SOUTH AUSTRALIA

TWENTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW OF OCCUPIER'S LIABILITY

1973

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

R. G. MATHESON, Q.C.

J. F. KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

TWENTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW OF OCCUPIER'S LIABILITY

To:

The Honourable L. J. King, Q.C., M.P.
Attorney-General for South Australia.

Sir,

Your predecessor referred to us the question of the present law in South Australia relating to Occupier's Liability.

With a few statutory exceptions, to which reference will be made, the law in this area is the common law as it has developed over the centuries. It is based on an elaborate system of classification of an entrant on to property in accordance with the circumstances of his entry and many of its basic distinctions and rules depend upon the stress laid in previous generations upon the privileges of those who owned land. The law so developed is inevitably extremely technical and it has become extremely complex not only in the number and the overlapping of its categories but also in its mode of application.

We have been assisted in our deliberations by considering the Third Report of the United Kingdom Law Reform Committee; the Reports on Occupier's Liability of the Institute of Law Research and Reform of the University of Alberta and of the Law Reform Commission of Ontario, the Working Paper on Occupier's Liability of the Law Reform Commission of New South Wales, and a Report of the Law Reform Committee of New Zealand limited to the area of Occupier's Liability to Trespassers. We have also consulted a large number of textbooks, articles and cases, reference to many of which will be found in the body of the Report.

At the present time the law subsumes the duties of occupiers of land to entrants upon it under seven categories:—

1. Duties as between master and servant.
2. Duties to those who enter under a contractual right.
3. Duties to those who enter under a public right.
4. Duties of invitors towards invitees.
5. Duties of licensors towards licensees.
6. Duties of occupiers of land towards trespassers.
7. Duties of lessors of real property towards visitors to the property.

We propose to deal with these classifications in the order set out above.

1. *Master and Servant*

The duties of a master towards his servant are those set out in *Smith* v. *Baker* (1891) *A.C.* 325 and *Wilsons and Clyde Coal Co.* v. *English* (1938) *A.C.* 57, namely that a master has a general responsibility for the safety of his servants and specifically he must provide competent staff, a safe place of work, proper plant and appliances and a safe system of work. These duties have been supplemented by a large number of statutory enactments, regulations and conditions in industrial awards. Three of the principal Statutes in South Australia supplementing these duties are Division III of Part XII of the Industrial Code, 1967-1972 and the safety provisions of the Building Act, 1970-1971 and the Industrial Safety Health and Welfare Act, 1972.

It is our opinion that whilst further development in this area of the law may still be necessary it should not be dealt with in this Report at all. It forms part of the industrial law. As in general the duties now owed by a master to his servant are more onerous than those in any of the other six categories enumerated by us, there should be express statutory provisions excluding the relationship of master and servant from the statutory amendment of the law which we recommend later in this Report.

2. *Persons Entering under a Contractual Right*

As the law stands at present, if the terms of the contract with the entrant on the premises expressly regulate the occupier's obligations for his safety the contract controls the situation. But such express regulation is rare, and in practice the development of the law on this topic has been based on a consideration of what terms should be implied in the contract permitting entry. Even when this problem has been resolved, however, a solution based solely on contract is frequently not suited to this area of the law, since it often happens that the consideration in respect of which entry is granted is provided by a person other than the injured entrant. This has, on occasion, led to judicial attempts to put the law on a basis that does not depend on the strict rules of contract. Windeyer J. has said that: " . . . to attract a duty according to the principles of *Francis* v. *Cockrell* . . . it is generally said that the admission of the public to the premises must be for reward to the defendant occupier. But that, it seems to me, is not because the duty is contractual. Rather it is because in such cases the liability is in effect similar to that in the earliest cases in the law of tort, those concerning the common callings, such as carrier, innkeeper, smith. The liability for negligence in cases of that sort arises from want of care in a public business that the defendant carries on. It matters not whether the plaintiff or someone else was to pay him for his services to the plaintiff . . .". (*Voli* v. *Inglewood Shire Council* (1963) 110 *C.L.R.* 74, *p.* 93). This view, however, cannot yet be said to be firmly established, and the Committee is of opinion that it should be made clear that when a person enters premises as a result of a contractual obligation on the defendant to permit his entry the nature of the duty owed to him should be the same whether the entrant has furnished the consideration for the contract allowing for his entry or whether another person has provided it.

The extent of the obligation imposed on the occupier (whether the obligation has been based on implying terms into the contract permitting entry or some other way) has commonly been taken to depend on whether the permission to enter his premises constituted the main purpose of the contract or not. Where it does constitute the main purpose of the contract the obligation amounts to a warranty by the occupier that the structure is as safe for the purposes contemplated by the contracting parties as reasonable care and skill on the part of anyone can make it. Where it does not constitute the main purpose of the contract, but is purely ancillary to it, the obligation is less stringent and resembles the duty owed to an invitee (which may for present purposes be described as a duty to use reasonable care to prevent damage to the entrant from unusual danger of which the occupier knows or ought to know, although there are poorly defined cases in which the occupier may be liable for the negligence of an independent contractor). This distinction is by no means an easy one to apply in practice and there are cases which cause difficulties in classification (see, for example, *Brannigen* v. *Harrington* (1921) 37 *T.L.R.* 349 and *Cosgrave* v. *Rusk* (1965) 55 *D.L.R.* 2*d*. 98, criticized by *Fleming*: *Law of Torts* (4*th Ed*.) 382); moreover, it appears from *Bell* v. *Travco Hotels Ltd*. (1953) 1 *Q.B*. 473 that the extent of the obligation may change for different parts of the same premises. The first question raised in examining this area of law, therefore, is whether this distinction should be maintained. It has been abolished in some jurisdictions; the Occupier's Liability Acts of 1957 (England) and 1962 (New Zealand) both provide that the duty owed by the occupier shall be the common duty of care, defined as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe using the premises for the purposes for which he is invited or permitted by the occupier to be there", while the Occupier's Liability Act, 1960 (Scotland) prefers that occupiers shall owe to all entrants on their premises "such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of (that) danger". The New Zealand Act provides further (s. 7 (2)) that in determining whether the common duty of care has been discharged regard is to be had to "the existence and nature of the contract". Moreover, the Reports of the Law Reform Commission of Ontario and of the Institute of Law Reform and Research of the University of Alberta and the Working Paper of the New South Wales Law Commission all recommend abolition of the distinction and advocate that the same standard of care should be owed to a contractual entrant as to any other visitor to premises.

In the light of this body of opinion and the reasoning on which it is based two members of this Committee would wish it to recommend that the distinction should be abolished, and that the separate category of entrants under a contract should go along with it. The other two members of the Committee believe that the distinction should be maintained, on the ground that a person who hires or lets premises for consideration should accept a higher measure of responsibility than that of responsibility merely for his own negligence; and on the ground that despite the difficulties of precise formulation of the distinction (which are most clearly expressed in the Third Report of the United Kingdom Law Reform Committee at paras. 47-54, especially para. 50) it does not believe that a formulation of a distinction recognized by the common law for a century is impossible of achievement. The contractual entrant

to whom the higher duty is owed is commonly a guest at a lodging house (as in *Watson* v. *George* (1953) 89 *C.L.R.* 409) or an entrant to a public hall (as in *Voli* v. *Inglewood Shire Council* (*supra*)); and the majority of the Committee believes that such a person is entitled to expect the premises to be as safe as care can make them and that the occupier of the premises should be prepared to accept the expense of making and keeping them so, as a necessary business expense.

If the distinction is to be maintained and the higher measure of responsibility preserved it becomes necessary to define that measure more precisely. The authorities point to an ambiguity in the phrase "as safe as care and skill on the part of anyone can make them". One interpretation, adopted by the High Court in *Watson* v. *George* (*supra*), is that the occupier is liable for the carelessness of himself, his servants and his independent contractors, but that he cannot be held responsible unless someone has been careless. Consequently if an entrant is injured by a defect in the premises not discoverable on reasonable inspection by an occupier, who has not sought expert advice owing to his ignorance of the defect, there is no liability. One member of the Committee believes that this should remain the measure of responsibility. An alternative, and more stringent, interpretation, deriving from the original notion of implied warranty, is that the occupier should be liable to the entrant unless the injury is caused by a latent defect not discoverable by the exercise of any reasonable care and diligence, even of an expert. Two members of the Committee believe that this more stringent responsibility should be imposed on an occupier of a building or structure, on the grounds that it is in their view more in accord with the rationale for maintaining a higher duty towards contractual entrants and because it would in practice lead to a duty being imposed on an occupier who hires his premises for use to have the premises inspected and examined regularly by competent experts.

