

THE LAW REFORM COMMISSION  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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CONSULTATION PAPER  
ON  
OCCUPIERS' LIABILITY

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June 1993

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The Law Reform Commission  
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## THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty four Reports containing proposals for the reform of the law. It has also published eleven Working Papers, six Consultation Papers and Annual Reports. Details will be found on pp.141-145.

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<i>CONTENTS</i>	<i>PAGES</i>
<b>CHAPTER 1: INTRODUCTION</b>	<b>1- 3</b>
<b>CHAPTER 2: THE PRESENT LAW</b>	<b>4- 34</b>
(a) Contractual Entrants	4
(b) Invitees	5
<i>Hotel Proprietors Act 1963</i>	7
(c) Licensees	8
(d) Trespassers	11
Statutory Duties on Occupiers	34
<b>CHAPTER 3: THE LAW IN SOME OTHER JURISDICTIONS</b>	<b>35- 78</b>
Northern Ireland	35
England	35
Scotland	39
Scandinavia	41
Ontario	42
Alberta	47
British Columbia	49
Manitoba	51
Saskatchewan	51
South Africa	53
The United States of America	54
New Zealand	62
Australia	63
Australian Capital Territory	64
Tasmania	64
Western Australia	66
South Australia	71
New South Wales	72

<i>CONTENTS</i>	<i>PAGES</i>
<b>CHAPTER 4: PROVISIONAL RECOMMENDATIONS FOR REFORM</b>	<b>79-135</b>
GENERAL OPTIONS	80
(a) Restoration of the Former Law	80
(i) Trespassers	81
(ii) Invitees	84
(iii) Licensees	84
(b) Negligence as the Sole Test	86
(c) Not Legislating and Leaving the Law to Evolve	87
(d) Strict Liability	88
SPECIFIC ISSUES	92
(a) A Restricted Duty to Certain Trespassers	92
(b) A Restricted Duty to Entrants using Certain Lands for Recreational Purposes?	94
1. The level of duty to be prescribed	97
Option (a)	97
Option (b)	98
Option (c)	98
2. The persons who should be designated "recreational users"	99
3. What categories of property should be included?	100
4. What categories of occupier should be protected?	101
5. Should the exception apply to activities conducted on the exempted premises?	102
6. The constitutional dimensions of a recreational use restriction on liability	102
Our Provisional Conclusions	104

<i>CONTENTS</i>	<i>PAGES</i>
(c) A Special Exemption in relation to National Monuments?	104
 OUR OVERALL CONCLUSIONS	 106
The English Approach	106
The Deenihan Bill	107
The Alberta Approach	108
National Monuments	110
 TECHNICAL ISSUES	 111
(1) How should Premises be Defined?	111
(2) Who should be Characterised as Occupier?	112
(3) Should the Legislation Elaborate on what Constitutes Reasonable Care?	114
(4) Should the Occupier be Free to Modify or Exclude Liability?	116
(5) To what Extent should an Occupier be Liable for the Conduct of an Independent Contractor?	131
(6) Occupiers' Liability for Attacks by Dogs	133
(7) Preservation of Higher Obligations	134
 <b>CHAPTER 5: SUMMARY OF RECOMMENDATIONS</b>	 <b>136-140</b>
 <b>LIST OF COMMISSION PUBLICATIONS</b>	 <b>141-145</b>



## **CHAPTER 1: INTRODUCTION**

1.1 In this Consultation Paper we examine the law relating to occupiers' liability and make provisional proposals for reform. Comments on these proposals from any interested groups or persons will be welcome. When we have reflected on these comments we will publish, later this year, our Report on the subject, which will contain our final recommendations.

