SOUTH AUSTRALIA

FORTY-EIGHTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO OWNERS OR OCCUPIERS OF LAND AND TRESPASSERS ON THAT LAND

1985

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

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

THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman*

M. F. GRAY, Q.C., S.-G.

P. R. MORGAN.

D. F. WICKS.

M. J. DETMOLD.

G. F. HISKEY, S.M.

The Secretary of the Committee is Mrs J. L. Leonard, c/o Supreme Court, Victoria Square, Adelaide 5000.

FORTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO OWNERS OR OCCUPIERS OF LAND AND TRESPASSERS ON THAT LAND

To:

The Honourable C.J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

In the Twenty-Fourth Report of this Committee relating to Occupiers' Liability, the Committee dealt with the law relating to invitors and invitees and licensors and licensees and persons entering land as of right and recommended that the law should be amended to provide a general duty on the owner or occupier of land of the type described by Lord Atkin in *Donoghue v. Stevenson [1932] A.C. 562 at 580.*

The committee did not reach a unanimous decision with respect to trespassers. All members of the Committee except one expressed a preference for leaving trespassers outside the scope of the proposed reform, particularly as the common law was then developing, whilst one member of the Committee recommended that trespassers be dealt with according to the ordinary laws of negligence.

You have referred back to us for further consideration the question of whether a trespasser should have any, and if so what, rights against the owner or occupier of the land upon which he is trespassing.

The definition of "trespasser" is as is set out in *Clerk & Lindsell on Torts (15th Edition 1982) page 631:*

> "A trespasser is a person who has neither right nor permission to enter on premises."

That short and succinct definition cloaks the fact that trespassers are of very many kinds, from the toddler who innocently strays on to premises and the infant who is still too young to be able to read a warning sign, up to criminals such as murderers, arsonists, robbers, rapists and burglars who enter upon premises as trespassers for the furtherance of a criminal object. As was said by Lord Morris of Borth-y-gest in *British Railways Board v. Herrington [1972] A.C. 877 at 904:*

> "The term 'trespasser' is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child—all may be dubbed as trespassers."

The duty owed until recent years by owners or occupiers of land towards all kinds of trespassers with certain exceptions which we will deal with later, is, with one minor gloss, well set out in the First Edition of *Halsbury's Laws of England (1912) Volume XXI paragraph 664—*

> "The occupier of premises owes no duty to persons who come upon them as trespassers. He must not, however, encourage or attract trespassers to a place where they are exposed, whether intentionally or not, to some specific danger or which he is cognisant, nor may he, when aware of the presence of a trespasser on his premises, do any act which endangers his safety."

We would add only one comment to that definition. A person may lawfully use force in defence of his person or property against an intentional trespasser.

The leading case on the law as it then stood is the decision of the House of Lords in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] A.C. 358.* In that case a boy four years of age was killed by being crushed in the terminal wheel of the haulage system belonging to a colliery company. The system which was used for depositing ash in a field adjoining the colliery, consisted of an endless wire cable, operated from time to time as might be necessary from the pithead by an electric motor, while at the other end of the system which was not visible from the pithead, there was a heavy horizontal iron wheel round which the cable passed and returned. The field was surrounded by a hedge which was quite inadequate to keep out the public and it was to the knowledge of the colliery company used as a playground by young children. The colliery officials at times warned children out of the field but their warnings were disregarded. The wheel was dangerous and attractive to children and at the time of the accident it was insufficiently protected. Whilst the child in question was sitting either on the cover of the wheel or in a position in front of and in close proximity to the pulley and rope, the appellant's servants set the mechanism in motion as a result of which the child was caught and drawn in to the mechanism and was killed. The House of Lords held that the boy was a trespasser and went on to the colliery premises at his own risk and that the company owed him no duty to protect him from injury.

