943] A.C. 448. This paradox has been largely obscured by a tendency to treat the builder as the occupier. It has probably been removed altogether, although in the wrong way, by *Wheat* v. *Lacon*, *infra*, n. 116.

on this part of the premises is a blunt answer to the contemporary slogan that 'occupation of premises is not a ground of exemption from liability.' So long as the occupier's liability is distinguished from his servant's or licensee's by reference to doctrines which prevent the issue of reasonable care going to the jury, it cannot be anything else.

(1) *Current Activities*

Perhaps the best known device for evading occupier doctrines is the idea that they do not apply where the injury is a consequence of current activities on the premises. This has been described as a latter-day development resulting from a

> resuscitation of that pregnant distinction between misfeasance and nonfeasance which, found in some of the earlier occupier cases, had almost vanished into the limbo of forgotten things.[57]

The somewhat uneasy status of this exception is evident in a brief survey of the pre-1958 position, which concluded only that 'There is support for the view . . .'[58] that current activities are a matter for *Donoghue* v. *Stevenson.* But despite some uncertainty in its broader application, there has been no denying the application of the general tort duty in the simplest case, where the occupier personally injures the entrant by a particular act of negligent misfeasance. As Lord Somervell put it in *Perkowski* v. *Wellington Corporation,*

> If the occupier negligently drives his car into the licensee then the principle that the licensee must take the land as he finds it would clearly have no application.[59]

From the simple conception of a negligent act by the occupier or his servant, the idea developed that an undertaking might be negligent in a broader sense, where a specific act of negligent misfeasance was difficult to show. This is reflected in a modern tendency to describe the exception as one of current 'operations,' the overall operation might be negligent, if not any casual act it involved. The high-water mark of the current operations doctrine is probably the majority ruling by the Court of Appeal in *Videan* v. *British Transport Commission*[60]

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57 Fleming, *An Introduction to the Law of Torts,* p. 80. Among the early cases are *Gallagher* v. *Humphrey* (1862) L.T. 684, in which Coleridge C.J. referred to the 'superadded' negligence of the person granting the permission, and *Tebbutt* v. *Bristol Rlwy.* (1870) L.R. 6 Q.B. 73, in which a railway company was liable for a porter's negligence in wheeling luggage along the platform. Many cases concern the negligence of railway porters in leaving carriage doors open, *e.g., Thatcher* v. *G. W. Rlwy* (1893) 10 T.L.R. 13; *Toal* v. *N. B. Rlwy* [1908] A.C. 352; *Burns* v. *N. B. Rlwy.* [1914] S.C. 754; *Hare* v. *B.T.C.* [1956] 1 W.L.R. 250. These cases all concern an occupier's liability for the conduct of his servant, a feature which has given rise to an associated method for advancing *Donoghue* v. *Stevenson; infra* p. 97.

58 Payne, (1958) 21 *M.L.R.* 359, 367.

59 [1959] A.C. 53, 67. In *Chettle* v. *Denton* (1951) 95 *Sol. Jo.* 802, the defendant occupier was liable to a licensee in ordinary negligence for carelessly shooting him during a hunting expedition.

60 [1963] 2 Q.B. 650.

that the enterprise of running a railroad system brought the occupier into a *Donoghue* v. *Stevenson* liability. As Lord Denning described it,

> Whenever an occupier does things on land, whether he runs a moving staircase, or puts a bull into a field, or drives a railway engine or uses land as a cinder tip, or even digs a hole, he is conducting activities on the land . . .[61]

At least with railways, this approach has found acceptance in the High Court of Australia in a number of cases,[62] the need to prove a particular affirmative act of negligence being largely ignored. So much so that in *Cardy's Case* Fullagar J. was prompted to argue that *Donoghue* v. *Stevenson* could no longer be limited to activities because

> . . . neither in *Cook's Case* [1909] A.C. 229, *Callan's Case* [1930] A.C. 404 nor in *Mourton* v. *Poulter* [1930] 2 K.B. 183 was there any positive act of negligent misfeasance . . . the substance of the defendant's fault lay in an omission to take a reasonable precaution.[63]

A more recent discussion by the Privy Council similarly emphasizes the unreality of a recourse to the distinction at the 'operations' level. In *McDermott's* case[64] the plaintiff's initial fall was due to the condition of the track and its surrounds, although her injury occurred when the train wheels passed over her feet. Disregarding for the moment the fact that the Privy Council ruled that the general tort duty arose out of a narrower doctrine of 'inherently dangerous activity,' it is interesting to see how it disposed of a contention that only a licensee duty arose because it was really a static defect case. This contention, it thought, was

> too artificial and unrealistic to be acceptable. The positive operations and the static condition interact, and the grave danger is due to the combination of both.[65]

It went on to amplify that the railway operator's

> general duty . . . must include an obligation to keep the crossing itself in reasonably adequate condition . . . and that the breaches in question were breaches of this obligation.[66]

In other words, the evolution of the activity duty has reached a stage where any static defect which contributes to the risk of a potentially injurious operation carries its own *Donoghue* v. *Stevenson* duty, irrespective of *Indemaur* v. *Dames*. No doubt this would be reading too

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61 *Ibid.*, p. 667.
62 *Thompson* v. *Bankstown Municipality* (1952) 87 C.L.R. 623; *Railways Commissioner* (*N.S.W.*) v. *Hooper* (1954) 89 C.L.R. 486; *Rich* v. *Railways Commissioner* (*N.S.W.*)(1959) 101 C.L.R. 274; *Railways Commissioner* (*N.S.W.*) v. *Cardy* (1960) 104 C.L.R. 274.
63 (1960) 104 C.L.R. 274, 297-298.
64 [1967] A.C. 169.
65 *Ibid.*, p. 189.
66 *Ibid.*, p. 189.

much from *McDermott's* case, which failed to indicate the relationship between the railway operator's duty for an 'inherently dangerous activity' and the pre-existing and broader duty for activities simpliciter.[67] With regard to the latter it cited,[68] without explanatory comment, a dictum from *Quinlan's Case* to the effect that, if the plaintiff had there been a licensee, then the 'positive act' principle of *Gallagher* v. *Humphrey* would have applied. If that were so, why did it not apply here? Perhaps the implication is that an inherently dangerous activity will allow negligence in regard to conditions to merge with activities and colour the overall operation as negligent, but that the simpler activities doctrine has been put back into the 'positive act' stage of its development. One wonders why the Privy Council did not simply explain the railway operator's duty as an example of the duty in *Thompson* v. *Bankstown Municipality*,[69] so that a general tort duty could arise from injuries that did not result from the movements of machinery or trains, and would attach alike to cinder-tips, turn-tables and other relatively static conditions which do not 'interact' with positive operations. The uncertainty on this point is not aided by a separate reference to the plaintiff's contention that a *Donoghue* v. *Stevenson* liability arose. Such a duty, said the Privy Council, was 'illustrated'[70] in the present case by the two relations of occupier to licensee and railway operator to lawful user. This suggests that, if the plaintiff had been injured only by her tripping over the embankment, she would have to rely on the occupier's duty not the railway operator's duty. Otherwise there would be no room for the first relation to apply.