1.2 The law relating to Occupiers' Liability is, to date, the only topic which has been referred to the Commission by the present Attorney General and was referred to us on 20th March, 1992. The Commission has noted that, over the last ten years farmers organisations, particularly the I.F.A., have been seeking reform of the law in this area. Farmers are concerned, in particular, about the extent of their duty to trespassers who sustain injury on their lands. Their concern would appear to spring from the following factors:

- (a) Increased recreational user of land e.g. for hill walking, fishing, golfing, sight-seeing and visits to monuments.
- (b) Urban sprawl, particularly around Dublin, into agricultural areas, with its attendant increase in trespass, accidental or deliberate, particularly by children.
- (c) A perception that the Courts are interpreting the law in a manner more and more favourable to trespassers.
- (d) A fear that the above factors will lead, in due course to an increase in insurance premiums.

1.3 The 'old' law in this area was, perhaps still is, that an occupier (a) owes no duty to a trespasser save to refrain from setting out deliberately to

injure him or (b) should not be knowingly reckless as to the likelihood of injuring him. This law is, attractively, cut and dried. The approach of the farmers is that all recreational 'trespassers' are welcome on their lands provided they look after and take responsibility for themselves. Organisations of recreational users are also in favour of this approach. Where, then, is the problem? It must not be forgotten that farmers themselves constitute a significant percentage of recreational users of land and actually encourage such user for both social and commercial reasons.

1.4 The approach of the unorganised, potential trespassers at the extremities of the urban sprawl is not known. These housing developments constitute a large reservoir of potential child-plaintiffs and it is, undoubtedly, the development of the law and the evolution of a doctrine of "proximity" in the context of child trespass that causes most alarm to farmers and their legal advisers. Judicial statements such as that of Walsh J in *McNamara v E.S.B.*<sup>1</sup> to the effect that if the Courts had previously upheld the old law i.e. that the only duty to a trespasser was one not to act with reckless disregard of his presence, they were wrong, have undoubtedly, directly or indirectly, fuelled the farmers' campaign.

1.5 The Commission will examine closely the present state of the law and the reality of occupiers' fears in this Paper. If ever the Commission's usual consultation procedures were important and necessary, they are doubly so for this study. The ownership and user of land has deep historical significance and gives rise to strong emotions. Concepts such as the right to private property and the inviolability of the dwelling are embedded in the Constitution. Is a land-owner not entitled to make his lands reasonably safe for himself, his family, employees and licensees and then relax and enjoy his property without the fear of further duties and expenses being foisted on him by the Courts? Even the successful defence of a speculative action by an impecunious trespasser is expensive. If the occupier is insured, his company may settle a case for its nuisance value and increase the occupier's premium. *Pace* the late Mr. Justice McCarthy, concepts founded on property should not be regarded as "artificial". In recent years, the rod licence dispute escalated, largely, because of a failure to consult fishermen and to take account of deep emotion relating to ancient rights, however difficult certain expressed attitudes may have been to understand. It would be gravely mistaken to regard the farmers campaign as mean-minded. On the contrary, it is grounded on a wish to increase the recreational user of *their* lands on reasonable terms.

1.6 Nevertheless, the realities may not be quite as black as they are painted in certain quarters. In addition, certain statements we have seen on occupiers' rights misstate the law. In Chapter 2 we set out the main features of the present law. In Chapter 3, we examine some aspects of the law in other jurisdictions, including proposals from law reform bodies which have yet to be

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1 [1975] I.R. 1.

acted upon. In Chapter 4, we examine the strengths and weaknesses of the present law and make provisional recommendations for reform. Chapter 5 sets out a summary of these provisional recommendations.

1.7 As we have indicated, we would be very pleased to receive comments on our provisional recommendations from any interested person or group. Since we intend to publish our Report on the subject later this year, we would be grateful if all comments could reach us by 1st October, 1993.

## CHAPTER 2: THE PRESENT LAW

2.1 In this chapter, we give an outline of the present law on the subject.<sup>1</sup> To do so is not easy since clearly the law is in a state of transition. The traditional approach divides entrants into four distinct categories and ascribes a distinct duty to the occupier relative to each of these categories. A negligence-based test has displaced the traditional approach in respect of trespassers. Logically, it seems hard to see why a negligence-based test should not apply to all categories of entrant, but the Supreme Court has evinced some reluctance to take this step. One is therefore left with the somewhat unsatisfactory position that the traditional approach must still be considered, even though there is a strong likelihood that sooner or later, it will be displaced.