That view of the law was affirmed as late as 1964 in *Commissioner of Railways v. Quinlan [1964] A.C. 1054.* That was a decision of the Privy Council on appeal from the Full Supreme Court of New South Wales. On January 5, 1956 the respondent Quinlan was driving a motor truck across a private level crossing near Carlingford in New South Wales. The private level crossing went across a railway line operated by the appellant Commissioner of Railways for New South Wales. Quinlan's truck collided with a train at the crossing and he alleged that the Commissioner was negligent in the care, control and management of the train and crossing and in failing to take reasonable and proper steps to secure the safety of persons using the crossing. It was conceded that he was a trespasser. The judgment of their Lordships' Board was delivered by Viscount Radcliffe. The judgment allowed an appeal from the Full Supreme Court of New South Wales which had dismissed the Commissioner's appeal from a judgment of the Supreme Court entered for the respondent for £3,250 Australian as damages awarded by the verdict of a jury. The law was laid down by their Lordships at page 1075—

> "That a trespasser must take the land as he finds it . . . subject to the restriction that the occupier must not wilfully or recklessly conduct them [sc. the occupier's activities] to his harm."

Their Lordships further held at page 1077 that the only knowledge which would be sufficient to impose liability is "knowledge in the occupier sufficient to impose upon him the duty not to be wilful or reckless towards the man to whom otherwise he would owe no duty at all; and such knowledge is something a great deal more concrete than a mere warning of likelihood. The presence, if it is to be treated as anticipated, must be "extremely likely", to use Lord Buckmaster's words in the *Excelsior Wire Rope Co.'s case [1930] A.C. 404 at 410.* Their Lordships at page 1078 rejected the idea that the rule in *Donoghue v. Stevenson* applied to the relationship between an owner or occupier of land and a trespasser on that land.

A different approach was taken by the House of Lords in the case of *Excelsior Wire Rope Company Limited v. Callan [1930] A.C. 404* referred to above. The facts in that case were that the infant respondents Leslie

Daniel Callan aged nine years and Eileen Callan aged five years were injured by the movement of a wire rope used to move a truck along a siding constructed by the appellant company near a railway. On one occasion when a truck had to be moved, two of the company's employees, in accordance with their usual practice, walked to the post to which a pulley block was attached through which the wire rope passed for the purpose of seeing that the rope was properly adjusted and to drive children away. After the men went back to start the machine, Eileen Callan was seen swinging on the rope and the movement of the rope caused her hands to be caught in the pulley and crushed, and her brother in trying to rescue her similarly injured. It was held by the House of Lords that as it was well known to the company that when the machine was going to start it was extremely likely that children would be near the post (or sheave as it is called), the duty owed by the company when they set the machine in motion was to see that no child was in such a position as to be exposed to danger by the occasional use to which the machine was put and they had failed in that duty, and that as the immediate danger was apparent it was not material whether the children were or were not trespassers. It is not surprising that in the far-off days when some of the more senior members of this Committee were studying law, a favourite question of examiners in torts was to ask candidates to reconcile the decision in Addie's case with the decision in Callan's case. They are of course irreconcilable.

Quinlan's case was stringently criticized in an article called *"An Adult Trespasser on the Railway Lines"* by the then editor of the Law Quarterly Review, A.L. Goodhart Q.C., in *(1964) 80 L.Q.R. pages 559 and following.* Ultimately Addie's case was overruled, although this is not said in so many words, in the decision of the House of Lords in *British Railways Board v. Herrington [1972] A.C. 877.* In that case the defendants owned an electrified line which was fenced off from a meadow where children lawfully played. In 1965 the fence had been in a dilapidated condition for several months and people took a short cut through it across the line. The defendant's station master who was responsible for that stretch of the line was notified in April 1965 that children had been seen on it. Thereafter the fence was not repaired. On June 7, 1965 the plaintiff then aged six, trespassed over the broken fence from the meadow where he had been playing and was injured on the live rail. He successfully brought an action claiming damages for negligence and the verdict in his favour was sustained both in the Court of Appeal and in the House of Lords. The difficulty with the House of Lords' decision is that their lordships gave different reasons for their judgment. Lord Reid at pages 898-899 said that the test of an occupier's duty to a trespasser was subjective because the trespasser forced a neighbour relationship on the occupier. The occupier's liability depended on whether in such circumstances a conscientious humane man with the occupier's knowledge, skill and resources, could reasonably have been expected to do or refrain from doing before the accident something which would have avoided it. Lord Morris at page 909 held that there was no duty on an occupier to ensure that no trespasser entered his land, nor to make his land fit for trespassers to trespass in, nor to survey his land to discover the existence of dangers of which he was not aware since a trespasser trespasses at his peril, but the occupier did owe the trespasser a duty to take such steps as commonsense or common humanity would dictate to exclude or warn or otherwise within reasonable and practicable limits reduce or avert danger. Lord Wilberforce held that the plaintiff succeeded because of the existence near the public of a dangerous situation; that is to say the placing of electrical conductors over above or on the ground proximate to places of access, placed a duty on the occupier from the continuous nature of