All members of the Committee agree that, whatever the measure of the responsibility imposed on him, the occupier should be unable to contract out of it or to modify it in any way that would reduce its stringency.

3. *Duties to Persons Entering by Public Right*

The basic single division that the common law has drawn between entrants to premises has been between persons who have entered with the consent of the occupier, to whom duties of care may in appropriate circumstances be owed and persons who have entered without it, who are trespassers to whom no duty to be careful has, until very recently, existed. This division was not fully capable of coping with some kinds of entrants to premises: in particular lawful users of premises open and available to the public and persons who enter private premises for a public purpose authorized by law. The common law has not yet formulated a standard of care appropriate to the latter of these categories, though it is likely that the care owed to him is that owed to an invitee (see *Read* v. *Lyons* (1947) *A.C.* 156, where the entrant was a munitions inspector in the public service). As will appear later, the Committee proposes that the standard of care due to all lawful entrants on premises should be the ordinary duty to take such care as is in all the circumstances reasonable for the safety of the entrant; and, if this is acceptable, is of opinion that such a standard is appropriate to cover

the case of the person entering private premises under lawful authority.

In the United Kingdom the case of the entrant on premises open to the public has been treated as one of determining whether or not the entrant should be treated as an invitee or as a licensee. In England the prevailing opinion before the Occupier's Liability Act was that the entrant should be treated as a licensee (the authorities are conveniently collected in *Pearson* v. *Lambeth Borough Council* (1950) 2 *K.B.* 353), while in Scotland he was treated as an invitee (*Plank* v. *Stirling Magistrates* (1956) *S.C.* 92); though the English practice led to a fresh and more stringent interpretation of the rules governing the duty owed to a licensee (*Pearson* v. *Lambeth Borough Council, supra*). The Courts in Canada have also decided to try to accommodate the entrant to a public place within the traditional categories, usually preferring to designate the entrant to a public park a licensee and the entrant to public buildings an invitee (the relevant cases are collected by McDonald and Leigh: *The Law of Occupier's Liability and the Need for Reform in Canada* (1965) 15 *U. Toronto L.J. 55 at p.* 59). In Australia, however, this attempt has been abandoned, and since the judgment of Dixon J. in *Aiken* v. *Kingborough Corporation* (1939) 62 *C.L.R.* 179, especially at pp. 209-210 the courts have generally acknowledged the existence of a separate category of entrants as of public right. Acknowledgment of the new category has, however, done little to simplify or clarify the law, since it has been found difficult to formulate the circumstances in which the duty to be careful arises. In *Aiken's case* Dixon J. argued that "the exercise of a public right of access calls for a measure of care in which, on the one hand, knowledge on the part of the occupier of the existence of the danger is not an essential condition, and, on the other hand, the visitor is not entitled to expect that premises shall be provided free even of dangers which are apparent" and concluded that: "I think the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person from dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care". This statement has been the cause of some confusion: Latham C. J. thought that it imposed a responsibility "independent of both knowledge and means of knowledge", and therefore one more stringent than that imposed on an invitor; and seemed to be reluctant to accept such a position (*Burrum Corporation* v. *Richardson* (1939) 62 *C.L.R.* 214, 229-230). Since then it has been discussed several times, especially in the Courts of New South Wales, the most extensive discussion which reviewed previous authorities being that in *Barr* v. *Manly Municipal Council* (1968) 1 *N.S.W.R.* 378. In that case Walsh J. A., following a very careful analysis, concluded that a duty only lay upon the public authority with respect to dangers of which it had means of knowledge; in this respect the position of the authority is similar to that of an invitor, though in other respects (which he did not specify) it might be higher. Wallace P. refused to accept that the authority in charge of a public park should owe any duty beyond that owed by an invitor. "It may well be that a higher duty exists in a case where the 'premises' are artificially constructed premises such as a public jetty on a wharf or a swimming pool but where the property occupied and into which the public may enter as of right is, for example, a reserve or park, different considerations seem applicable. In this country a park or reserve may consist of "rugged mountain ranges" . . . I am unable to accept that less than constructive knowledge of a non-apparent danger should be

capable of attracting liability on the part of the occupying authority in the case of a reserve or park". (1968 1 *N.S.W.R.* 378 *at p.* 379). On the whole the case law supports the following proposition made by Higgins: *Elements of Torts in Australia* at p. 333:—"The general trend of judicial opinion in Australia is that the minimum duty of care owed to an entrant as of right on public premises is the same as that owed to an invitee entering on private premises and that possibly in the case of structural and other artificially created dangers the duty may be somewhat higher".

Further guidance for the case of the structure may perhaps be found in *Voli* v. *Inglewood Shire Council*. That case concerned the liability of the occupiers of a public hall, and in a passage which has already been cited (110 *C.L.R.* 74 *at pp.* 93) Windeyer J. appeared ready to extend the duty owed to an entrant by contractual right to any person entering premises in the course of a "public business" carried on by the occupier. This may support the view that in the case of any public hall in particular or public building or other "artificially constructed premises" in general the standard of care required of the occupier is that most carefully defined in *Watson* v. *George* (*supra*).

With the exception of the Law Reform Commission of New South Wales all the bodies to which we have made reference have recommended that "the common duty of care" (*i.e.*, "such care as in all the circumstances of the case is reasonable to see that the visitor is reasonably safe using the premises for the purposes for which he is invited or permitted by the occupier to be there"; see the definition in the English and New Zealand Acts) be adopted as the measure of responsibility owed to entrants on public premises. The Law Reform Commission of New South Wales generally advocates the same view, but wishes to preserve the decision in *Voli's case* (Working Paper, ss. 64-66) on the ground that "the limited duty of insurance" bears less harshly on a public authority than on a private person. The Committee prefers the majority solution in this instance. Most cases are likely to involve the negligence of the servant of a public body; when the body lacks employees with the expertise to keep premises in a safe condition the Committee can see no adequate ground for differentiating its liability from that of any other person or body corporate. The Committee therefore recommends that the entrant by public right should be owed the same standard of care as any other gratuitous entrant on private property; and that public authorities should be responsible only for the negligence of their servants and not for that of their independent contractors.

4. *The Distinction between Invitees and Licensees*

The common law has drawn a broad distinction between two kinds of persons who enter on land with the consent of the occupier: between a person who enters the land in pursuance of a common material interest—usually financial—with the occupier and an entrant who does not share such an interest with him. The former is known to the law as an invitee and the latter as a licensee; and the occupier has greater responsibilities in ensuring the safety of the invitee than in ensuring that of the licensee. This distinction has been the object of very considerable criticism and it is perhaps the principal feature of all the reforms and proposed reforms of the law of occupier's liability referred to in the introduction to this Report that they have done away with it.

There have been essentially two main grounds of criticism of the present distinction. The first is that it has unnecessarily added an unacceptable degree of complexity to the law, not only by requiring an initial process of classifying an entrant in any case of occupier's liability but because it has led to the production of other and consequential distinctions and refinements of law; and secondly that the criterion of material interest is in itself an inappropriate one against which to assess the extent of the duty owed to the entrant.