### (a) *Contractual Entrants*<sup>2</sup>

2.2 A contractual entrant is a person who enters premises in pursuance of a contract between himself and (normally) the occupier. Although some cases have been decided on general negligence principles the general rule is that the rights of the contractual entrant are to be found by reference to the contract. In the absence of express terms, there is an implied term on the part of the occupier that he has taken reasonable care to make the premises safe for the contemplated purposes. The duty of reasonable care imposes an obligation on the occupier with regard to his own acts and omissions, the acts and omissions of his servants, and the selection of his servants and independent contractors. Except in the case of vehicle hire and carriage contracts, the occupier is probably not liable for the *negligence* of independent contractors properly selected, at least in so far as defects caused by such negligence are of a technical nature and would not be evident on a reasonable examination. Paying spectators at a

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<sup>1</sup> See McMahon & Binchy, *Irish Law of Torts*, ch 12 (2nd ed, 1990).

<sup>2</sup> *Op cit*, p211 (citations omitted).

sporting event accept the inherent risks of such games. The occupier must of course take reasonable care as to the state of the premises and the conduct of the competitors.

**(b) Invitees**

2.3 An invitee is a person who comes onto premises with the owner's express or implied consent, in circumstances that involve a material benefit for the occupier.<sup>3</sup> The classic example is a customer in a shop: the shop clearly derives a material benefit from the customer's presence. It is not necessary that a deal actually be concluded: a person who goes into a book shop to browse, with no definite intention to make a purchase, is no less an invitee on that account. As was observed in *Boylan v Dublin Corporation*,<sup>4</sup> "[w]hat is to be looked at is the nature of the purpose for which the visitor comes, and whether the party in occupation would normally have a material interest in visits made for the purpose".

2.4 The classic statement of the duty owed to an invitee was made by Willes J in *Indermaur v Dames*:<sup>5</sup>

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

2.5 A few points about this criterion of liability may be noted. First, the danger must be *unusual*. This term may suggest a connotation of infrequency of occurrence, and this is undoubtedly at its core. As *McMahon & Binchy* comment, "[t]he invitor ... is not liable for usual dangers, simply because an ordinary vigilant person is expected to encounter these with open eyes and without danger to himself".<sup>6</sup> There is, nevertheless, not a complete identity between the notion of an *unusual danger* and a *rare danger*. Some dangers are characterised as unusual even though they occur with notorious frequency: spillages on supermarket floors, for example. The underlying idea is that the danger is one that the invitee had *a right not to expect*, though in reality he may well have apprehended that it would occur.

2.6 Examples of dangers held to have been unusual in Irish caselaw include torn linoleum on a dance floor<sup>7</sup> and a dark staircase, without a handrails

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3 *Id.*, pp213-214.  
4 [1949] IR 60, at 80.  
5 LR I CP 274, at 287 (1866).  
6 1st ed, p239.  
7 *Kelly v Woolworth* [1922] IR 5.

leading to a toilet in a public house.<sup>8</sup>

2.7 The next aspect that may be noted about the *Indermaur v Dames* test is that it imposes liability, not only in cases where the occupier was actually aware of the unusual danger but also where he *ought to have been aware* of it. It has been noted<sup>9</sup> that:

"Reasonable care is a standard with which the courts are familiar, and its application may be illustrated by referring to the position of employing independent contractors. An occupier has many continuing duties with regard to the state of the premises. In many cases, especially where technical skill is required (e.g. wiring the house, installing central heating, etc.), and where the occupier himself does not possess such skill, he will be obliged to employ an independent contractor to do the work: even more, it may be negligent if he does not do so. With regard to independent contractors the occupier's duty is two-fold: first, he has the duty to exercise reasonable care in the selection of competent contractors to do the job: secondly, when the job has been done he has the duty to inspect and to remedy *obvious defects of a non-technical nature which he could be expected to see*. He will not be liable for *technical defects* which he could not discover, provided he used reasonable care in his selection."