the danger, the lethal danger of contact, and the fact that to children the danger may not be apparent: see his speech at page 920. Lord Pearson held that the rule in Addie's case had been rendered obsolete by changes in physical and social conditions because the greater proportion of the population lived in towns where there was less space for children to play and a greater temptation therefore to trespass. Accordingly occupiers had to take reasonable steps to deter people, especially children, from trespassing in dangerous places. Lord Diplock held that Addie's case did not provide an exclusive or comprehensive statement of the occupier's duty towards a trespasser. The characteristics of the occupier's duty were:

(1) There must be actual knowledge of the presence of the trespasser or knowledge of facts which make it likely that he will come on the land and actual knowledge of conditions on the land likely to injure a trespasser unaware of the danger.

(2) If a reasonable man, possessed of the actual knowledge of those facts would recognize the likelihood of the trespasser's presence and the risk, the occupier's failure to appreciate them does not absolve him.

(3) The duty is limited to taking reasonable steps to enable the trespasser to avoid the danger.

(4) The relevant likelihood to be considered is of the trespasser's presence at the actual time and place of danger to him, such likelihood as would impel a man of ordinary humane feelings to take steps to mitigate the risk of injury to which the particular danger exposes the trespasser: see his speech at pages 941-942.

Accordingly Lord Reid, Lord Morris and Lord Diplock espoused a common humanity test, Lord Wilberforce a test arising from the continuous nature of the danger and Lord Pearson a test spelt out from the presence of the danger and changed conditions now that so many more people live in towns where there are no playing spaces for children.

The duty of common humanity test was applied by the Privy Council in *Southern Portland Cement Limited v. Cooper [1974] A.C. 623,* on appeal from the High Court of Australia, and ultimately from the Supreme Court of New South Wales. This was the case of an infant trespasser aged thirteen years who came in contact with a high voltage electric cable on land owned by the defendants which she could only come into contact with because they had carelessly tipped waste material from crushing operations relating to limestone in large quantities which partially buried some of the poles which carried the electricity cable so that the plaintiff was able to come into contact with the cable with disastrous results. Lord Reid, who delivered the judgment of the Board, said at page 644:

> "The rights and interests of the occupier must have full consideration. No unreasonable burden must be put on him. With regard to dangers which have arisen on his land without his knowledge he can have no obligation to make enquiries or inspection. With regard to dangers of which he has knowledge but which he did not create he cannot be required to incur what for him would be large expense.
>
> If the occupier creates the danger when he knows that there is a chance that trespassers will come that way and will not see or realise the danger he may have to do more. There may be difficult cases where the occupier will be hampered in the conduct of his own affairs if he has to take elaborate precautions. But in the present case it would have been easy to prevent the development of the dangerous situation which caused the plaintiff's injuries. The more

serious the danger the greater is the obligation to avoid it. And if the dangerous thing or something near it is an allurement to children that may greatly increase the chance that children will come there."

So, in that passage the Board proceeded from a common humanity duty, to dangerous situation, and from there to allurement.

Clerk & Lindsell (op. cit.) say at page 635:

"Unfortunately it is difficult to see how in nature if not in content the new duty of 'ordinary humanity' differs in any meaningful sense from the usual *Donoghue v. Stevenson* duty of care. Unless the occupier is to be judged by some standard other than that of the reasonable man—unless he is to be liable only for gross negligence, in other words—and of this there is no suggestion whatsoever in the speeches in Herrington's case or elsewhere—it is hard to see how an occupier can be liable to a trespasser for negligent behaviour without this placing on him an obligation to take reasonable care for the trespasser's safety—or in other words the ordinary *Donoghue v. Stevenson* duty of care."