Whatever the implications of *McDermott's* case, it would seem that some relevant activity must be a prominent feature of any enterprise carried on by the occupier. The 'operation' of conducting a public baths left no room to argue this general tort duty in *Perkowski* v. *Wellington Corporation*.[71] *Perkowski's* case additionally illustrates a related method of exploiting the activities doctrine. This is to argue that any static condition which resulted from active conduct can classify as an activities case. Thus in *Slade* v. *Battersea Hospital*[72] the plaintiff successfully alleged the relevant danger to

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67 Although in *Quinlan's Case* the Privy Council ruled that 'current activities' could no longer be invoked in order to find a duty for the trespasser, the emphasis throughout was on the unique status of such a plaintiff in relation to any tort duty, not his unique status in relation to an occupier's duty. The reference to *Gallagher* v. *Humphrey* (op. cit., n. 57) shows that different considerations apply to a lawful visitor. The question left open by *Quinlan's Case* (and aggravated by *McDermott's* case) is not whether occupier's doctrines can be avoided by alleging a negligent misfeasance, but to what extent the interpretation given 'current activities' in cases such as *Videan* v. *B.T.C.* remains valid for non-trespasser categories.

68 *Ibid.*, p. 190.

69 (1953) 87 C.L.R. 619.

70 [1967] A.C. 169, 191.

71 [1959] A.C. 53.

72 [1955] 1 W.L.R. 207.

be the polishing of, and not the polished condition of, the hospital floors. The length of time between the activity and the condition it produces then tends to become crucial; in *Perkowski's* case the springboard in question had been erected for some years, and the Privy Council wasted no time in disposing of an activities argument,

> The argument, unsupported by authority, fails in principle. The licensee must take the land as he finds it and there could be no logic in drawing a distinction between its state when the occupier went into occupation and its state when changes had been made by him.[73]

But once having accepted the activity doctrine, it is difficult to see the logic in not applying it to any conduct on the part of the occupier or his servant whether an hour or ten years ago. For the length of this intervening period between negligence and damage is not relevant in ordinary negligence actions. The opinion quoted is necessary only to save a residual occupier's liability from thus taking the activity doctrine to its logical conclusion.

(2) *Vicarious Liability*

In *Mummery* v. *Irvings*[74] the invitee was not burdened by the doctrine of unusual danger because, as the High Court said, he could rely on 'a separate and distinct duty' which arose out of 'a casual act of negligence by the servant.' Although the authority for this resort to a vicarious liability for simple negligence is somewhat obscured by the fact that the relevant cases also concern industrial or railway activities, it is clear that the High Court in the present case were identifying a liability also applicable to static defects. For in sole elaboration of the distinct duties they said,

> . . . in the first case the occupier, except perhaps in some special circumstances, is alone liable whilst in the second the master and servant are joint tortfeasors.[75]

The principle was applied by Fullagar J. and by Taylor J. in *Rich* v. *Commissioner for Railways*[76] and was recognised by the Privy Council in *Perkowski* v. *Wellington Corporation.*[77] The first thing to notice about this liability is that since it is vicarious, the reference to a casual act of negligence is irrelevant, a system or practice negligently adopted or persisted in by an employee will give rise to the same liability on the occupier. The dichotomy breaks down further when one considers how the occupier's lack of care in *Indemaur* v. *Dames* relates with his employee's lack of care for simple negligence. For the foreman operator of some negligently set-up or sited machine cannot escape a negligence liability by arguing that his actual control

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73 [1959] A.C., pp. 67, 68.
74 (1956) 96 C.L.R. 99.
75 *Per* Dixon C.J., Webb, Fullagar and Taylor JJ., at p. 110.
76 (1959) 101 C.L.R. 135, 144, 148, 149.
77 [1959] A.C. 53, 67.

or use of the machine was beyond criticism. If harm is reasonably foreseeable from its continued operation in the circumstances, then his conduct in working it is subject to a negligence liability whether or not he is following orders or a settled practice.

Although the resort to this manoeuvre seems to have survived criticism,[78] it gives reason for wonder that occupiers' restrictions can survive for any defendants other than ordinary citizens in respect of their own dwellings. For corporate bodies such as companies and railway commissioners are negligent if at all only through the conduct and decisions of their superintendents and lesser employees. In such cases, the major scope left for occupiers' doctrines would arise from the protection that the no-affirmative-duty rule provides;[79] for the employer-occupier to be vicariously liable, the static defect must in some degree arise from a prior negligent act or operation by the employee. On the other hand, it would not matter that the defect had been part of the condition of the premises for the last ten years[80] if it was the result of negligent conduct by an employee at that time. The division suggested by this development accords in principle with the submission elsewhere in this article that the law of torts should if need be differentiate between commercial and private occupiers. The former would have to meet the *Donoghue* v. *Stevenson* standard, whereas a higher protection would remain for the ordinary citizen. But, as has been suggested, the retention of present occupiers' doctrines is still an unsatisfactory way to achieve this.

(3) *A Common Law 'Common Duty of Care'*

The doctrines discussed above only partly suggest the extent to which courts might sidestep the orthodox but restrictive duties to invitees and licensees. Recent Australian cases have tended to a more direct assault. This has been somewhat obscured by the more spectacular version of this problem concerning trespassers, recently if uneasily settled in *Quinlan's Case.*[81]

In 1963 in *Voli* v. *Inglewood Shire Council*[82] Windeyer J. said:

> These rules do not of themselves provide a final answer in all cases. In some cases a lawyer thinks at once of *Indemaur* v. *Dames* ((1866) L.R. 1 C.P. 274; (1867) L.R. 3 C.P. 311), and

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78 It is not, since *Quinlan's Case,* available for trespassers: Fleming, (1966) 82 *L.Q.R.* 25. Much of the argument used by Fleming to counter the contrary suggestion from Atiyah ((1965) 81 *L.Q.R.* 186) is inconsistent with the idea of such a distinct duty for non-trespasser cases.

79 Apart from this, there are cases in which the knowledge and conduct of various servants will be attributed to the occupier-employer so as to render its operation careless, although no particular servant or manager could be so classified. A liability synthesized in this fashion must conform to occupiers' doctrines. I am indebted to H. Luntz for this qualification.

80 As in *Perkowski* v. *Wellington Corporation* [1959] A.C. 53, 67.

81 [1964] A.C. 1054.

82 (1963) 110 C.L.R. 74.