2.8 An occupier will not be liable if he does not call in experts where he has no reason to suspect that expert advice is required. In *Collier v The Earl of Mountcharles*<sup>10</sup> where a plaintiff invitee was injured when a stone stairway collapsed in a castle, the occupier's omission to obtain an expert's opinion was not held to be unreasonable, as the stairway had stood firmly for 180 years and there had been no evidence whatsoever, before the accident, that the stairway was defective. An interesting *obiter* of Fitzgerald, J., in that case, may be quoted, however, to show that, if a similar case came before the courts in the future, a different decision might possibly be expected:

"The position may now be different having regard to the future of these limestone steps and the evidence given on behalf of the plaintiff as to their inherent weakness. The accident and its consequences might well be held to be a warning to occupiers of premises containing similar stairways that a defect may exist."

2.9 If the occupier is, or ought to be, aware of an unusual danger, then he must use *reasonable care* to prevent damage to the invitee from this danger. In some cases it may be possible to discharge this duty of due care by *warning* the invitee of the danger but, in contrast to their English counterparts<sup>11</sup>,

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8 *O'Donoghue v Greene* [1967] IR 40.  
9 McMahon & Binchy, *op cit*, 1st ed, p242 (citation omitted).  
10 Unreported, Supreme Ct, 19 December, 1969.  
11 *Cf London Graving Dock Co Ltd v Horton* [1951] AC 737.

Irish courts have made it clear that a warning will not always be sufficient. As was stated in *O'Donoghue v Greene*,<sup>12</sup> "knowledge or notice of an unusual danger by the invitee does not exempt the occupier from liability unless such knowledge or notice enables the careful invitee to perform his task without danger".

2.10 Finally, in relation to invitees, it is to be noted that Willes J in *Indermaur v Dames* appeared to premise the existence of the occupier's duty on the absence of any contributory negligence on the part of the invitee. Such an approach was not, perhaps, a source of great confusion at a time when contributory negligence was an absolute bar to all claims (save where the defendant had the last opportunity to avoid the accident). With the passage of the Civil Liability Act 1961, and the transformation of the defence of contributory negligence into a matter of proportionate reduction in compensation rather than an absolute bar, it was necessary for the Oireachtas to make it plain that Willes J's language could not be invoked to defeat the claim of a defendant guilty of some contributory negligence. This is achieved by section 34(1), which provides as follows:

"Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant ..."

#### ***Hotel Proprietors Act, 1963***

2.11 An interesting statutory provision should also be noted at this stage. According to section 4 of the *Hotel Proprietors Act, 1963*, "where a person is received as a guest at a hotel, whether or not under special contract, the proprietor of the hotel is under a duty to take reasonable care of the person of the guest and to ensure that, for the purpose of personal use by the guest, the premises are as safe as reasonable care and skill can make them".

2.12 From this it would seem that a guest's statutory right against a hotel proprietor is wider than the traditional definition in *Indermaur v Dames*<sup>13</sup> of the invitee's right against his invitor. For, as it is phrased in the statute, it would seem that the hotel proprietor is also liable for the acts of his independent

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12 [1967] IR, at 48. See also *Long v Saorstát & Continental Steamship Co Ltd*, 93 ILTR 137 (1953), *Morley v Eye, Ear and Throat Hospital Incorporated*, [1967] IR 143, *Allen v Counahan*, 100 ILTR 58 (1964) and *Power v Crowley and Reddy Enterprises Ltd*, High Ct, Blayney J, 29 October 1992.