The full weight of the first criticism can only be assessed after an examination of the extent of the care owed to each category of entrant. But there is little doubt that the mere existence of the distinction causes extra complications to lawyers and litigants. Dixon J. in *Lipman* v. *Clendinnen* (1932) 46 *C.L.R.* 550 said that "In determining the liability of an occupier, it is imperative that a decision should first be reached fixing the class to which the person belongs who complains of injury"; and there is a proportion of cases in which this preliminary classification is the principal question at issue. The problem of classification is not aided by the fact that an entrant on premises may well move from one category of entrant to another at different stages in his visit. The best-known example is perhaps that given by Denning L. J. in *Dunster* v. *Abbott* (1954) 1 *W.L.R.* 58 *at pp.* 59-60: "A canvasser who comes without your consent is a trespasser. Once he has your consent he is a licensee. Not until you do business with him is he an invitee". The first sentence in this quotation minimizes the point that a canvasser would often be treated as entering premises subject to an implied licence; but that it is possible for an entrant to change his status quickly during the course of a single visit is vividly illustrated by the case of *Stephens* v. *Corcoran* (1968) 65 *D.L.R.* 2*d*. 407 where Wilson J. of the High Court of Ontario held that a patron of a beverage room in a hotel who on leaving the room to go home took a short cut through a hall not authorized for use by patrons, unbolted a door and fell down a stairway was an invitee while in the beverage room, at best a licensee in the hall, and a trespasser when he opened the bolted door. Cases such as these demonstrate the care and attention to detail necessary in the process of classification and the application of the broad distinction between invitees and licensees. Others demonstrate the fact that the distinction may be drawn in such a way that unfairness results. It is established, for example, that a person who calls at a block of flats to do business with a tenant but who is injured while using a stairway or passageway that remains in the exclusive occupation of the landlord is no more than a licensee of the landlord and so owed only the less extensive obligation of care (*Fairman* v. *Perpetual Investment Building Society* (1923) *A.C.* 70; *Lipman* v. *Clendinnen* (*supra*); *Jacobs* v. *L.C.C.* (1950) *A.C.* 361). These cases have been criticized on the ground that they take too narrow a view of the concept of "material interest" in that a landlord who denies his tenant the privilege of receiving visitors is unlikely to let his premises, so that his receipt of rent to some extent depends on the fact that visitors may use the stairways and passages (Law Reform Committee (U.K.) Report s. 11). If this reasoning is justified it is an example of a case where difficulty in drawing distinctions has led to undesirable results; if it is seen as too artificial this line of authority casts doubt on the appropriateness of "common material interest" as the criterion upon which any distinction between categories of visitors should turn.

The second criticism of the distinction goes to the appropriateness of the test of "common material interest" to differentiate between different entrants upon premises. There is little doubt that in many cases it produces results which look arbitrary and which it is difficult to justify. The U.K. Law Reform Committee Report goes into great detail on cases of this sort (ss. 64-71) and only a few instances are given here. It is strange that if an occupier invites a friend to dinner he owes him a lesser duty than a business acquaintance whom he invites to dinner to discuss a project or business scheme; and that he owes a lesser duty to the neighbour whom his wife invites in for a cup of tea than to the television repairman to whom she may offer one after his work is done. It is equally strange that if two collectors for charity, or two persons selling raffle tickets call on a householder he may be held to owe a more rigorous duty to the one to whom he makes a donation than to the one to whom he does not. Many similar problems may arise in the case of visitors to shops, especially department stores. It may be that in the case of the latter any entrant other than a thief or a person intent on paying a social call to an employee should deserve to rank as an invitee, since such stores try to attract the impulse buyer; but the case of a person who enters a small shop to make an inquiry but begins to leave before doing so owing to the slowness of the service presents more difficulties. It is the existence of this inconsistency of treatment of such entrants, between whom it is very difficult to draw lines justifying different rules, that renders the test of "common material interest" as it is at present interpreted inadequate for any practical differentiation of categories of entrants on to premises.

This conclusion is not surprising in the light of the history and development of the law in this field as it is explained by N. S. Marsh Q.C. (1953) 69 *L.Q.R.* 182 and M. C. Atkinson (1968) 2 *U. Tas. L.R.* 82. In extending the protection afforded to entrants on land the courts were influenced by the various analogies available to them, a point seen most clearly with respect to the duty owed to a licensee, which Willes J. saw as similar to that owed to the donee or the gratuitous borrower of a chattel (*Gautret* v. *Egerton* (1867) *L.R.* 2 *C.P.* 375). The duty owed to an invitee was sometimes developed by way of analogy to an entrant under contract, and at other times by reference to the law of public nuisance. The eventual outcome of this piecemeal development of the law reflects the tools available to the nineteenth century judges rather than a careful balancing of the interests of landowner and injured entrant. It reflects, too, the need felt by the judges to exercise strict control over juries, who at the time played an important role in civil cases. In *Toomey* v. *London and Brighton Railway* (1857) 3 *C.B.* (*N.S.*) 146 Williams J. upheld a decision to withdraw the case from the jury on the ground that there was no evidence of negligence to go before it with the remark that: "Every person who has any experience in Courts of Justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result". The jury in practice plays no part in this State in civil cases, and judges have at their disposal the developed law of negligence to assist them in the resolution of individual cases. It is inevitable that the old distinctions should appear rigid and arbitrary when more flexible techniques of coping with the problems they sought to meet are at hand and the need to supervise the triers of fact less pressing.

The inadequacy of the test of "common material interest" does not, of course, necessarily argue for the removal of all distinctions between lawful entrants upon property; it may be that justice would best be served by reformulating a distinction between different kinds of entrant. One possibility which has attracted considerable attention is that there should be a more stringent responsibility on the part of an occupier of business premises to which the public commonly resort than on the part of the private householder. This might be justified on various grounds: the occupier is in a better position to distribute the losses caused by an injury to the entrant, whether by insurance or by pricing adjustments, than is the individual householder and could regard covering the loss as a business expense. Moreover, most shops and offices are already covered by public risk insurance policies, so that the potential loss is already allowed for; while very many private dwellings are not covered by householders liability insurance (the premiums for which, though modest, may well be beyond the resources of individual occupiers). The Committee has considered this possibility but does not consider its adoption justified. Even if such a distinction could be properly articulated it would treat small family shops and even private homes where full-time or part-time work is done, along with major department stores, where in any particular case the proper analogy may be with the private dwelling; it might, in the long run, prove as unsatisfactory as the present distinction now is. In the view of the Committee the range of possible circumstances in which lawful entrants come on to premises is so wide, while any two cases may be very close to each other and distinguishable only in subtle and minor ways, that it is inappropriate to draw any single distinction between different entrants and any attempt to do so will result in results which will appear needlessly arbitrary. Attempts to avoid such results might even further complicate the law. What is needed is a single but flexible standard which will enable the courts to deal with cases on their individual merits, taking proper account of the similarities and differences that the facts may offer. The Committee therefore recommends that the distinction drawn between invitees and licensees be abolished and that responsibility to all lawful entrants (other than contractual entrants) be subject to the same general principles.

5. *The Duties Owed to Lawful Entrants*

(i) *The present law: invitees and licensees.* The practical effect of the distinction between invitees and licensees lay in the extent of the responsibility cast on the occupier towards his visitors. The classical statement of the duty owed to an invitee is that of Willes J. in *Indermaur* v. *Dames* (1866) *L.R.* 1 *C.P.* 274 *at p.* 288: "He (the invitee) using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guiding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by the jury as a matter of fact." There is no single statement of the duty owed to a licensee which has been as much cited as this, but there is a concise and authoritative statement made by Dixon J. in *Lipman* v. *Clendinnen* (1932) 46 *C.L.R.* 550 *at pp.* 569-570: "The result of the authorities appears to be that the obligation of an occupier towards a

licensee is to take reasonable care to prevent harm to him from a state or condition of the premises known to the occupier but unknown to the visitor which the use of reasonable care on his part would not disclose and which considering the nature of the premises, the occasion of the lease and licence and the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect". A comparison of each of these statements suggests that in each case the duty to the entrant, when it arises, is one to take reasonable care to ensure his safety, but that the duty to be careful arises in different circumstances. This branch of the law, therefore, can be seen today to be a part of the law of negligence, though the existence of a duty depends on factors other than the mere entry on the land coupled with a general forseeability of harm.