> only later of *Donoghue* v. *Stevenson* ([1932] A.C. 562). But, even without the aid of a statute such as now exists in England, the trend of judicial authority has been to treat the liability of an occupier for mishaps upon his premises as governed by a duty of care arising from the general principles of the law of negligence. The special rules concerning invitees, licensees and others are ultimately subservient to those general principles. Instead of first looking at the capacity in which the plaintiff comes upon the premises, and putting him into a category by which his rights are measured, the tendency now is to look at all the circumstances of the case, including the activities of the occupier upon, or in respect of, the premises, and to measure his liability against the conduct that would be expected of a reasonably careful man in the circumstances. The judgments in *Commissioner for Railways (N.S.W.)* v. *Cardy* ((1960) 104 C.L.R. 274) provide recent illustrations of this tendency. How the visitor comes to be upon the premises is always an important fact. But it is not necessarily decisive. It seems better to appreciate that the ultimate question is one of fact and governed by general rules, than to create *new categories and distinctions.*[83]

This appears to represent an advance on the same judge's views in *Cardy's Case,* for there he suggested that the occupier rules would still be decisive in the absence of a duty arising from 'particular circumstances.'[84] The later view is indistinguishable from that of Fullagar J. in *Cardy's Case*[85] and Lord Denning in *Videan* v. *British Transport Commission;*[86] in effect it amounts to reducing occupier's principles to the status of factual matters going to the question of breach of duty. The subsequent maintenance of any distinction between this interpretation of occupier's liability and a *Donoghue* v. *Stevenson* duty would depend only on the readiness of courts to allow appeals on the ground that insufficient emphasis was given by the trial judge or jury to the importance of such factual matters. In other words, the view all but invites a substantive repeal of occupier's doctrines in favour of a general tort duty, relegating the older authorities to a comparatively minor role; a result which is not far removed from the 'common duty of care' established by the U.K. legislation. The further development of this viewpoint can be traced in three post-*Quinlan* decisions. The first of these was a Tasmanian decision which considered and rejected it. In *Smith* v. *Buckley*[87] Crisp J. directed his attention to the 'liberalising tendency' initiated by Dixon C.J. in *Cardy's Case* and considered its relevance to categories of entrant apart from that of trespasser. He concluded that any such

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83 *Ibid.,* pp. 88, 89. Italics added.
84 (1960) 104 C.L.R. 274, 317.
85 *Ibid.,* p. 295.
86 [1963] 2 Q.B. 650, 664.
87 [1965] Tas. S.R. 210.

development was now precluded by the Privy Council's ruling in *Quinlan's Case*:

> Though *Quinlan's Case* directly concerned a trespasser, it would seem to be of general application in relation to any attempt to depart from recognized common law categories of entrants upon another's land or premises, by appealing to a general tortious duty . . . there must be considerable hesitation . . . not only in enlarging the duty of care to trespassers . . . but modifying whether up or down duties of care owed by entrants whose rights are contractual of the other.'[88]

This is a reasonable interpretation because, if the Privy Council discarded concomitant tort duties to a trespasser (including those arising from current activities) to avoid defeating the 'No Duty' rule, the same argument arises that concomitant tort duties equally defeat those technical bars comprised in hidden traps and unusual dangers when dealing with licensees and invitees. An interesting feature of Crisp J.'s judgment is his reference to the possibility of using a general tort duty to *reduce* the occupier's liability rather than to extend it. For 'current activities' generally, and the doctrines associated with trespassers specifically, have always been used to provide an additional, sufficient test of liability, not a necessary test excluding the orthodox liability. The point could have arisen in the past in an action by an invitee injured by the neglect of an independent contractor carrying on a current activity on the occupier's premises. There is no evidence that it was ever successfully raised in such a case however, or in an action brought by a contractee on the basis of a breach of a non-delegable duty. In the instant case the plaintiff, a contractee, succeeded on the occupier's personal negligence in his system of running an electric-car stall at a fairground, so that it did not affect the decision that Crisp J. ruled out the occupier's reliance on some lesser general tort duty.

However, the Privy Council in *Quinlan's Case* did not try to explain how the 'No Duty' rule for trespassers affected the proper approach to other entrants, and it is not surprising that a different view has developed. In *Harvard House Pty. Ltd.* v. *Jackson*[89] the Full Court of the New South Wales Supreme Court were 'prepared to assume' a parallel *Donoghue* v. *Stevenson* duty to a licensee which would be higher, because not restricted to a hidden trap or the mere provision of a warning, but did not do so because the case was neither pleaded nor litigated on such a basis. The case is more important than it might appear as a post-*Quinlan* endorsement of a general tort liability to non-trespasser categories, because the Full Court were considering this larger duty where the injury resulted from a static defect. The facts were that the action had succeeded at the trial on the basis

88 *Ibid.*, p. 214.
89 [1965] N.S.W.R. 624, 625.

that the source of injury was a trap, but the appeal was allowed on a ruling that the relevant bracket (projecting from a wall lining a staircase) was not a trap. If the case had not been litigated under the older system of pleading prevailing in New South Wales it seems likely that the appeal would have been dismissed on the ground that the jury verdict could survive the absence of a technical trap. The endorsement by this Court then, goes considerably further than a restatement of established concomitant tort duties such as that arising from current activities; it goes just as far as Windeyer J. suggested in *Voli's* case.

How this is likely to stand up to the views of the Privy Council is a confused question, and one largely to be determined from their reasoning in *Commissioner for Railways* v. *McDermott*.[90] In this case the Privy Council ruled that a 'lawful user' (being a licensee) of railway premises could recover on the basis of the railway operator's negligence, for an injury suffered whilst crossing the line, but without having to prove the existence of a hidden trap. Another tort duty could be relied upon, and this was the duty owed by a railway operator to those who lawfully use the premises. The first difficulty is the characterisation of this railway operator's duty; is it, for instance, a restatement for licensees of the current activities *Donoghue* v. *Stevenson* duty that had been previously ruled out for trespassers in *Quinlan's Case*? The answer seems no, not just because there was no reference whatsoever to current activities giving rise to a general tort duty, but because the Privy Council emphasized the railway operator's duty as an 'inherently dangerous activity.' The fact that in *Quinlan's Case* the Privy Council endorsed *Thompson* v. *Bankstown* but rejected 'current activities' suggests that they might have intended *McDermott's* case to have the same effect. Not any activity, but a suitably dangerous activity, would give rise to a general tort duty. This is consistent with their treatment of a third tort duty mentioned in *McDermott's* case, *viz.*, '*Donoghue* v. *Stevenson*.' Without defining the relationship between this and the railway operator's duty, the Privy Council ruled it inapplicable; it was already 'illustrated' by the occupier's duty and the railway operator's duty.[91] But experience suggests the unwisdom of assuming any such rational or consistent approach, and perhaps the given answer was intended only as a lesson in style. So that, where a dangerous *enterprise* can produce a general duty courts need not waste time in considering whether an apparent condition actually represents an activity. This would be turning an optimistic if blind eye to the difficulties shown in Lord Denning's judgments,[92] of restraining *Gallagher* v. *Humphrey* within the confines of a 'casual act.' None of this conjecture is ruled out by

90 [1967] A.C. 169.
91 *Ibid.*, p. 191.
92 *Supra*, p. 95.

the likelihood that the plaintiff in *McDermott* could not rely on the general tort duty if her only injury came from falling at the crossing. For this would show merely that the enterprise duty is relevant only if the dangerous activity was something necessary for the injury to occur, not that the source of danger must arise from a negligent control of the activity.