13 *Supra*. In *Duggan v Armstrong*, Supreme Court, 28 June 1992, McCarthy J found it "difficult to discern" the nature of the additional duty which, accordingly to the plaintiff, section 4 had imposed on the defendant hotel proprietor, over and above the common law duty. Two points should be noted about this case: first, it is not clear whether McCarthy J was disposed to categorise hotel guests as contractual entrants or invitees, and secondly the relevant duty as he appeared to perceive it at common law, was that of due care.

contractors. That this section is intended to extend the hotel proprietor's liability, rather than to consolidate his common law position, seems to be affirmed by sub-section (2) of section 4, which declares that the "...duty is independent of any liability of the proprietor as occupier of the premises".

2.13 Section 7 of the Act (which imposes a financial limit on the proprietor's liability) applies only to damage to the guest's *property* and does not apply to an action under section 4 for personal injuries. The hotel proprietor is prohibited from contracting out of his liability under section 4 by section 8 of the Act. Such an action, however, is of course confined to hotel "guests" and does not extend to other lawful visitors, whether they be invitees or licensees.

(c) *Licensees*

2.14 A licensee is a person permitted by the occupier to be on his premises in circumstance where the visit *does not materially benefit the occupier*. That permission can range very widely: it embraces cases where the *licensee* derives a clear benefit at the expense of the occupier as, for example, where a householder permits a stranger to make a telephone call without charge as well as cases where there is a mutuality of benefit, with the benefit to the occupier falling short of material benefit - as in the case of a social guest at a party, for example.

2.15 The consent required to make a visitor a licensee may be express or implied. Where it is express(ed) little difficulty normally arises. The instances, however, where consent can be *implied* from the conduct of the occupier, are so many and so varied that they sometimes give rise to dispute. For example, where the occupier knows that the public, or a class of persons, are in the habit of going on to his land, and he does nothing to prevent this, a licence to enter *may* be implied.<sup>14</sup> In this connection, however, it has been said that mere toleration or refraining from objection is not to be equated with consent; toleration does not amount to permission. As Fitzgibbon J, said in *Kenny v ESB*,<sup>15</sup> "An open gate or an unfenced field does not amount to an invitation or licence *urbi et orbi* to enter upon private property" And as *Salmond & Heuston*<sup>16</sup> note: "An occupier who resigns himself to the occasional and perhaps inevitable presence of trespassers on his property does not thereby take upon himself the obligations of licensor." Although mere tolerance is not sufficient to make the entrant a licensee, "tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission".<sup>17</sup> The distinction between "mere toleration" and "tacit inactive permission" is a fine one and provides the court with a useful tool with which it can hold in many cases, with equal ease, that the entrant was a licensee or a

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14 *Boughton v Bray* UDC [1964] Ir Jur Rep 57; *Mangan & Another v Finglas Housing Soc* 86 ILTR 159 (1952); *Lowery v Walker* [1910] 1 KB 173; [1911] AC 10.

15 [1932] IR 73, at 84.

16 *Salmond & Heuston on the Law of Torts*, 309 (18th ed by RFV Heuston & RA Buckley, 1985).

17 *Addie & Sons v Dumbreck* [1929] AC 358, at 372 (*per* Lord Dunedin).

trespasser, dependent on the view it takes of the particular facts.<sup>18</sup> It is a flexible instrument which the courts can use in "hard cases" to achieve justice, and especially in those cases involving children.

2.16 The following persons have been held to be licensees by the courts: the owner of a car admitted, by a mechanic after hours, to the garage where his car was kept<sup>19</sup> a delivery man on the tenant's business while crossing, of necessity, property retained by the landlord (held to be a licensee of the landlord)<sup>20</sup> a worshipper visiting a church, the doors of which were open to the public<sup>21</sup> persons resorting to public parks and playgrounds,<sup>22</sup> a schoolchild in school<sup>23</sup> a person who had with others frequently used without objection a short cut through a development lot<sup>24</sup> and children who had used a piece of waste ground as a playground without objection from the occupiers.<sup>25</sup>