Fleming, Law of Torts (6th Edition 1983) page 455 says:—

"Moreover, what 'common humanity' demands from him [sc. the occupier] must be adapted to his financial and other resources. An impecunious occupier with little assistance at hand may be excused where large organisations, like railways, public utilities or public authorities, have to perform. Thus rather than saying that trespassers must take the land as they find it, one might say that they must take the occupier as they find him."

It is not surprising that Courts faced with the fact that many trespassers are young children or persons trespassing on land either unwittingly or certainly without criminal intent, tried by a variety of devices to find some way of making the occupier liable in a proper case.

The first method used was that of a fictitious licence based on an implied consent. The leading case on this is the decision of the House of Lords in *Lowery v. Walker [1911] A.C. 10.* In that case the respondent Walker who owned a savage horse which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the occupier and which he knew the public were in a habit of crossing without leave on their way to a railway station. The appellant Lowery in crossing the field was attacked, bitten and stamped on by the horse. The county court Judge before whom the matter came at first instance, found as a fact that the respondent was guilty of negligence in putting a horse which he knew to be ferocious into a field which he knew to be habitually crossed by the public, and gave judgment for the appellant in the sum of £100. His decision was reversed by the Divisional Court and by the Court of Appeal. It was restored by the House of Lords. The Earl of Halsbury who gave the leading judgment said at page 14 that where an owner or occupier put a dangerous beast where he knew it might be probable—and almost certain if the thing continued—that the beast would sooner or later do some injury to persons crossing the ground and crossing it in one sense with his permission—not that he had given direct permission but that he had declined to interfere and so acquiesced in their crossing it, then the owner or occupier was bound to take ordinary precautions to prevent persons going into a dangerous place where he knew they were going and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen.

The doctrine of implied licence was a pure fiction and was given its quietus by the judgment of Dixon C. J. in *Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 C.L.R. 274 at pages 281-282.*

The problem of fictitious licence was aggravated by the doctrine of allurement which operated only in the case of small children. It was said that if the noxious thing was an allurement which would tempt children to play with it, that sufficed in practice to convert the temptation into an invitation. The difficulty with this discrimen is that it has no content. Anything can be an allurement to an adventurous small child.

The next amendment to the draconic common law was that of Lord Denning M.R. in *Videan v. The British Transport Commission [1963] 2 Q.B. 650* where he drew a distinction between the static condition of the premises and an activity carried on by the owner or occupier on those premises. If the owner or occupier was carrying on an activity on the premises, a majority of the Court of Appeal held that the ordinary rules of negligence applied, and if the consequence was within the risk created by the negligence, then the owner or occupier was liable. A similar result had been earlier come to with regard to contractors in *Davis v. St. Mary's Demolitions [1954] 1 W.L.R. 592.* Videan's case was expressly disapproved in Quinlan's case. However the concept of activity duty was accepted by the High Court of Australia in *Rich v. Commissioner for Railways (N.S.W.) (1959) 101 C.L.R. 135* and it may well be that this concept, in Australia at least, survives the disapproval of Videan's case by the House of Lords in England in Herrington's case, so that the law may not be the same in the two countries. The question of whether an occupier owes concurrent duties to a trespasser was expressly left open by Gibbs J. (as he then was) in *Public Transport Commission of New South Wales v. Perry (1977) 137 C.L.R. 107 at 132.*

The next exception to the rule is one which is amply attested by judgments of the High Court of Australia and that is that if the owner or occupier is carrying on a hazardous enterprise or activity on premises, then the owner or occupier is under a duty to take steps to prevent persons coming into contact with the hazardous activity: see the judgment of the High Court of Australia in *Thompson v. Bankstown Corporation (1953) 87 C.L.R. 619* and *Munnings and Another v. The Hydro-Electric Commission (1971) 125 C.L.R. 1.* Notwithstanding Herrington's case, the Court of Appeal upheld this doctrine of liability for hazardous activity when it was likely to attract children whom the owner or occupier knew would be likely to trespass in *Pannett v. P. McGuinness & Co. Ltd. [1972] 2 Q.B. 599.*