What conclusions or possibilities arise from *McDermott's* case? The first must be that occupiers' doctrines are, in the last analysis, good law; one cannot argue *Donoghue* v. *Stevenson* merely by showing that harm is reasonably foreseeable in the absence of care. Secondly, the Privy Council deliberately left open the relevance of *Donoghue* v. *Stevenson* in other cases, saying '. . . in this case at any rate, there is no room for (it).'[93] Clearly then, such a duty may be inferred not only from other 'inherently dangerous activities,' but from other characteristics of the occupier-entrant relationship.[94] The prospect that a future identification of such characteristics will depend more upon matters of principle and less on inventive counsel and courts seeking immediate solutions to 'hard cases' is not encouraging. The apparent reluctance of a court of last resort to search for and announce a clear rationale for the duty in *McDermott's* case[95] approaches, in this context, a failure in judicial responsibility. Perhaps 'current activities' was not arguable because the woman's injury arose initially from the condition of the crossing;[96] if so, it is still arguable in future cases. Alternatively, perhaps 'current activities' is good law only for inherently dangerous activities.[97] Again, perhaps the presence of a hazard, whilst necessary is not sufficient; there must be a further factor for the relationship to create the duty. In the instant case this arose from the defendant's being a railway operator; in future cases it might be found in some other characteristic of the occupier. Finally, the foreseeabilty of harm issue might or might not be an additional basis

93 [1967] A.C. at p. 191.

94 'There is no exemption from any other duty of care which may arise from other elements in the situation creating an additional relationship between the two persons concerned.' (P. 187. This passage, with the remainder of the paragraph, was taken verbatim from the argument by Ray Watson Q.C. at p. 179). Hence, if the occupier is guiding the licensee through the premises (*Heard* v. *N.Z. Forest Products* [1960] N.Z.L.R. 329), if he is keeping something static but hazardous on the premises (*Thompson* v. *Bankstown* (1953) 87 C.L.R. 619), if the occupier is a school authority and the plaintiff a pupil (*Rich* v. *L.C.C.* [1953] 1 W.L.R. 895), or if he is running a railroad, occupiers' restrictions are alike inapplicable. If he is doing none of these things then the restrictions may or may not apply, depending on whether some other 'relevant relationship' can be put up.

95 Illustrated *inter alia* by the Privy Council's description of their decision: 'This case is concerned with a level crossing lawfully and necessarily used to a substantial extent by all the inhabitants. . . . No opinion is expressed with regard to private crossings or crossings only slightly used.' (pp. 189, 190) The innuendo is that the authorised user of a private crossing and the citizen on a little-used public crossing may both have to prove a trap.

96 That is, the duty in *McDermott* arose out of a dangerous enterprise, hence it did not matter that the plaintiff fell due to a static condition. If the enterprise were insufficiently dangerous the static condition would have required proof of a trap.

97 With a suitably expanded conception of an 'activity' injury.

for avoiding a negligence liability, even supposing that a duty relationship, as conceived above, can be established.

The matter has been further considered in three cases since *McDermott's* case. In *Barr* v. *Manly Municipal Council*[98] Jacobs J.A. considered the proper formulation of the duty owed to the user of a public recreation reserve, and continued,

> I am conscious of the fact that an alternative to this . . . is some general statement that the public authority . . . owes a duty to act reasonably in all the circumstances. It seems to me that such a generalization, although it may have the advantage of simplicity, has the disadvantage that it gives no real guidance to the tribunal of fact which must determine whether the duty of care has been breached . . . . In New South Wales we still have trial by jury, and one would have thought that, at least so long as this position continues, there must be a field of law revolving around the so-called 'duty of care' which gives a degree of the traditional judicial control over the decisions of juries which has been exercised by the elaboration of the duty of care beyond the bare test of acting reasonably in order to prevent foreseeable risk of injury. It seems to me that in the present case a further formulation of the duty is necessary and desirable . . . .[99]

By contrast, in *Blackman* v. *Borrie*[100] D'Arcy J. applied the general tort duty for the benefit of an invitee although the latter was injured by a danger which would probably have been classified as a static defect. The plaintiff was fixing a roof as an employee of a company doing work for the defendant building contractor. A timber which he used as a handhold gave way and he fell and was injured. The timber was secured by three-inch nails at each end, to serve a temporary purpose, and the plaintiff took it for a permanent fixture. The court ruled that the defendant occupier was liable for breach of a general tort duty, since its supervisor ought to have foreseen the danger of placing the timber in a position where it was likely to be used for support when crossing the roof. D'Arcy J. said,

> That there was justification for the plaintiff's plea in broad scope rather than in terms of relationships or categories of entry . . . is apparent on the authorities as they existed when the pleadings were settled.[101]

An interesting feature of the case is that no attempt was made to draw on the authorities cited above; the only support offered by the court being the isolated dicta of Ormerod L.J. in *Clay* v. *A. J. Crump* and Sellers L.J. in *McArdle* v. *Andmac Roofing Co.* The fact that

98 [1968] 1 N.S.W.R. 378.
99 *Ibid.*, p. 390.
100 [1968] W.A.R. 97.
101 *Ibid.*, p. 100.

neither case had anything to do with the question[102] indicates an attitude that the matter is very much open to debate.