The practical truth of this general proposition depends on the breadth of interpretation given to the concept of "unusual danger" in the case of invitees and to that of "concealed danger" or "hidden trap" in the case of licensees. So far as the former is concerned the courts have consistently refused to lay down any rigid definitions, but that the phrase is construed widely is illustrated by such cases as *Commissioner for Railways (N.S.W.)* v. *Anderson* (1961) 105 C.*L.R.* 42, where a cross bar between two posts and about four feet from ground level was held capable of being an unusual danger at the entrance of a railway station. The consequence is that there is only a narrow practical difference between a liability in respect of an unusual danger and a liability based on foreseeability of injury. It is also the case that the division between the circumstances giving rise to a duty to an invitee and those giving rise to a duty to a licensee has been considerably narrowed; indeed in *Slater* v. *Clay Cross Co.* (1956) 2 *Q.B.* 264 Denning L. J. (as he then was) thought it had narrowed "to vanishing point". This view, however, probably goes too far. That the distinction between an "unusual" and a "concealed" danger is slight is evidenced by such cases as *Greene* v. *Chelsea Borough Council* (1954) 2 *Q.B.* 127, where the plaintiff licensee was injured by the fall of a cracked and bulging ceiling, to the condition of which she had already drawn the attention of the defendants. But the difference is less narrow with respect to the requirement of knowledge. Although *Hawkins* v. *Coulsdon Urban District Council* (1954) 1 *Q.B.* 319 establishes that an occupier who knows of circumstances existing on his premises but does not realise that they constitute a danger when a reasonable man would do so knows of the danger for the purposes of the rule, and it is sometimes said that an occupier who realizes that third parties are likely to create a danger on his premises but does nothing to prevent them knows of the danger even if at the moment of the injury he is ignorant of the fact that they have created it (*e.g.*, U.K. Law Reform Committee Report, s. 74), it is clear that the occupier must possess actual knowledge of either the facts constituting the danger or of a likelihood of the dangerous situation being created. This would be different from the reasonable foresight of a danger which is all that is needed to bring the duty to an invitee into effect even if both of the conditions in the preceding sentence were firmly established. But the second of them depends on a line of cases including *Ellis* v. *Fulham Brough Council* (1938) 1 *K.B.* 212 and *Pearson* v. *Lambeth Borough Council* (1950) 2 *K.B.* 353 which Australian courts would regard as cases concerning entrants on to public premises in virtue of their public rights rather than as cases concerning

licensees, and the reasoning in these cases has not yet been extended to cover the case of a person entering premises with the consent of a private occupier. The requirement of actual knowledge of a danger by the occupier before a duty is owed to a licensee does, therefore, provide an important distinction between the duty owed to an invitee and the duty owed to a licensee.

This difference, however, extends only to cases in which an injury to the entrant results from the condition of the premises. Despite a few suggestions to the contrary (*e.g.*, in *Glasgow Corporation* v. *Muir* (1943) A.C. 448) it is generally agreed that whenever an occupier carries out an activity on his property he owes a duty to be careful to anyone who may reasonably foreseeably be affected by what he is doing, be they invitees or licensees (*Slater* v. *Clay Cross Co.* (*supra*); *Commissioner for Railways* (*N.S.W.*) v. *MacDermott* (1967) 1 *A.C.* 169). This rule, in its turn, has given rise to demarcation problems, especially where the plaintiff is a licensee. It has been argued successfully that a person who falls on a level crossing owing to its poor condition and is injured by being struck by a train travelling too fast to stop when she came within the view of the driver has been injured in the course of the business activity of running a railway rather than because of the condition of the crossing alone (*Commissioner for Railways* v. *MacDermott* (*supra*)); while the plaintiff who sought to rely on an "activity" duty in *Perkowski* v. *Wellington Corporation* (1959) *A.C.* 53 when he had dived into very shallow water from a board constructed by the defendants at the edge of the sea, failed to convince the courts of his point. Other cases have raised similar difficulties: if an occupier switches off a light illuminating a driveway so that a person leaving the premises is injured by straying from the path, is the injury due to the act of switching off the light or to the condition of the premises? (*Dunster* v. *Abbott* (1953) 2 *A*11 *E.R.* 1572). Or if a railway company heaps hot ashes into a pile onto which a small boy climbs and is injured when he falls through the solid-seeming crust of cooled ash on to the glowing embers beneath, is his injury due to the activity of carrying on a railway or to the condition of the heap? (cf. *Commissioner for Railways* v. *Cardy* (1960) 104 *C.L.R.* 274). The need to draw fine distinctions of this sort is another factor that makes the present law of occupier's liability very technical and very complicated.

Another difference in the responsibilities of an occupier to invitees as against licensees is that he is sometimes liable for the negligence of an independent contractor if an invitee is injured, but he is not so liable when the plaintiff is a licensee. The distinction between cases in which an occupier is or is not liable to an invitee for the negligence of an independent contractor was recognized by Windeyer J. in *Voli* v. *Inglewood Shire Council* (1963) 110 *C.L.R.* 74 *at pp.* 97-98, but he found its formulation as a matter of law difficult. The most determined effort to formulate the distinction was made by Salmon J. in *Green* v. *Fibreglass* (1958) 2 *Q.B.* 45 where he identified the cases where such liability existed as those "where the safety of the invitee depended upon the careful performance of some act which called for no technical knowledge or experience but upon acts which the courts held that the invitor could and should have done himself and which he neglected to do". In such cases (*e.g.*, *Woodward* v. *Mayor of Hastings* (1945) *K.B.* 174, where the plaintiff was injured by ice and snow which had not been

cleared away properly) the invitor merely delegated the performance of his duty, but remained responsible when performance was inadequate. But in cases such as *Haseldine* v. *Daw* (1941) 1 *K.B.* 688 (where the occupier had employed competent contractors to maintain and repair a lift) and *Green* v. *Fibreglass* itself (where the plaintiff was injured by negligently installed electrical wiring) the occupier cannot himself carry out the necessary tasks; by employing a competent contractor he fulfils his duty to be careful in the only practicable way and it would be wrong to hold that he had merely delegated it.

Apart from matters relating to the circumstances which give rise to a duty of care towards the entrant there are two general matters which affect the care to which he is entitled. In *London Graving Dock* v. *Horton* (1951) *A.C.* 737 the House of Lords held that knowledge on the part of an invitee of a danger he may encounter while on the premises absolves the occupier from any further duty to be careful for his safety in relation to that danger. The effect of this rule has been much reduced by its interpretation in *Commissioner for Railways* v. *Anderson* (supra) and in *Smith* v. *Austin Lifts Ltd.* (1959) 1 *W.L.R.* 100 as being called into play only when the invitee has a full and thorough appreciation of the extent of the danger. The rule itself seems based on a misapprehension as to the effect of the knowledge of the entrant. Just as an occupier may sometimes, but not always, fulfil his duty to the entrant by simply warning him of the unusual hazard, so the knowledge by the invitee of the danger may sometimes, but not always, mean that there are no steps that the occupier need take to discharge his duty to take reasonable care for his safety. But whether this is so or not is a question of fact rather than of law (cf. *Bond* v. *South Australian Railways Commissioner* (1923) 33 *C.L.R.* 273). The rule has also been extended so as to cover licensees (*Greene* v. *Chelsea Borough Council, supra*); but in this case the knowledge of the licensee prevents the danger from being hidden or concealed, so that it is hard to see that it can have an independent existence in this context.

Lastly there is a general problem as to the care owed to a child entering the premises of the occupier. The child will often be a licensee; and this gives rise to two problems. First, to a child very many dangers are concealed in the sense that he has no full appreciation of the risks inherent in a given set of circumstances. Secondly, a child may find ways of injuring himself that far exceed in ingenuity the behaviour of an adult; so that in order to ensure his safety many stringent precautions, the taking of which might bear heavily on the occupier, may have to be taken. Yet the essential obligation of the occupier is only one of reasonable care. Some of the solutions to these difficulties are set out in *Fleming*: *Law of Torts* (*4th Ed.*) *at pp.* 411-421, together with criticisms of many of the shifts which courts have adopted. Generally, the first difficulty is resolved with the assistance of the concept of an "allurement", a danger at once attractive and dangerous to children; and the second along the lines suggested by Devlin J. in *Phipps* v. *Rochester Corporation* (1955) 1 *Q.B.* 550—that in many cases an occupier should take steps sufficient to prevent injury to a child accompanied by a responsible adult, since some responsibility for the safety of young children should rest with their parents.

(ii) *Recommendations as to the duties to be owed to lawful visitors.* The Committee has already pointed to the narrowness of the distinction

between invitees and licensees; the preceding account of the duties owed to each category of entrants points to the proliferation of fine distinctions consequent upon that basic one. It is necessary to distinguish the duty owed where an activity is being carried on from that owed with respect to the condition of the premises; the cases in which the duty is delegable from those in which it is not; and the difference between "unusual" and "concealed" danger has become very difficult to identify. Moreover, where the rules differentiate effectively between the duty owed to an invitee and that owed to a licensee their operation produces questionable results: as the English Law Reform Committee pointed out the effect of the rule that an occupier owes a duty to a licensee only in respect of dangers known to him is to place a premium on negligence (Report, s. 74). This confirms the Committee in its view that a single flexible rule adaptable to the circumstances of individual cases is required rather than a mass of rigid rules which are difficult to apply. It believes that a lawful entrant on the land of an occupier qualifies in virtue of his entry as a "neighbour" of the occupier in the terms of the wellknown statement of principle delivered by Lord Atkin in *Donoghue* v. *Stevenson* (1932) *A.C.* 562, 580 and that the occupier should be obliged in consequence to "take reasonable care to avoid acts or omissions which (he) can reasonably foresee would be likely to injure (him)". (*ibid*). This is, of course, the ordinary standard to which a person who owes a duty of care to another is held and it therefore possesses the virtue of familiarity to both the courts and the profession as well as that of adaptability in its application to the facts of a particular case. It is also the standard adopted as that of "the common duty of care" by the Occupier's Liability Acts in force in England (s. 2) and New Zealand (s. 4) and recommended for adoption by the Ontario Law Reform Commission; and, with variations in phrasing, that adopted by the Occupier's Liability Act (Scotland) (s. 2). This Committee also recommends this as the appropriate duty to impose on an occupier.