2.17 The duty to the licensee has been stated in two ways; first, and more usually, the occupier is said to be obliged to *warn* the licensee of concealed dangers of which he actually knows; secondly, it is said that the licensor " must *act* with reasonable diligence to prevent his premises from misleading or entrapping the licensee..."<sup>26</sup> or put negatively, "the licensor must not lay a trap for him or expose him to danger not obvious nor to be expected there under the circumstances".<sup>27</sup> A discrepancy is here evident: according to the former, the duty is merely *to warn*, whereas in the latter the duty seems to be *to act* to prevent damage.<sup>28</sup> In *Rooney v Connolly*<sup>29</sup> it was held that the parish priest who had encouraged young school girls to make devotional visits to the church should at least have warned them of the dangers of stretching over the lighted candles. The Court rejected the argument that the defendant should have taken other precautions such as building a step in front of the candle rack. Such a step, the Court felt, might do more harm than good in the circumstances, since it might have actually *increased* the dangers for young children. In addressing the issue, however, the Court appeared to accept the suggestion that the defendant might have a duty to do something more than warn the licensee in some cases.

2.18 Too much must not be made of this discrepancy, however. It is difficult to imagine a case where a warning would not have the effect of changing a concealed danger into an obvious one. Moreover, it is clear, whether

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18 Cf, eg, *Kenny v ESB*, *supra* and *Mangan & Another v Finglas Housing Soc Co.*, *supra*.

19 *Perry v Statham, Ltd* [1929] IR 277.

20 *Ahearn v Rudd & Others* [1945] IR Jur Rep 45; *Parkinson v Peelo and Others* 73 ILTR 318 (1939).

21 *Kirwan v Representative Church Body* [1959] IL 215; *Rooney v Connolly* [1987] ILRM 768.

22 *Ellis v Fulham Borough Council* [1938] 1 KB 212 (CA); *Sutton v Bootle Corporation* [1947] 1 KB 359 (CA). See also *Donaldson v Irish Motor Racing Club and Thompson*, unreported, Sup Ct 1 Feb 1957. Cf generally, B van der Smisssen, *Legal Liability of Cities and Schools for Injuries in Recreation and Parks*, Chaps 2-4 (1968).

23 *Bohan v Driscoll* [1929] IR 438. This is not an invariable characterisation; cf McMahon & Binchy, *op cit*, pp303-304.

24 *Mangan & Another v Finglas Housing Soc supra*.

25 *Boughton v Bray UDC supra*; see also *Cook v Midland Great Western Railway Co of Ireland* [1909] AC 229.

26 *Mersey Docks & Harbour Board v Proctor* [1923] AC 253, at 274 (*per* Lord Sumner)(emphasis added).

27 *Id*. See also *Ahearn v Rudd*, [1945] IR Jur Rep, at 47, where the duty of the licensor is said to be a duty "to protect licensees against concealed dangers which he actually knows to exist" (emphasis added); cf *Fairman v Perpetual Investment Building Society* [1923] AC 74.

28 Cf. *McMahon & Binchy*, 1st ed, pp240-243.

29 [1987] ILRM 786.

the occupier's duty is to *warn* or to *act*, that his duty is certainly limited in two other ways: it is confined to *concealed* dangers of which the occupier *actually knows*. Many cases are dismissed on these points rather than on the warning issue.<sup>30</sup>

2.19 In this connection it is well to add that the distinction between "unusual danger" and "concealed danger" is a fine one, and the distinction between the two is confused by the fact that in many cases the danger is *both* concealed and unusual. Nevertheless, it should be emphasised that the terms are quite distinct. "Unusual danger" means that which one would not *reasonably expect* to find on premises in the present circumstances. "Concealed" means hidden or deceptive and not *readily detectable* to a person using reasonable care. In *Rooney v Connolly*<sup>31</sup> lighted candles upon a devotional candle rack were held to constitute a concealed danger for a nine-year-old plaintiff licensee. If the plaintiff was classified as an invitee (did she put money in the box for the candle?), she might, ironically, have failed to convince the court that she was injured by an "unusual danger" since a candle rack in a church is hardly unusual.<sup>32</sup>