A final example of this uncertainty is seen in the New South Wales Court of Appeal decision in *Hislop* v. *Mooney*.[103] The plaintiff, whilst drinking at the saloon bar of the defendant's hotel, was injured when a workman on the roof dropped a piece of timber through a coloured glass skylight above the bar. He alleged both general negligence and breach of the occupier's duty. In awarding a new trial in an appeal from a verdict for the defendant, Sugerman J.A. and Holmes J.A. were divided in their opinions on the relevance of *Donoghue* v. *Stevenson*. Sugerman J.A. had no doubt that the duty must be found if at all in *Indemaur* v. *Dames;* resort to *Donoghue* v. *Stevenson* was 'not a correct approach.'[104] Nor did it matter that the injury was not a result of a static defect, the principle applying equally where the unusual danger was in the activity of third parties. In support he cited *McDermott's* case, which makes it clear that he meant only that an additional duty could not be found in the foreseeability test of *Donoghue* v. *Stevenson*, not that an additional relationship could not give rise to a *Donoghue* v. *Stevenson*-type duty. Holmes J.A. disagreed that any such clear dichotomy could be found between cases arising under *Indemaur* v. *Dames* and *Donoghue* v. *Stevenson* 'that it is not possible for a plaintiff to rely upon both duties in an appropriate case.'[105] On the assumption that Holmes J.A. had also read *McDermott's* case, his disagreement could make sense only if he regarded an 'appropriate' case as a case where harm was reasonably foreseeable in all the circumstances; otherwise his objection would have been pointless.

(4) *Conclusions*

Although much of the previous discussion concerns developments that would have to be examined in any general codification of occupiers' principles, it is not necessary to delay more urgent reforms on their account. Most obvious is the adoption of a general tort duty; the case for which being that the orthodox duties are less just, unnecessary, and have led to much uncertainty. They cannot be justified on grounds of jury control, because the type of control has no relation to relevant jury bias. 'Traps' and 'unusual dangers' are technical bars which apply both where jury findings of unreasonable care would be realistic as where they would be excessive. In jury states such bars serve to relieve courts from the discomfort of ruling

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102 The first concerned an architect's liability to the employee of a building contractor working on the site, the latter concerned a defendant who was neither identified nor hypothetically considered as an occupier.

103 [1968] 1 N.S.W.R. 559.

104 *Ibid.*, p. 563.

105 *Ibid.*, p. 565.

that a finding of unreasonable care is not supportable on the facts;[106] in non-jury states the control argument does not even arise. Furthermore, the question whether a danger constitutes a trap or is unusual is in any case one for the jury.[107] Nor can such doctrines be justified as inherently fairer than 'reasonable care in all the circumstances' as a means of balancing the two interests. Admittedly a more sympathetic case can be put for the protection of the private homeowner than the industrial or governmental occupier,[108] but all-round reasonable care is not an undue minimum even for the former, given a realistic approach to what might be expected between ordinary citizens.

Moreover, present uncertainty surrounding the orthodox doctrines and their relationship with such a general duty is a sufficient basis for reform. Although uncertainty is a feature of any fault-based compensation scheme using tests of reasonableness and foreseeability, this extra uncertainty at the doctrinal level is an unnecessary burden. The fact that it harms only the litigant and benefits only the lawyer should alone qualify it as a matter for professional concern with a view to reform. The major obstacle to this is probably the attitude that it can and should be left to the wisdom of the courts. But the history of occupiers' law is surely a history of judicial failure: half of the difficulty coming from an arbitrary selection of liability criteria and the subsequent tendency to forget this fact, the other half from the methods devised by courts to avoid these duties. If *McDermott's* case represents a judicial achievement (by inviting the development of concomitant duties the combined effect of which may eventually exclude orthodox doctrines), then there is little reason to delay whatever policy qualifies it as such, and none whatsoever in giving this task to the courts. Not because of any fault in judges, but because their legislative activity should be confined to the interpretation of policy in penumbral areas, not the initiation of policy in new doctrine. *McDermott* shows this weakness. It appears to limit the duty to inherent dangers which involve activities, implying that neither static defect injuries by the railway operator, nor activities generally, will suffice. But why not?

Perhaps decisions such as *Anderson* v. *Commissioner for Railways* and *McDermott*, by contriving to mitigate doctrines to whose authority they defer, in the long run do more harm than good. As Dean Wright has said:

> Indeed, it can be argued that by steadfastly maintaining an appearance of the law's inability to surmount difficulties the

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106 In many cases the process of establishing the danger as usual is indistinguishable from that of finding that reasonable care had been taken; *e.g.* *Hurst* v. *Falconer* (1962) 79 W.N. (N.S.W.), 320, 321. *Cf.* *Edmonds* v. *Commonwealth* (1961) 78 W.N. (N.S.W.) 334; *Hull* v. *Boland* [1962] N.S.W.R. 611.

107 *Australian Shipping Board* v. *Walker* [1959] V.R. 152; *Hislop* v. *Mooney* [1968] 1 N.S.W.R. 560, 564.

108 *Infra*, p. 113.

> English courts make legislative reform easier and more wide-sweeping. The Occupiers' Liability Act, 1957, is an illustration in point. This legislation followed close upon two or three House of Lords judgments which were remarkable for their enthusiasm in reaching results that were far from inevitable, were indeed opposed to common sense, and could only be supported by a literal interpretation of isolated words in early decisions.[109]

When one reflects on the difficulties which must face any attempt to streamline such a complex and non-spectacular area of compensation law, the eccentricities of which are largely hidden from a commercial or business concern by insurance practice, the innuendo in Wright's statement has considerable appeal.

Finally, it might be noted that the general effect of the English legislation has been beneficial, and the fears that it would produce greater uncertainty and less justice have not been borne out in practice. The most appropriate testimonial comes from Lord Denning himself:

> 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.[110]

In fact, if we disregard a decision by the House of Lords to introduce the notion of multiple occupiers, the only controversial developments since the passage of the Act relate to two decisions which resulted from a failure to take needed reforms far enough. The first was *Videan* v. *B.T.C.*,[111] which saw the Court of Appeal vigorously sponsoring an activity duty for a trespasser by ruling that the Act was limited in scope to structural defects; the second was the difference of opinion expressed in *Roles* v. *Nathan* as to the relevance of a visitor's non-normal user of premises.[112] The first needs no comment; the second reflects a failure to appreciate the basis for discarding the orthodox doctrines in the first place.

F The Accommodation of Trespassers

The accumulation of doctrine surrounding an occupier's non-responsibility to a trespasser presents an instructive essay in contemporary legal history. The methods used to avoid the original orthodoxy are sufficiently distinctive of the merits and defects of a common law system as to suggest their inclusion in a law course long after any legislative abolition of *Addie* v. *Dumbreck*.[113] But judicial imagination

109 Wright, 'The Adequacy of the Law of Torts,' (1961) 6 *J.S.P.T.L.*, pp. 13-14.
110 *Roles* v. *Nathan* [1963] 2 All E.R. 908, 912.
111 *Supra*, p. 94.
112 *Supra*, p. 86.
113 [1929] A.C. 358.

and ingenuity apart, a study of this treasury of case law must leave the most avid torts teacher with the wonder whether the game has all been worth the candle, and how much confusion and injustice could have been avoided and how much candour should have been saved by some simple statutory reform. The history of this development has been retold but recently[114] and the present article will concern itself with an appraisal of the current state of the law, preceded only by a brief sketch of its background.