The next inroad upon the general doctrine was made by the High Court of Australia in the case to which we have already referred to *Public Transport Commission of New South Wales v. Perry (1977) 137 C.L.R. 107.* In that case the plaintiff was an intending passenger on a train and was waiting at a suburban station. Whilst awaiting the arrival of the train she suffered an epileptic fit, fell unconscious on the rails, and was struck by the train. The jury found that the train driver had failed to keep a proper lookout and to take all reasonable care in driving the train. On the appeal before the High Court of Australia it was contended that the plaintiff was a trespasser to whom no duty was owed other than the duty not recklessly to harm her. The High Court held that the plaintiff's involuntary fall from the platform where she was entitled to be did not make her a trespasser and did not absolve the defendant from its duty to take reasonable care for her safety.

One problem which has not been solved on the cases is: assuming there is a duty on the occupier, in what circumstances does it exist in

terms of probability of the danger actually materialising. In *Westwood v. Post Office [1973] 1 Q.B. 591 at page 605* the Court of Appeal defined it in terms of substantial probability that trespassers would come and quoted from the speech of Lord Reid in *Herrington's case (supra)* at page 399. In *Southern Portland Cement v. Cooper (supra)* their Lordships held at page 639 that the test was that the occupier had to consider in advance of the arrival of a trespasser, whether or not "it is *extremely likely* that a trespasser will come". Further down the page they put it in terms that "the occupier may have to regulate his activities at a much earlier time as soon as he knows that the arrival of the trespasser at some future time is *very probable*". And they go on to say:

> "If the occupier knows facts from which he ought to infer that the coming of the trespasser is *very likely*, he will not be heard to say that he shut his eyes to those facts or did not realise this probability. He as good as knew it."

Their Lordships however at page 640 imposed a different test where one is dealing with future events. They said:—

> "But when one passes from knowledge of something that has already happened to foresight of what may happen in future, the justification for limiting the imposition of a duty to cases of extreme likelihood disappears. In their Lordships' judgment there is neither logical nor practical justification for holding that an occupier comes under a duty to potential trespassers if he estimates or ought to estimate that the arrival of one or more trespassers on his land is extremely likely, but that he has no duty to them if he merely estimates or ought to estimate that the chance, probability or likelihood of their arrival on his land is somewhat less than extremely high. Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line in extreme probability."

They went on at page 644:

> "Their Lordships have already rejected the view that no duty is owed unless the advent of a trespasser is extremely probable. It was argued that the duty could be limited to cases where the coming of trespassers is more probable than not. Their Lordships can find neither principle nor authority nor any practical reason to justify such a limitation. The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there.
>
> Such consideration should be all-embracing. On the one hand the occupier is entitled to put in the scales every kind of disadvantage to him if he takes or refrains from action for the benefit of trespassers. On the other hand he must consider the degree of likelihood of trespassers coming and the degree of hidden or unexpected danger to which they may be exposed if they come. He may have to give more weight to these factors if the potential trespassers are children because generally mere warning is of little value to protect children."

Ultimately, their Lordships adopted the statement of Lord Uthwatt in *Read v. J. Lyons & Co. Ltd. [1947] A.C. 156 at 185:—*

"There is demanded of him [sc. the occupier] a standard of conduct no higher than what a reasonably minded occupier of land, with due regard to his own interest, might well agree to be fair and no lower than a trespasser ... might in a civilized community reasonably expect."

They went on to disapprove of the High Court's view that there were two separate parallel duties, but as we have already pointed out the High Court, speaking through Gibbs J., refused in Perry's case to hold that these parallel duties did not any longer exist. We think that, like any other issue of fact, it should be proved on the balance of probabilities that the risk was more likely than not to eventuate unless the owner or occupier took proper steps to avert it.