Three consequential matters fall for consideration in the light of this recommendation. The first is the question of delegability and the liability of the occupier for the acts of his independent contractor. Following the recommendations of the English Law Reform Committee (Report s. 78 (v)) the Occupier's Liability Acts of England (s. 2 (4) (*b*)) and New Zealand (s. 4 (6)) have abolished the vicarious liability of the occupier in favour of a personal liability based on the reasonableness of his conduct in employing and selecting a contractor and taking steps (if any are possible) to satisfy himself that the work has been properly done). Similar proposals are made by the Ontario Law Reform Commission (Report, p. 19) and the New South Wales Law Reform Commission (Working Paper, ss. 64-65). The Committee also believes that the standard adopted in England and New Zealand is appropriate to an occupier and recommends its adoption, though it would draw attention to the drafting question considered by the New South Wales Working Paper (s. 65).

The second matter is that of the difficulty raised by *Horton's case* (*supra*). The English and New Zealand Occupier's Liability Acts contain identical provisions designed to ensure that a warning absolves an occupier in cases in which it genuinely meets the needs of the requirement of reasonable care (England, s. 2 (4) (*a*); New Zealand s. 4 (5)). Where this recommendation is not made it seems that the Law Com-

missions concerned feel that it is redundant. The Committee agrees that specific provision should be made to put the question beyond doubt, and recommends that the English and New Zealand example be followed.

The third point relates to the standard of care owed to children. This is a very general question extending well beyond the sphere of occupier's liability, although perhaps more frequently raised in such cases than in other kinds of situation. The Committee makes no recommendation for statutory reform on this matter.

The Committee has considered alternatives to the recommendation of the imposition of the ordinary duty of care on an occupier with respect to lawful entrants on premises, but has rejected them. In particular, the Committee does not recommend the adoption of any scheme of a stricter liability either on occupiers generally or on some categories of occupiers (*e.g.*, those who encourage or allow members of the public to visit their business premises). So far as the group of occupiers as a whole are concerned the common law definition of occupier includes old people, pensioners and tenants who might well find the payment of even quite small insurance premiums beyond their means, and the Committee understands that there is at present no consistent practice of private occupiers insuring themselves against their existing liabilities. Any stricter liability might therefore cause great hardship to many ordinary householders. So far as the more limited group of occupiers of business premises is concerned, the Committee does not believe it fair to treat small businessmen and professional people in small practices any more harshly than ordinary householders and to subject them to greater responsibilities of an order that large department stores or supermarkets might be able to accommodate. Moreover the Committee has been unable to discern any great injustice in the recent cases in which plaintiffs have failed in their actions against department stores through their inability to prove negligence (*David Jones* (*Adelaide*) *Ltd.* v. *Roufas* (1966) *S.A.S.R.* 17; *David Jones* (*Canberra*) *Ltd.* v. *Stone* (1970) 123 *C.L.R.* 185). Lastly, the Committee is against the introduction of new distinctions into this area of the law, since they would inevitably produce fresh complexities, borderline cases, and apparently arbitrary decisions of the kind that the Committee feels strongly should have no place within it.

6. *Trespassers*

The problem of the consideration required of an occupier to trespassers on his property has long proved intractable for both courts and commentators. When the problem of the injured trespasser first became controversial it arose from cases where occupiers had set spring guns to protect their crops and their game coverts from poachers, but had injured trespassers who had entered the property with more innocent motives. The early authorities are thus concerned with acts of the occupier which are deliberately aimed against trespassers rather than with any prospect that the occupier might ever have positive obligations imposed upon him to ensure their safety, but even in that context the trespasser received very limited protection. Although Best C. J. said emphatically in *Bird* v. *Holbrook* (1828) 4 *Bing.* 628, 643, that: "it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object

of English law to uphold humanity . . ." the effect of that case, taken together with *Ilott* v. *Wilks* (1820) 3 *B. and A.* 308 was merely to require that a person who set spring guns should give clear notice of the fact that he had done so. With this as the general background it is not surprising that the basic rule, affirmed in *Addie* v. *Dumbreck* (1929) *A.C.* 358 by the House of Lords and again in *Commissioner for Railways (N.S.W.)* v. *Quinlan* (1964) *A.C.* 1054 by the Privy Council, has been that the only duty owed by an occupier to a trespasser has been to refrain from injuring him deliberately or recklessly.

This rule is clearly enough suitable when applied to poachers and to burglars; but not all trespassers are necessarily wicked. Even in the early cases already cited the plaintiffs were trespassing with more innocent motives (*in Bird* v. *Holbrook*, for example, the recaption of property at a time when the occupier was absent from his property); some trespassers have strayed from a public path to private property without realizing the fact; and many are children who may have been lured to the property of the occupier by some feature of it that they find especially attractive. The result of this has been that courts have at various times tried to impose qualifications on the field of application on the basic rule, but many of these have subsequently been discarded. One of the oldest of these efforts was the attempt to classify an entrant as a licensee rather than a trespasser. On general principle it is clear enough that a permission to enter property need not be given in express words; the evidence may support the conclusion that the conduct of the occupier was such that permission to enter has been granted. (For a recent affirmation of this principle see *Ramsay* v. *Appel* (1972) 46 *A.L.J.R.* 510). The possibilities of reclassifying the entrant as a licensee in the light of the conduct of the occupier are often thought to have been recognized in *Cooke* v. *Midland Great Western Railway of London* (1909) *A.C.* 229 and *Lowery* v. *Walker* (1911) *A.C.* 10; and for many years after them lower courts were astute to find some reason for classifying the entrant as a licensee. One factor on which they seized in the case of child entrants was the existence on the property, to the knowledge of the occupier, of a situation which children would find attractive but which would be very dangerous to them. In these cases the existence of the "allurement" was construed as amounting to an invitation to enter, while its dangerous qualities to a child rendered it a "concealed trap" sufficient to give rise to the duty of care owed to a child licensee. Nevertheless appellate courts were periodically critical of the practice of inferring the grant of the licence when there was no real evidence to support it; and in such cases as Addie v. Dumbreck itself and *Edwards* v. *Railway Executive* (1952) *A.C.* 737 the House of Lords insisted that the evidence should provide a proper basis from which the grant of a licence might be implied. In Australia the practice of inferring the grant of what had become quite fictitious licences was terminated following strong criticism by Dixon C. J. in *Commissioner for Railways* v. *Cardy* (1960) 104 *C.L.R.* 274 when, referring to the basic rule laying down the duty owed to trespassers, he said (p. 285): "The application of the rule is modified to the point of exclusion by inferring a licence from circumstances notwithstanding the unreality of the supposition that there was any actually consenting mind or will" and went on to ask: "Why should we here continue to explain the liability which that law appears to impose in terms which can no longer command an intellectual assent and refuse to refer it

directly to basal principle?" The Privy Council acknowledged the force of these criticisms in *Quinlan's case;* and since then little has been heard of the inferred licence, though its disappearance has left the notion of an allurement behind it, perhaps as a now independent doctrine or perhaps to be fitted into a general scheme of legal principle in some other way.