From the rigorous early doctrine of *Addie's* case, that the occupier owed no duty to the trespasser save to avoid wilfully or recklessly injuring him,[115] the courts excelled themselves in finding ways to provide compensation for a class of plaintiffs who were characteristically wrongdoers only in a technical sense. By a discriminating view of the class of occupiers,[116] by distinguishing structures or objects on premises as a subject apart from the premises themselves,[117] by extending by implication the area of invitation,[118] by inferring licences either from evidence of some habitual resort to the premises[119] or from the presence of an allurement on them,[120] by allowing the action to proceed on the basis of the occupier's vicarious liability for the negligence of his servant,[121] by boldly pronouncing an exception where the premises were the subject of some special hazard,[122] and by emphasising a distinction between injuries caused by a 'static defect'

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114 Morison, 'Trespassers in the Wilderness,' (1964-65) 38 *A.L.J.* 331. See also Morison, 'Streamlining Liability to Trespassers. The Commissioner for Railways (N.S.W.) v. Cardy,' (1960-61) 34 *A.L.J.* 204: Thomson & Traill, 'Occupiers and Trespassers,' (1965-66) 39 *A.L.J.* 187; A. G. Crawford, (1965-66) 39 *A.L.J.* 213.

115 *Bird* v. *Holbrook* (1828) 4 Bing. 628. A generalized statement, applying both to non-occupiers and for non-trespassers, and requiring at least a warning, is found in *Kimber* v. *Gas Light & Coke Co. Ltd.* [1918] 1 K.B. 439, 444 *per* Bankes L.J.

116 *Davis* v. *St. Mary's Demolition Co.* [1954] 1 W.L.R. 592; *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404. Such cases have been rendered doubtful by *Wheat* v. *Lacon & Co. Ltd.* [1966] A.C. 552. For an analysis of the difficulties raised by this case see Hwang, 'Basic Definitions in the Law of Occupiers' Liability,' 10 *Malaya Law Review* 68.

117 In *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, the child committed no trespass to the shrubbery containing the poisonous plant, only to the plant itself. The case is clearer where the defendant is not also the occupier of the premises, as in *Buckland* v. *Guildford Gas Co.* [1949] 1 K.B. 410. See also *Victorian Railways Commissioners* v. *Seal* [1966] V.R. 107, 123.

118 *Pearson* v. *Coleman Bros.* [1948] 2 K.B. 359.

119 *Lowery* v. *Walker* [1911] A.C. 10; the excessive use of which device eventually led to a reaction in *Edwards* v. *Railway Executive* [1952] A.C. 737 and *Phipps* v. *Rochester Corporation* [1955] 1 Q.B. 450.

120 *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44.

121 *Mummery* v. *Irvings Pty. Ltd.* (1956) 96 C.L.R. 99, 110; *Rich* v. *Commissioner for Railways* [1959] A.L.R. 1104.

122 *Thompson* v. *Bankstown Municipality* (1953) 87 C.L.R. 619. The duty of care attached to those 'carrying on in the exercise of statutory powers an undertaking involving the employment of a highly dangerous agency' (p. 628). The similar duty applied by the Privy Council for the benefit of licensees was not expressly limited to government instrumentalities: *McDermott* v. *Commissioner for Railways* [1966] 1 N.S.W.R. 420.

and those caused by a 'current activity,'[123] the courts succeeded in either upgrading the trespasser to a more favourable category or taking him outside the system of categories to the general duty of *Donoghue* v. *Stevenson*.

The attempt to refashion this contrived doctrine by Dixon C.J. in *Cardy's* Case,[124] by a reference back to 'basal principle,' is comparable with the judgment of Lord Atkin in *Donoghue* v. *Stevenson* as an exercise in reconciling innovation with precedent. The acknowledgment of additional or 'overriding' tort duties to a trespasser did not necessitate abandoning the doctrine that a trespasser *as such* was owed no duty.[125] All that need be abandoned was the fiction whereby the denial of a licence was precluded so that,

> If now we boldly look at the facts which give rise to the imposition in this manner of the liability it will be but to complete the course of development by a process for which the history of the law furnishes many precedents. It is but to attribute the liability to the constituent elements of the title to the correlative right and to explain why they create it.[126]

Apart from the streamlining of doctrine, the practical achievement of this re-orientation lies in the promotion of the trespasser plaintiff from his (inferred) licensee status to the standing of a *Donoghue* v. *Stevenson* plaintiff. But it is a matter for conjecture whether this by itself amounted to much, in view of the difficulty in showing (1) that more than an adequate warning might be reasonably required and (2) that harm to a trespasser would be reasonably foreseeable without something approaching a 'trap'.

A notable difficulty in *Cardy's Case* is the precise nature of this liability acknowledged by Dixon C.J. with the general tort duty of *Donoghue* v. *Stevenson*. For, although Fullagar J. held that Lord Atkin's neighbour principle applied as well to the occupier-trespasser relationship (and, by the same token, to invitees and licensees), it is doubtful that Dixon C.J. was prepared to allow other than specific duties arising out of the relationship.[127] However, the assessment of these positions is now largely academic as a result of the ruling in *Quinlan's Case*,[128] that both Australian judges were wrong in law.

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123 *Mourton* v. *Poulter* [1930] 2 K.B. 183; *Dunster* v. *Abbott* [1954] 1 W.L.R. 58; *Slater* v. *Clay Cross* [1956] 2 Q.B. 264.

124 *Commissioner for Railways* v. *Cardy* [1961] A.L.R. 16.

125 Morison, 'Streamlining Liability to Trespassers,' 34 *A.L.J.* 204, 205.

126 *Commissioner for Railways* v. *Cardy* [1961] *A.L.R.* 16, 21.

127 Morison, 34 *A.L.J.* at 207. It is a pity Dixon C.J. did not more explicitly identify the duty invoked in *Cardy's Case*. It arose wherever the occupier actively created or continued in existence a 'specific peril.' If this had been sufficiently distinguished from a duty based *only* on foreseeability of harm, then the Privy Council may well have allowed it. (See p. 1081). That a catalogue of such overriding duties might in practice nullify *Addie* v. *Dumbreck* would apparently not reflect on the humanity and learning of dead Law Lords so long as the duty did not arise simply on a *Donoghue* v. *Stevenson* test.

128 [1964] A.C. 1054.