In the last resort the difficulty in this area seems to be factual rather than legal. In this country many Australians have beach houses which they only visit at substantial intervals, mainly during the summer. Others are trustees of vacant properties. Others still have properties with vacant possession for sale in which nobody is living. Others again are the owners of properties which were used many years ago by previous owners or by prospectors for mining and there are old mines shafts and adits on the land, the very existence of which may not be known to the present owner, nor may there be any really safe method of protection even if he does know of them. The same considerations apply to properties with old disused wells on them or with ramshackle buildings or ruins of buildings which are no longer in use. In all of these cases if there is no dangerous activity being carried on and the owner has no knowledge of trespassers, be they children or adults, it seems hard to say that the owner or occupier should be liable for damage to a trespasser in those circumstances. So it seems to us that in every case it must be a question of a duty to take reasonable care. *Clerk & Lindsell (op. cit.)* say at page 635:—

"Of course, as a matter of fact it may be reasonable for an occupier to take less care for the safety of a trespasser than for the safety of someone he invites in; but as a matter of law the occupier's duty is nonetheless a duty to take reasonable care, and the fact that the plaintiff is a trespasser is merely a circumstance affecting what care is reasonable in this case. Reasonable care is a flexible, not a fixed standard."

We accordingly recommend as follows:—

(a) Trespasser with criminal intent:

The only duty imposed on the owner or occupier should be not to injure the trespasser intentionally except in self defence of person or property.

(b) Adult trespasser who intends to trespass and has no reasonable and lawful excuse:

The same duty as under *(a)* above.

(c) Adult trespasser in any other case:

The ordinary rules of negligence should apply.

(d) Child trespasser not being a trespasser with criminal intent:

The ordinary rules of negligence should apply.

The next problem that arises is where the injury arises out of precautions which the owner or occupier has taken to give due protection to his property and to act as a deterrent to trespassers coming on the property. This matter came for decision by the Court of Appeal in *Cummings v. Granger [1977] 1 Q.B. 397* where the defendant was the occupier of a

breaker's yard in the East End of London. At night the yard was locked up and the defendant's untrained Alsatian dog was turned loose to deter intruders. One night an associate of the defendant who had access to a key unlocked the side gate and, accompanied by the plaintiff who knew about the dog, entered the yard. The dog attacked the plaintiff causing her serious injury. It was held by the Court of Appeal that she had no cause of action because it was not unreasonable in the circumstances for the defendant to keep a dog in the yard to protect his property. It is arguable whether the same decision would be reached in Australia where, as we have said, there are two parallel duties which apparently are still recognized by the High Court. In any case this is an unusual case in that the plaintiff knew of the presence of the Alsatian dog on the premises and nevertheless entered them as a trespasser. We think that if the injury is caused by reasonable precautions to safeguard the protection of property, and due notice is given of the precautions or the plaintiff knows of the existence of the precaution, then the plaintiff should not have a cause of action.

We also think that the knowledge to be imputed to the occupier in all cases of claims by trespassers should be actual knowledge and not constructive knowledge. Where, as in England, the Courts have used the "ought to have known" test some of the results have been quite unsatisfactory, as in *Harris v. Birkenhead Corporation [1976] 1 W.L.R. 279* where the tenant of a house informed an officer of the defendant corporation that at some time she would be moving from the house and the Court said that other officers of the corporation having the duty to secure empty houses in the clearance area against vandals must have observed that the house was empty and therefore the corporation ought to have known that the house was empty and accordingly it had the requisite knowledge to make it liable to the plaintiff for the injuries which she received as a trespasser. That was a case of a child aged four, where the temptation is always on the Court to stretch the law in favour of the infant. But as there was no proof that officers of the corporation *did* know that the house was empty so as to make their knowledge the knowledge of the corporation, the case in our respectful opinion goes too far, and knowledge for the purpose of the amendment which we are recommending to the law, should mean actual and not constructive knowledge.

We should add that nothing in the amendment to the law recommended by us affects the position of mushroomers and others under the Trespassing on Land Act 1951, nor the law as to a person being unlawfully on premises under Section 17 of the Police Offences Act 1953, nor the laws relating to trespassing on Crown lands and all of these are to be regarded as untouched by the amendment which we propose.

We took the precaution of inquiring from the State Government Insurance Commission as to the likely effect of our recommendations on premiums charged for this class of insurance. We received a very helpful reply from the Assistant General Manager of the Commission, a copy of which is annexed to this report.