Two other related approaches designed to mitigate the severity with which the law viewed the trespasser evolved before 1964. One, more espoused in England than in Australia, but numbering Fullagar J. amongst its more notable adherents, sought to draw a distinction between the duty owed by an occupier with respect to the condition of his premises and the duty owed by the occupier when he was carrying out an activity on his land. So far as the former situation went, the traditional duty was appropriate; but if the occupier carried out any activity on his land he became subject to the ordinary rules of negligence as set out by Lord Atkin in *Donoghue* v. *Stevenson*. This approach, adopted in *Rich* v. *Commissioner for Railways* (1959) 101 *C.L.R.* 135 and expressed enthusiastically by Lord Denning M. R. in *Videan* v. *British Transport Commission* (1963) 2 *Q.B.* 650, was strongly disapproved by the Privy Council in *Quinlan's case,* principally on the ground that it was inconsistent with the terms of the rule laid down in *Addie* v. *Dumbreck*. The other related approach has its origins in the cases of *Thompson* v. *Bankstown Corporation* (1953) 87 *C.L.R.* 619 and in *Cardy's case* (*supra*). In the former case a boy had been badly burned while trespassing on an electricity pole sited in a public street but the High Court held that he was able to maintain his action despite his status as a trespasser. Dixon C. J. and Williams J. defined the problem raised by the case as one of "choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other", the respective categories being those of "an occupier of a structure with respect to the safety of those who come upon it" and of "the duty of exercising a high standard of care falling upon those controlling an extremely dangerous agency, such as electricity of a lethal voltage". Their decision that the latter was the more appropriate category within which to fit the case was approved by the Privy Council in *Quinlan's case* on the ground that the fact that the defendants were maintaining on and over a public place a highly dangerous electric transmission in a defective condition justified taking the case outside the occupier/trespasser relation; and the principle it embodies has more recently been applied in *Munnings* v. *Hydro-Electric Commission* (1971) 45 *A.L.J.R.* 378. If applied only within the confines of facts such as those which existed in *Thompson's case* and the very similar facts of *Munnings' case* the principle is only of limited significance; its broader importance lies in that there is a possibility that circumstances may arise in which the usual rule is "over-ridden" by some other feature of the whole of the facts upon which the case must be adjudicated.

This possibility is one that was more fully realized in the judgment of Dixon C. J. in *Cardy's case*. Having rejected the doctrine of the imputed licence, he sought to explain the cases in which trespassers had succeeded in claims against occupiers by reference to another principle, recognition of which, he said, "by no means involves the imposition upon occupiers of premises of a liability for want of care for the safety of trespassers. . . . . The rule remains that a man trespasses at his

own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognizes that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence. . . . In principle a duty of care should rest upon a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge". (104 *C.L.R.* 274 *at pp.* 285-286).

This seems to amount to a restatement of the general duty owed by an occupier to a trespasser in terms modifying the hitherto generally accepted rule; and as such it seemed to have been disapproved by the Privy Council in *Quinlan's case* when it held that the traditional formula that the only duty owed was not to injure the trespasser wilfully or recklessly was "an exclusive or comprehensive definition of the duty". Nevertheless two members of the High Court have recently held that the principle explained by Dixon C. J. still represents the law in Australia, though they have reached this conclusion by arguing that it is a statement of the basis upon which "over-riding duties" may be held to arise rather than a restatement of the general rule. In *Cooper* v. *Southern Portland Cement Ltd.* (1972) 46 *A.L.J.R.* 302 Barwick C. J. seized on a passage in the opinion of the Privy Council in *Quinlan's case* which contemplated the displacement of the occupier and trespasser relationship by another and different relationship between the parties, provided that the grounds of displacement are capable of reasonably precise definition ((1964) *A.C.* 1054 *at p.* 1081) coupled with the Board's approval of *Thompson's case* as justifying that conclusion; and Menzies J. relied also on the fact that the Board had thought *Cardy's case* rightly decided as well (though its approval of the result reached in that case seems to have been arrived at by different reasoning). It is also worth noting that Windeyer J. in *Munrings' case* had reached the same conclusion. On this authority, then, the basic duty to trespassers remains that of refraining from doing them wilful or reckless harm; *Quinlan* is decisive of the point that the mere fact of entry on the land of the occupier by the trespasser does not impose any duty of care towards the trespasser on the occupier; but if the circumstances outlined by Dixon C. J. in *Cardy* arise a duty to be careful for the safety of the trespasser will come into existence. Those circumstances include knowledge by the occupier of an especially dangerous situation on his property, coupled with the knowledge that trespassers are on the property in the vicinity of the danger or, at least, knowledge that they are very likely to be there.

This then is one way in which the trespasser may receive protection in some cases. Another, espoused by the Privy Council in *Quinlan,* was to assume that although the duties towards the trespasser retained their traditional formulation, the formula might "embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity". This open invitation to redefine "reckless-

ness" was taken up in various ways after 1964. The Privy Council itself suggested that the principle set out by Dixon C. J. in *Cardy's case* covered conduct that was within the ambit of "conduct so callous as to be capable of constituting wanton or intentional harm". This suggestion led the Full Court of Victoria to apply the principle set out in *Cardy* as a test of reckless conduct in *Victorian Railway Commissioners* v. *Seal* (1966) *V.R.* 107; in the same case Gillard J. expressed the view that the presence of an allurement on the premises was relevant to the determination of a case since it furnished evidence that the presence of child trespassers was "very likely" as distinct from merely foreseeable and at the same time the omission to protect the child from the attractive danger was capable of rendering the conduct of the occupier callous or reckless rather than merely negligent ((1966) *V.R.* 107, 132-133). The most extreme steps were taken by the English Court of Appeal in *Herrington* v. *British Railways Board* (1971) 2 *Q.B.* 107, where a majority of the Court held that "recklessness" meant no more than gross or great negligence. This approach has, however, been subjected to considerable and cogent criticism. Barwick C. J. has disapproved even the definition used in *Seal's case* as introducing "undesirable imprecision and uncertainty into the law" (46 *A.L.J.R.* 302, 309). When counsel put forward a definition of "recklessness" similar to that adopted by the majority in *Herrington's case* Davey J. A. of the Court of Appeal of British Columbia rejected it as being neither meaningful nor practical, and likely to lead to arbitrary decisions, and the Supreme Court of Canada subsequently upheld his view (*Stanton* v. *Taylor Pearson and Carson (B.C.) Ltd.* (1966) 56 *D.L.R.* 2*d.* 240). When *Herrington's case* went to the House of Lords most members of the House said or implied that "recklessness" in the context of liability to a trespasser has its classical meaning of "a conscious disregard to the consequences—in effect deciding not to bother about the consequences" (per Lord Pearson, (1972) 2 *W.L.R.* 537, *at p.* 574). Lords Diplock and Wilberforce both felt that the expanded concept of recklessness used in the Court of Appeal gave rise to a fiction comparable to that of the imputed licence, and should similarly be discarded. It is therefore not to be expected that the courts will use this line of approach in future.

This survey of the principles at present binding on Australian courts suggests that the most probable line of development of the law is the acceptance of the traditional statement of the duty owed to a trespasser by an occupier qualified by the imposition of a duty of care on an occupier in circumstances of the kind adverted to by Dixon C. J. in *Cardy*. Development *via* the theory of the imputed licence and of an extended interpretation of recklessness appears to have been halted; *Quinlan* forbids the entry of ordinary negligence principles; and the principal alternative open is perhaps that which would accord special status to circumstances involving children and allurements. Before looking at proposals for any reform of the law, however, one further case should be mentioned. In *Herrington* v. *British Railways Board* (1972) 2 *W.L.R.* 537 all members of the House of Lords agreed that some modification of the principles laid down in *Addie* v. *Dumbreck* was necessary though there was little agreement amongst them as to what form the modification should take. Lord Diplock, for example, adopted the technique apparently adopted by Dixon C. J. in *Cardy's case* of laying down a fresh principle, based on the existence of a duty

of care when the occupier has actual knowledge of facts as to the condition of his land or of activities carried out upon it which are likely to cause personal injury to a trespasser who is unaware of the danger and also has actual knowledge either of the presence of a trespasser on his land or of facts which make it likely that the trespasser will come on to his land. Lord Wilberforce, by contrast, preferred a theory of over-riding duty, adopting "*Addie's case* as the plain general rule; room, in circumstances to be carefully defined, for a special duty of care". His definition of the circumstances giving rise to such a duty is deliberately vague and confined to cases of allurements and cases where there is a dangerous situation accessible to the public, but he cited *Cardy* with approval and his general approach is consistent with the views of Dixon C. J. in that case. The other members of the House branched on to new lines altogether. Lord Reid wished to adopt a humanitarian concept based on a notion of "culpability", embodying a subjective criterion of "whether a conscientious humane man with (the occupier's) knowledge, skill and resources could reasonably be expected to have done or refrained from doing before the accident something which would have avoided it", granted that there is a "substantial probability that trespassers would come". Lords Morris and Pearson apparently agreed that if the presence of the trespasser is known or reasonably to be anticipated by the occupier then the occupier owes to the trespasser a duty of common humanity, which they describe as less than a duty to be careful and normally fulfilled by taking steps calculated to exclude or to warn the trespasser. It is also noteworthy that Lords Diplock and Wilberforce held that the duty of care, when it arises, is a duty to take such care as can reasonably be expected bearing in mind the means and resources of the individual occupier (by analogy with *Goldman* v. *Hargrave* (1967) 1 *A.C.* 645).