In approaching the latter decision for the first time it is not easy to dispel the impression that the ghosts of *D.P.P.* v. *Smith*[129] and *Parker* v. *The Queen*[130] linger just around the corner. Something of the spirit of approach is brought out in the way Viscount Radcliffe deals with Dixon C.J.'s renovation of principle,

> It is impossible and, indeed, misleading to approach the established formula that defines the occupier's duty as if it were the 'old' or 'the older' law. A definition which has been stated in precise terms by judges as learned and humane as Lord Sumner, Scrutton L.J., Lord Dunedin and Lord Porter, to mention only United Kingdom judges who are recently dead, is not likely to be either old-fashioned or to be impaired by an inadequate appreciation of the general law of tort. . . .[131]

The results are not altogether surprising; the restatement of principle in *Cardy's Case* was wrong in law but, judicial proprieties having presumably been settled, the result of the decision was nevertheless correct. For many torts lawyers this concession is a singularly unattractive aspect of the Privy Council's ruling. To take a common-garden variety instance of an occupier's negligence and interpret this as coming within the idea of a 'wilful or reckless' injury is dubious reasoning to say the least. The fact that the Privy Council could do this where no question of wilfulness or recklessness had been left to the jury, and in reference to a case not presently the case under consideration on appeal, merely underlines the view that it produced nothing other than a new label for an old doctrine, a 'negligence with an abusive epithet,'[132] and in effect gave a result akin to that sought by Fullagar J., but with considerable added cost in terms of confusion and candour.

There are some arguments, particularly relevant to the future rationalization of torts involving wilful injury, for acknowledging the application of a *Donoghue* v. *Stevenson* model where duties of care are deliberately broken,[133] at least where the action is a claim primarily for compensation. Whatever the value of this technique, the reverse process of allowing inadvertent injurious conduct to be claimed for in an action based on wilful or reckless injury is most unsatisfactory. Such cases as *Bird* v. *Holbrook*,[134] *Derry* v. *Peek*[135] *and Milotin* v. *Williams*[136] show that the distinction is primarily one of kind, between inadvertent risk and a deliberate conscious injury or risk of injury. This is not contradicted by the fact that conduct sufficiently below the

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129 [1960] 3 W.L.R. 546.
130 [1963] A.L.R. 524.
131 [1964] 2 W.L.R., at p. 832.
132 Morison, 38 *A.L.J.* at pp. 335, 336.
133 Such a view was taken in *Jamison* v. *Encarnacion* 281 U.S. 635, 50 S.Ct. 440 (1930).
134 (1828) 4 Bing. 628.
135 (1889) 14 App.Cas 337.
136 (1957) 97 C.L.R. 465.

standard of the reasonable man will, where the risk is great and the precaution easy, at some stage support a case of recklessness; just as the difference in kind between yellow and orange is unaffected by their gradual separation in a colour spectrum. As a test of responsibility, the importance of this distinction transcends both the law of occupiers' liability and the law of torts.[137] The almost casual nature of its sacrifice in *Quinlan* is aggravated by the fact that, on the proposal of Dixon C.J., it seemed unnecessary. For the Privy Council had conceded at least one overriding tort duty in *Thompson* v. *Bankstown Municipality*[138] and had adverted to the possibility of others,[139] so they were not against this conception in principle.

A curious restriction on this use of an expanded concept of recklessness by the Privy Council is evident in their attitude to future cases in which the source of danger lay in some static defect. They emphasised in such cases the unlikelihood of a plaintiff being able to establish the requisite recklessness.[140] Whatever the intent behind this, it is clear that Australian courts will avoid it just by virtue of the ease with which the facts of *Cardy's Case* can be assimilated to ordinary instances of neglectful omission by the occupier. This is brought out by the detailed consideration given to *Quinlan* by the Victorian Supreme Court in *Victorian Railways Commissioners* v. *Seal.*[141] At first sight it seemed unfortunate that the High Court in *Cardy's Case* should have denounced previous subterfuges used to extend duties to trespassers, because the Privy Council both agreed with them yet denied the goal for which these means were sacrificed. The Victorian Supreme Court managed to salvage much of this however; first by demonstrating that static defects were no less likely to found a duty than current operations; secondly, by showing that licences will still be established out of proof of a period of habitual user and, thirdly, that the allurement doctrine will be no less effective as a factor in determining the 'extreme likelihood' of the trespasser's presence.

Quinlan's Case leaves much uncertainty however, for it must be assumed that, in any case where a trespasser's likely presence founds a duty in his favour at the trial, there is some prospect of an appeal succeeding to the Privy Council on the insufficiency of this likelihood. This uncertainty is not entirely excluded by the practice, evident in *Seal's* case and destined to become an important formality, of putting both questions to the jury, first whether the occupier took less than

137 Fortuitous casualties might include the 'no duty' doctrines associated with wandering domestic animals and tumble-down houses. Both *Cavalier* v. *Pope* [1906] A.C. 428 and *Searle* v. *Wallbank* [1947] A.C. 341 could be outflanked by a similar assimilation of negligence to a 'wanton disregard.'

138 [1964] A.C. 1054, 1080.

139 *Ibid.*

140 *Ibid.*, p. 1075.

141 [1966] V.R. 107.

reasonable care and, secondly, whether he exhibited a 'wanton or reckless disregard.'

G A Statutory Solution

What seems clear from this resume of recent case law is that a final solution should be sought outside the courts. The favoured academic view is for an unrestricted *Donoghue* v. *Stevenson* approach, as advocated by Fullagar J. in *Cardy's Case,*[142] and as apparently applicable[143] under the Occupiers' Liability (Scotland) Act, 1960. But a history of excessive immunity does not establish that all immunity should be dispensed with and it is worth considering the view of the Law Reform Committee, ultimately reflected in the Occupiers' Liability Act, 1957, as to why the law should not admit such a duty to the trespasser. Trespassing children should recover on grounds of 'common humanity,' the Committee said, but the insurmountable problem was

> to evolve an exception in favour of child trespassers which would in practice give them any substantial degree of protection without imposing too heavy a burden upon occupiers of land used for perfectly legitimate purposes.[144]

It is not clear whether this denial of a duty of care to the most sympathetic sub-class of trespassers results from the difficulty of drawing a line between children and adults or from the difficulty of reconciling a duty to children with an occupier's interests. Presumably it is the latter for it should not be difficult in principle to draft a more permissive rule for infants. The problem seems to be how to protect the minimum claims of an occupier if the question of reasonable care is to go to the jury. As Professor Morison points out, the possibility that in the circumstances the plaintiff could reasonably expect nothing from the occupier tends to be excluded by the way the issue, reduced to a question whether the occupier took sufficient care for the plaintiff, comes to the jury. This in practice overlooks the fact that the occupier may at times be justified in pursuing his own interests to the exclusion of those of intruders.[145]

This problem of control, which underlies the failure to evolve a satisfactory law for trespassers (and, it is submitted, for invitees and licensees) deserves careful attention: the difficulty is usually said to be one of jury sympathy, resulting in biased verdicts against a class of occupiers usually indemnified, and despite the reasonableness of their conduct. This seems to underlie the rejection of a generalized tort duty for licensees by Jacobs J.A. in *Barr* v. *Manly Municipal Council.*[146] Such a duty he said, would have minimized the distinction between the categories of invitee, licensee and trespasser, and,

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142 Morison, 34 *A.L.J.*, p. 209.
143 *McGlone* v. *British Railways Board, The Times,* Oct. 28th, 1965 (H.L.).
144 *Cmd.* 9305, p. 35.
145 34 *A.L.J.*, p. 209.
146 (1967) 87 W.N. (N.S.W.) 136.