2.20 The courts have held that an open fire is a concealed danger for infant-licensees,<sup>33</sup> so also a defective metal tripod fixed in a market place and used by children in play;<sup>34</sup> similarly a defective railing on steps where children used to play,<sup>35</sup> a defective platform upon which a coal man making a delivery was expected to stand,<sup>36</sup> and a gully-trap on a highway where children used to play.<sup>37</sup> Examples of dangers held not to be concealed include: a working pit in a garage,<sup>38</sup> a barbed-wire fence in a field adjoining school grounds, relative to a boy of 10 years,<sup>39</sup> an unfenced quarry on a piece of waste land, even at night time,<sup>40</sup> and a bridge in disrepair.<sup>41</sup>

2.21 The major difference between the duty owed to the invitee and that owed to the licensee is that in respect of the former the occupier is liable for unusual dangers of which *he ought to know*, whereas in the latter case liability attaches only for concealed dangers of which the occupier *actually knows*. On the face of it, therefore, the duty owed to the licensee seems to place a premium

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30 See eg, *Kirwan v Representative Church Body, supra*; *Mangan & Another v Finglas Housing Society supra*; *Aherne v Rudd supra*; *Perry v Stratham, Ltd supra*.

31 *Supra*

32 See *Rooney v Connolly* [1987] ILRM 768 at 788 (per McCarthy J).

33 *Boughton v Bray* UDC [1984] Ir Jur Rep 57; *Bohane v Driscoll* [1929] Ir 428. See also *Rooney v Connolly, supra*, where a lighted candle in a church was held to be a concealed danger for a nine-year-old girl. "Clearly the danger may be obvious to the child's eyes, but equally clearly it may be concealed from her understanding or appreciation"; per Hederman J.

34 *O'Rourke v Cavan* UDC 77 ILTR 16 (1943).

35 *Macken v Devine* 80 ILTR 121 (1946). Although the judge called the children invitees, there is room for argument that they were in fact licensees.

36 *Parkinson v Peelo & Another* 73 ILTR 218 (1939) - probably *obiter*, as the decision against the licensor turned on the lack of actual knowledge.

37 *Swift v Westport UDC* [1944] IR 259 *Contra McGovern v Clones UDC* [1944] IR 282.

38 *Perry v Stratham Ltd* [1929] IR 277.

39 *Courtney v Masterson, Kelly & Flynn* [1949] Ir Jur Rep 6.

40 *Hounsell v Smyth* 7 CB (NS) 731 (1860).

41 *Gautrel v Egerton* LR 2 CP 371 (1867).

on the occupier's negligence. If the occupier fails to inspect, or consciously and purposely keeps himself in ignorance of concealed dangers on his land he will, seemingly, be insulating himself from any legal attack which plaintiff-licensees may make on him. The courts, however, have in recent years interpreted the "actual knowledge" requirement so liberally that the line between actual and constructive knowledge has become blurred somewhat, much to the advantage of the licensee.<sup>42</sup> In *Rooney v Connolly*<sup>43</sup> Griffin J stated that "[i]f the licensor knows of the physical fact which constituted the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved."<sup>44</sup>

**(d) Trespassers**

2.22 A trespasser is one "who goes on land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to".<sup>45</sup> The test generally adopted is one that approaches the issue from the standpoint of the reasonable entrant: as *Salmond & Heuston*<sup>46</sup> observe,

"no person is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited."

2.23 The category of trespassers clearly includes such persons as burglars and poachers, but the "wide and heterogeneous selection of people"<sup>47</sup> who fall into this category also embraces such relative innocents as a child who disobeys a neighbour's injunction not to come over the wall in pursuit of a ball or a person who takes a short cut to the bus stop via his (unsympathetic) neighbour's front lawn.