Herrington's case takes on added significance since the Committee understands that *Cooper's case* is due to go on appeal to the Privy Council, where some of the ideas expressed in the House of Lords may be influential. It is noteworthy that all members of the House of Lords use tests other than those laid down in *Cardy's case* in their preference for a standard based on more subjective principles than that of the ordinary duty of reasonable care. The Committee does not believe this development to be desirable, believing as it does that Dixon J. was correct when he said in *Transport Commissioners of N.S.W.* v. *Barton* (1933) 49 *C.L.R.* 114 *at p.* 131: "all attempts have failed in the past to fix upon a standard of conduct, an external standard at any rate, which requires less than due care in the circumstances and more than abstention from intentional harm. I think that in relation to the person and property of trespassers it will not be found possible to formulate an ascertainable standard of such a character". It would hope that the development of the law in Australia will be in accord with this, and that should it be agreed that the law is likely to proceed by way of the over-riding duty, that duty would be the ordinary one of exercising reasonable care towards the trespasser.

The foregoing protracted account of the present law indicates both the difficulties that the courts have had in coping with the problems raised by the trespasser and the difficulties which still exist in giving a concise summary of the present law. A similar lack of apparent agreement has characterised the reactions of commentators and law reform agencies to this area of law. Four approaches to a resolution of the

problem are discernible in the proposals at present either being canvassed or already in force. At one extreme lies the approach of the English Law Reform Committee which, in 1954, considered that the law laid down in *Addie* v. *Dumbreck* was satisfactory and recommended no change in it (Report, para. 80). At another extreme the Occupier's Liability Act (Scotland) makes no differentiation at all between different kinds of entrant, so that trespassers as well as lawful visitors are owed the common duty of care; and the Law Reform Commission of Ontario has recently adopted the same view. Between these views are the positions adopted by the Law Reform Commission of New South Wales and the law reform agencies of New Zealand and Alberta. The New South Wales Commission agreed that there should be no differentiation between the duty owed to a trespasser and a lawful entrant, but considers that the adoption of the ordinary duty of care would be too dramatic a change in that it would leave the judges with too little and the jury with too much influence over the ultimate decision. It proposes instead a test of "whether the entrant in all the existing circumstances was reasonably entitled to expect that the defendant occupier would as a reasonable man modify or regulate his conduct in respect of the protection of the entrant from the damage which he suffered" (Working Paper, para. 54). The New Zealand Law Reform Committee divides trespassers into protected and unprotected classes, the former being owed a duty of care and the latter not. Unprotected trespassers are defined as persons who enter premises when their entry is itself an offence punishable by imprisonment or is made in the course of the commission of such an offence, and as persons who have been adequately warned of the danger or who know of its existence and nature. This pattern suggests that trespassers are regarded as protected unless they fall into a specified category. The Institute of Law Research and Reform of the University of Alberta, on the other hand, suggests that a trespasser ought to be owed a duty of care if he can bring himself within set criteria, and suggests that where there are constant trespassers in a limited area or there are known trespassers, dangerous activities must be carried on with reasonable care and that where there are trespassing children, highly dangerous artificial conditions impose a duty of reasonable care provided the occupier has reason to know children are likely to trespass, the children do not appreciate the risk and the utility of the condition and burden of eliminating it are slight compared to the risk to children.

It is clear enough that there is now little support for the *Addie* v. *Dumbreck* rule; since 1954 the courts have moved decisively away from it and none of the law reform agencies whose work is available to us and who have reported since the English Law Reform Committee have supported it. Its principal defect is that by treating all trespassers alike, its consistent application has resulted in unacceptable decisions and this has led to much of the difficulty in coming to any clear statement of the law. A majority of the Committee is also clear that it does not accept any of the compromise suggestions set out above. The Working Paper of the New South Wales Law Reform Commission is concerned to regulate the respective tasks of judge and jury, a problem which does not arise in South Australia; and its suggested formula seems to the Committee to confuse rather than to clarify the law. But one of the purposes of the formula is to allow the courts to continue to develop the *Cardy* principle and this may now perhaps be achieved by allowing

the common law to develop without legislative interruption. The New Zealand proposals seem to the Committee to be needlessly elaborate; the common law is capable of dealing with the illegal entrant without such legislation (cf. *Smith* v. *Jenkins* (1970) 119 *C.L.R.* 397 *at p.* 417 per Windeyer J. and *Herrington* v. *British Railways Board* (1971) 2 *Q.B.* 107 *at p.* 120 per Salmon L. J.) and questions of warning to and any knowledge of the trespasser are matters which ought to be relevant to the question of whether a duty of care has been fulfilled rather than that of whether one should exist (cf. the discussion of *London Graving Dock* v. *Horton* (*supra*)). The Alberta proposals confine any possible duty situation to relatively narrow circumstances and, as the common law now seems to be developing, this would merely deprive the present law of some of the flexibility which is one of its greatest assets. In the view of a majority of the Committee the choice to be made lies between adopting the general principles of the law of negligence or of allowing the common law, which may be at the threshold of significant development, to continue to develop on its own.

There are powerful arguments in favour of either course. The adoption of the general principles of the law of negligence has the major advantage that the law which courts have to administer and on the basis of which practitioners must advise clients, would be given a firm foundation on principles with which both are thoroughly familiar and accustomed to deal. Moreover, the general principles of negligence ought to be well capable of taking into account such matters as the unpredictability of the movements of the trespasser and to balance the convenience of the occupier against the security of the trespasser. The Occupier's Liability Act (Scotland) has apparently worked well since its introduction and has caused neither obvious injustice nor difficulty of application and the law it establishes passes without criticism and with some favourable comment in the leading Scottish treatise (*Walker*: *The Law of Delict in Scotland*, 1965). The only case which has gone to the House of Lords since the Act has been in force (*M'Glone* v. *British Railways Board* (1966) *S.C.* (*H.L.*) 1) tends to bear out that the Act does not impose undue burdens on occupiers. Moreover, there are good reasons for thinking that this was to be expected. In *Herrington* v. *British Railways Board* (1971) 2 *Q.B.* 107 Salmon L. J. who, with the other members of the Court of Appeal, supported reform placing the duty to trespassers on the basis of negligence, said at p. 120: "foreseeability of the likelihood of injury, the degree of risk, the gravity of the injury, are all circumstances which have to be assessed by the court and weighed against the burden which would be incurred by an occupier in taking steps to prevent injury before the court can decide whether or not negligence has been made out". Long before this Dixon J. in *Transport Commissioners* v. *Barton* (1933) 49 *C.L.R.* 114 had said (at p. 131): "If the standard of duty be, as it might be expected to be, the care which a reasonable man in the circumstances would exercise to avoid harm, its application in many cases might well result in an occupier being required to do little or nothing more than to refrain from malicious or reckless injury . . . For one important circumstance determining the care which would be reasonable is, or might be, the fact that the trespasser is intruding where he has no business. Another is that we do not expect that an occupier conducting operations upon his own land will lightly suspend, relinquish or divert them, and often the expense or inconvenience of interrupting a normal course of

action might be such that nothing but imminent risk to life or limb would be considered reasonably to require it". And even in the cases in which courts have used negligence principles in assessing the duty owed to a trespasser they have often decided in favour of the occupier (e.g. *Videan* v. *British Transport Commission* (1963) 2 *Q.B.* 650, especially per Lord Denning, M. R.). Lastly, the adoption of the general principles of the law of negligence would remove some apparent anomalies from the law. For example, if a trespasser is injured not by the occupier, but by a contractor or other person lawfully on the premises, the case falls to be decided according to general principles of negligence (*Buddand* v. *Guildford Gas Co.* (1949) 1 *K.B.* 410); and if a trespasser removes dangerous materials from premises and a third party is injured by them, the duty owed by the occupier to the injured person again falls to be decided according to ordinary negligence principles, though had it been the trespasser who was injured the special rules governing occupier's liability would have applied (*Kingzett* v. *British Railways Board* (1968) 112 *Sol. Jo.* 625 (*C.A.*) and *McCarthy* v. *Wellington City Corporation* (1966) *N.Z.L.R.* 481). Decisions such as these make the different treatment of the occupier/trespasser situation seem arbitrary to some members of the Committee.