> It might perhaps be desirable in a jurisdiction where, as in England, such cases are tried by judges. But, where trial by jury is still maintained . . . it would almost be tantamount to surrendering the whole field of law on this topic to the untrammelled decisions of juries.[147]

It is submitted that the real problem lies elsewhere; that it is in fact in the uncertainty as a matter of principle, given a perfectly detached jury, as to the responsibilities that should be imposed on an occupier for the benefit of others on his land. Should foreseeability of harm impose an affirmative duty where its breach is determined by a finding of less than reasonable care, even where the finding of breach is made by a judge? For it is not so much the need to control plaintiff sympathy as the very open-ended nature of this criterion of reasonableness, that endangers the defendant's interests: although such a test is relatively meaningful when considering the conduct of private home-owners (since jurymen are themselves of this class), it provides little guide, either to a judge or jury, when applied to an industrial occupier. For neither a compliance with universal industrial standards (which may be framed on the assumption of liability, and this liability insured against)[148] nor an alternative of having to close down the factory[149] can in theory protect the occupier from a finding of negligence.

A special difficulty affecting the duty of trespassers, and one which could be overcome without touching the broader question, is the inflexible nature of their treatment. Most people would think that, granted a justification for the tort liability, the non-innocent conduct of the plaintiff is still a balancing consideration. Unfortunately, this cannot be fitted into the apportionment framework of the contributory negligence legislation. A plaintiff is not contributorily negligent merely because he is a wilful trespasser. Even the burglar who falls into some hidden trap cannot be prejudiced by *volens* or contributory negligence without some *sciens* of danger; and yet there is no less reason to reduce his claim than if he were, in an objective sense, careless for his own safety. There is little doubt that the failure of past doctrine to allow the question of propriety of the plaintiff's conduct to relate more closely to his claim for compensation is at least as great a problem as the occupier's need for reasonable protection. A simple solution would be to expand the scope of the present contributory negligence legislation, so that a reduction of damages could be made on account of the wrongfulness of the trespasser's presence. This would leave the claims of small chidren and innocent adults unaffected, and allow a flexible treatment for the various degrees of non-innocent entry, from the wandering infant and the adult who

147 *Ibid.*, p. 152.
148 *Mercer* v. *Commissioner for Road Transport* (*N.S.W.*) (1936) 56 C.L.R. 580.
149 *Latimer* v. *A.E.C.* [1953] A.C. 643, per Lord Tucker.

comes to retrieve his child's cricket ball, to the neighbour who makes a regular convenience of the defendant's property, to the intruder with criminal intent. This proposal substantially avoids the need to rely on technical bars as a means of ensuring that non-deserving plaintiffs will not recover, without affecting the distinct problem of framing a duty formula that will resolve the occupier's interests with those of the least blameworthy trespasser.

With this factor out of the way, a compromise solution to the trespasser problem might be found in a broad distinction between two classes of occupiers, so that a stricter control of liability might be maintained with private home-owners, without affecting a *Donoghue* v. *Stevenson* liability on commercial and industrial occupiers and on governmental instrumentalities. This is not only because the latter are loss distributors whilst the former—who do not generally subscribe to a public liability policy[150]—are loss transferees.[151] Nor is it only because of the sympathy which has historically associated the contrived avoidance of *Addie* v. *Dumbreck* with railway turntables and industrial hazards. Rather, the distinction might be put on the proper scope of the 'no affirmative duty' proposition in a modern law of negligence. For there is no real basis for this protection where the defendant is carrying on a potentially injurious enterprise; his unreasonable omission to take care should characterise his overall operation as negligent, just as the train driver's negligent failure to apply the brakes makes his driving a negligent misfeasance.[152] This is because there is no more reason to protect this class of occupier by the misfeasance requirement than the manufacturer defendant in *Donoghue* v. *Stevenson* itself. Nor is there a better reason to protect this class of occupier from the vagaries of the reasonableness test, any more than the manufacturer. The interests of such occupiers, in short, are not sufficiently different from those of the manufacturer, in relation to his consumers, to warrant this higher protection. Hence the relevance to liability of the plaintiff's wrongdoing should be no greater here than in the general law of tort,[153] subject to the submissions made above.

By contrast, a case for the special protection of the private home-owner is that his interests will at times justify, where those of the first class perhaps should not, an exclusion of the interests of intruders.

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150 The Tariff insurance companies, represented by the Council of Fire and Accident Underwriters, include a maximum Third Party cover of $2,000 in the standard-form home-owner's policy. This is limited in a number of ways *e.g.*, it excludes cover for liability arising out of injuries due to additions to or alterations on the premises. Although further cover is available at the rate of $3.70 for $20,000, its use outside professional classes is comparatively rare.

151 The fallibility of assumptions underlying an 'enterprise' liability put on considerations of this kind has been suggested by Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts,' (1961) 70 *Yale L.J.* 499.

152 *Kelly* v. *Metropolitan Railway Co.* [1895] 1 Q.B. 944.

153 *Everitt* v. *Martin* [1953] N.Z.L.R. 298; *Henwood* v. *M.T.T.* (1938) 60 C.L.R. 438.

Again, this is not only because he is no better placed to insure for the entrant's injury than the entrant himself; but rather because the additional freedom that the misfeasance requirement gives this occupier represents a fairer balance of his interests with those of his fellow citizen where liability depends on a test of unreasonableness. If this freedom makes sense, it is in the ordinary relation of one citizen as such to another; and the private home-occupier's relation with someone on his premises seems if anything closer to this relation than that of an occupier conducting a commercial or governmental enterprise. At best this kind of argument is no more than an arbitrary compromise of relevant interests, but the present unitary doctrine appears even more arbitrary in principle. The question remains how best to secure this protection. It could be urged that the idea behind *Quinlan's Case* be statutorily adopted, so that the jury might be required to find something like *gross* negligence (because the hazard was great and its avoidance easy) for the domestic occupier. It is submitted that nothing of the kind is in fact needed, for the ordinary test of reasonable care in all the circumstances would probably allow a sufficient differentiation even supposing that, in translating occupiers into *Donoghue* v. *Stevenson* defendants, the misfeasance protection were removed from all occupiers. The danger then would not be that juries might err but, paradoxically, that judges in non-jury cases might develop and apply the same detailed standards to both classes alike.