While we are on the topic, we should, although it is slightly outside the remit which you sent us, draw your attention to the case of *Holden v. White [1982] Q.B. 679.* In that case there was row of terraced houses with a private pathway at right angles to a public road. One of the tenants owned the pathway. The plaintiff Holden was delivering milk to a house at the far end of the pathway when he trod on a defective manhole cover in front of that house and was injured. The house to which he was delivering milk was not the house belonging to the owner of the right of

way. The Court of Appeal held that the owner of a servient tenement, that is the pathway, owed no duty of care at common law to those using the right of way or their visitors, and that the English Occupiers Liability Act 1957 which we considered in our previous report had not extended this liability and accordingly the liability only attached to the case of damage caused to visitors to the owner of the right of way. The case has been criticized by Spencer in *1983 Cambridge Law Journal at page 48* and by Griffith in *1983 The Conveyance page 52.* It was a case which was not envisaged by us when we wrote our original report and clearly it was not envisaged either by those who wrote the English Report or enacted the English legislation, but it is a matter which we think that you might, when drawing the necessary legislation, bear in mind as a factor to be considered.

We have the honour to be

HOWARD ZELLING
J.M. WHITE
CHRISTOPHER J. LEGOE
M.F. GRAY
P.R. MORGAN
D.F. WICKS
M.J. DETMOLD
G. HISKEY

Law Reform Committee of South Australia.

16th July, 1984.

12th June, 1984.

Chairman,
Law Reform Committee of South Australia,
Supreme Court,
ADELAIDE, S.A. 5000.

Dear Sir,

Law Reform Committee of South Australia
Trespassers—Owners/Occupiers of Land
Negligence—Right of Action

Thank you for your letter of enquiry and thank you for referring the matter to the Commission.

The issue has largely resolved as being one of estimating the escalation of a current situation centering upon an area of considerable doubt in the public mind.

Although entry upon another's land is tortious whether or not the entrant knows he is trespassing, the liability or otherwise of the owner does not appear to be clear in most circumstances.

The issuing of a Public Liability cover is invariably based upon fear on the part of the owner that no matter how carefully fenced or locked the property, or how diligent he may be in removing perceived hazards and husbanding visitors, a decision upon liability could still go against him.

Public Liability is usually effected by the policyholder with little expectation that there will be a claim, however, fear of the foregoing is the incentive. Premiums generally are low and because of the relatively low premium pool, a successful claim will throw the entire portfolio into loss, a situation which is usually reversed over time without premium alteration, but which does occasionally require substantial premium increases and places considerable strain upon, and threatening the future of reinsurance treaties.

Thus, a change in law would have the potential on one hand of having little or no effect, but on the other, a series of freak occurrences could have a catastrophic effect upon a public liability fund and escalate premiums considerably.

Obviously results will depend upon the final framing and subsequent interpretation of the new law.

Assuming that the Committee will recommend no change in law where persons with criminal intent are involved, and also assuming that we are only considering the person injured whilst taking a short cut, the curious, the skylarking or those blundering onto property, a minimal premium increase could probably occur across the board. This could be between 20-40%.

RURAL

The premium would depend upon the locality of the property, particularly accessibility to the public and also the nature of the rural industry involved. Properties outside "Sunday Driving" range from the Adelaide metropolitan area would probably not be affected, but those in new areas, particularly hobby farms or those with the likelihood of mine shafts, could incur premium increases in excess of 50%. Governing this, as earlier commented, framing and interpretation.

INDUSTRIAL

We feel proper consideration must be given to the liability of business properties who properly fence, lock and otherwise secure their premises. If the eventual law places persons who break through this security in the category of committing an offence and therefore outside the area of compensation, the effect upon premiums would be small.

If, however, injury following breaking into property with intent to only satisfy curiosity or for the devilment of doing so becomes actionable against the property owner, then an increase in premium would inevitably occur.

An accurate estimation of the initial amount is not possible, being initially dependent upon the nature of business (hazards, attractiveness), security and location.

Without historical data, our best opinion is an initial increase of 10% in order to create a pool, the premium either decreasing or increasing according to experience.

We have canvassed the matter with our reinsurers who are unable to add further to our opinion.

If we are able to provide additional information, we will write to you again.

Yours faithfully,
BRIAN D. WOODS, Assistant General Manager

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