The arguments in favour of allowing the common law to continue to develop without legislative intervention depends very much on the law continuing to develop along the lines marked out by Barwick C. J. and Menzies J. in *Cooper* v. *Southern Portland Cement Ltd.* (*supra*) rather than along some of the lines suggested by members of the House of Lords in *Herrington's case* and criticized earlier. Basing the liability of the occupier on ordinary negligence principles, as does the Scottish Act, has the consequence that a duty is owed to any trespasser who may reasonably foreseeably enter premises. So mere occupation of land is capable of giving rise to a duty of care if the entry of a trespasser is reasonably forseeable. The principle expressed by Dixon C. J. in *Cardy* and restored in *Cooper* suggests that the duty depends not merely on the occupation of the land but of the presence of a special danger upon it and that it arises not when the entry of a trespasser is simply reasonably foreseeable but when it is known or expected or there are very good grounds for expecting his presence. In practice, for reasons discussed in the preceding paragraph, this distinction is by no means as clear cut as it seems; but it is apparent enough that a change to ordinary negligence principles accepts a social philosophy that imposes greater responsibilities on the occupier for the safety of the trespasser. Moreover, there have been cases where an occupier has been held negligent which seems to indicate that ordinary negligence principles may in fact impose quite onerous burdens upon him (cf. *McCarthy* v. *Wellington City Corporation, supra*). There is, therefore, at least a possibility that the change would impose extra responsibilities on the occupier. This may be undesirable, since even if trespassers are relatively "innocent" they are often nevertheless unwanted by the occupier and a cause of trouble and concern to him in that they may cause accidental damage to his property or otherwise disrupt his activities; and he may legitimately feel that in ordinary circumstances he would prefer to discourage them rather than be attentive to their safety. If, on the other hand, his duties stem from especially dangerous circumstances to persons whose presence, if undesired, is very probable, there is good reason to limit his freedom of action in some way. Secondly,

if there is a danger that the law will appear to impose too onerous a duty on an occupier, there is a temptation for courts to retreat from the usual objective standard of care to the more subjective descriptions of the occupier's duty countenanced in *Herrington's case* so as to ameliorate his position. Thirdly, appellate courts will be able to exert greater influence in ensuring consistency in the fixing of the extent of the responsibilities of the occupier. And lastly, it is hard to imagine that the courts will find great difficulty in managing the "overriding duty" concept, which is their own creation and belongs decisively to that same tradition as *Indermaur* v. *Dames*, which provided valuable guidance when attitudes relating to the duties owed to lawful entrants on land were perhaps comparable with those now held with respect to trespassers.

The Committee has been unable to come to a unanimous decision as to which choice is preferable. One member recommends that ordinary negligence principles be adopted as in Scotland, so that trespassers may formally be treated in the same way as other entrants on to property; while three prefer to see the common law allowed to develop in its own way. But it should be added that if the Privy Council in the appeal from the decision of the High Court in *Cooper's case* should lead the law into the channels suggested by Lords Reid, Morris and Pearson in *Herrington's case* two of those members who presently prefer to see the common law left alone would recommend a change to negligence as in Scotland whilst one would prefer the solution recommended by Alberta. And the Committee recognizes that if it is decided that the change to ordinary principles of negligence should be made, then on such inquiries as the Committee has been able to make the cost of insurance premiums is likely to be increased.

7. *Duties of Lessors to Visitors on Demised Property*

Where premises are leased to a tenant, the right of exclusive occupation of them goes to the tenant as the necessary incident of his tenancy. Consequently if a visitor to the demised premises is injured while on them his action lies against the tenant as occupier rather than against the landlord. Yet, especially in the case of short-term tenancies, the duty of keeping the property in repair belongs in considerable measure to the landlord. Since the decisions in *Cavalier* v. *Pope* (1906) *A.C.* 428 it has been clear that this duty is owed to the tenant in virtue of the contract between landlord and tenant and does not extend to other persons lawfully on the premises, so that an injured entrant has no direct redress against the landlord but must bring his action against the tenant who, in turn, must try to recover over against the landlord. In order to prevent this circuity of action the English Law Reform Committee recommended that where a visitor to premises has been injured because of the failure of the landlord to fulfil his duty of repair the visitor should have a several right to sue the landlord direct (Report, Part III).

This recommendation has been put into force in England (Occupier's Liability Act, s. 4), Scotland (Occupier's Liability Act, s. 3) and New Zealand (Occupier's Liability Act, s. 8), and has been adopted by the Law Reform Commissions of New South Wales (Working paper, s. 72) and Ontario.

This recommendation as it stands is of limited scope. The duties owed by the landlord to the tenant are relatively narrow in compass and do not extend to being reasonably careful to ensure the safety of the tenant. This recommendation therefore is not that the landlord with the duty to repair should owe the ordinary duty to be careful to the family or visitors of the tenant, since his duties towards them might then be more onerous than his duties to the tenant himself; it is only that the duties owed to the tenant should also be owed to his family and visitors. The Committee, however, would prefer to impose the ordinary duty of care on the landlord and would recommend that no contract between landlord and tenant be able to reduce the standard of care owed to the entrant nor permit the landlord to claim over against the tenant under the provisions of the lease or tenancy agreement. An even more stringent duty is already placed on the landlord if through lack of repair a person on a highway is injured (*Wringe* v. *Cohen* (1940) 1 *K.B.* 229, *Heap* v. *Ind Coope and Allsopp* (1940) 2 *K.B.* 476); and today the landlord of a tumbledown house has his freedom of user of his premises restricted by the Housing Improvement Act, 1940-1971, s. 23 and Part VII.

8. *Miscellaneous*

(*a*) *Effect of contract on occupier's liability to a third party.* Where a person contracts with the occupier on the footing that he is to be entitled under the contract to permit third persons to use them (whether in addition to or in place of himself) it seems that as the law now stands the duty owed by the occupier to such third parties in regard to the safety of the premises is the same as that which he owes to the other party to the contract (*Fosbrook-Hobbes* v. *Airwork Ltd.* (1937) 1 *All E.R.* 108). The English Law Reform Committee thought it unfair that the standard of care owed to any entrant should be capable of being reduced without his or her knowledge, and recommended that the duty owed to an entrant in right of a contract between the occupier and another person should be the ordinary duty of care unless the contract imposes a higher duty (Report, para. 55). This suggestion was put into force in England (Occupier's Liability Act s. 3) and New Zealand (Occupier's Liability Act s. 5). The Working Paper of the New South Wales Law Reform Commission (para. 71) agrees that the duty owed should be incapable of reduction in this way, but recommends that it should be incapable of being increased either. The Committee recommends adoption of the principle in force in England and New Zealand.

(*b*) Any legislation in this area of law should bind the Crown.

9. *Drafting*

The model for legislation of the kind we have recommended in this Report has been the Occupier's Liability Act, 1957 (England). It has been used as the basis of the New Zealand Act of 1962 and of the statute proposed by the Ontario Law Reform Commission (1972), though some sections have been modified in the light of criticisms of the English Act. The Committee would envisage this legislation as the basis of a statute embodying the changes it has suggested, but would draw the attention of Parliamentary Counsel to the specific criticisms of the English Act made by the New South Wales Law Reform Commission

and the Report of the Institute of Law Research and Reform of the University of Alberta, and to the following commentaries on the English Act: Payne, 21 M.L.R. 359; Glanville Williams 24 M.L.R. 114-115; Odgers (1957) C.L.J. 30; Street: Law of Torts, 4th edition, pp. 176-194; 226 Law Times Journal 162; 234 Law Times Journal 576 and 644; 107 Law Journal 308.

The Committee desires to express their appreciation to the Honourable the Chief Justice (Dr. J. J. Bray) and the Honourable Mr. Justice Bright, His Honour Judge O'Loughlin, His Honour Judge Muirhead, and Mr. D. R. Newman, Q.C., all of whom gave valuable assistance by commenting on the report in its draft stages.

Mr. J. F. Keeler, a member of the Committee, assumed the difficult responsibility of collating the drafts and comments into the final form in which the report now appears.

We have the honour to be

HOWARD ZELLING.

B. R. COX.

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JOHN KEELER.

Law Reform Committee of South Australia