2.24 The occupier's liability for injuring a trespasser is a subject that has been drastically overhauled by judicial decisions in the past two decades or so. The former position must first be examined.

2.25 It was commonly said that the occupier owed no duty to a person coming on to his premises as a trespasser. The trespasser as a wrongdoer was entitled to little or no consideration and it used to be said that he was certainly not entitled to that degree of care reserved for contractual entrants,

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42 See *Hawkins v Coulsdon & Purley UDC* [1954] 1 OB 319; *Pearson v Lambeth Borough Council* [1950] 2 KB 353, especially at 364 (per Asquith LJ). See also *Rooney v Connolly*, *supra*, where it was agreed between the parties that actual knowledge of the danger could be established by proof of knowledge of the physical facts from which it arose. See judgement of Finlay CJ.

43 [1987] ILRM 768.

44 *Id.*, at 783, citing *Salmond on the Law of Torts* 278 (18th ed., by RFV Heuston, 1973). See also Finlay CJ at 772.

45 *Addie & Sons v Dumbreck* [1929] AC 358, at 371 (HL (Sc), per Lord Dunedin).

46 *Op cit.*, 319.

47 *McNamara v ESB* [1975] IR 1, at 22 (Sup Ct, per Henchy J).

invitees and licenses.<sup>48</sup>

2.26 A qualification, however, must be added: the occupier (even when the law was most indulgent to his interests) might do no act so intentionally or recklessly injure the trespasser, whose presence was known or ought to have been known.<sup>49</sup>

2.27 Accordingly a trespasser could not complain if he fell down a defective stairway, but would of course have a good action against the occupier if the latter shot him simply because he was trespassing. Similarly, the occupier could not set spring-guns and the like which were really designed to injure trespassers who came on to the premises.<sup>50</sup> A nice distinction, which still survives, was made here by the courts, who declared that a man is entitled to keep potential trespassers off his property and to this end is entitled to erect a barbed wire fence or a spiked-wall; once on the premises, however, the trespasser may not be recklessly or intentionally injured.<sup>51</sup> Preventive or deterrent measures are thus permitted<sup>52</sup>; retributive measures are not. This distinction formerly marked the limit of the occupier's duty. Accordingly, a trespasser who fell into a dangerous excavation in a private road,<sup>53</sup> or who was injured by a savage horse,<sup>54</sup> or who was injured by falling through a window the sash of which had been removed<sup>55</sup> could not recover.<sup>56</sup>

2.28 Having established the limits of the occupier's duty to trespassers the courts evinced unease with the effects of such a restricted criterion of liability where certain "deserving" trespassers were concerned. Child-trespassers caused them the greatest anguish. Accordingly, by the device of "implied licence" and a broad definition of recklessness, the courts were able to mitigate the harshness of the law in these cases.

2.29 McMahon and Binchy, when they addressed the concept of recklessness in the context of Occupier's Liability said that two questions needed to be asked.

"First what is the difference between reckless conduct and unreasonable

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48 Cf. *Donovan v Landy's Ltd* [1983] IR 44, at 459 where all the important Irish and English cases are reviewed.  
49 *Coffey v McEvoy* [1912] 2 IR 95 at 111 (*per* Pallas CB); (*aff'd* [1912] 2 IR 290); see also *Tiernan v O'Callaghan* 78 ILTR 36 (1944).  
50 *Bird v Holbrook* 4 Blng 628, 130 ER 911 (1828).  
51 The position in relation to dogs attacking trespassers is now dealt with in section 21(3) of the *Control of Dogs Act 1986*, which provides that the ordinary rules of negligence are to determine the question of liability. This would appear to exclude an action for battery where the occupier unleashed a savage dog on a trespasser. The courts may be tempted to dispense with a literal interpretation of section 21(3) in such a case. Moreover, an action for negligence would surely be successful.  
52 We do not here enter into the question whether, under present law, the negligence test may in some cases modify the seemingly inevitable immunity attaching to deterrent dangers. We need merely note that it is possible to conceive of circumstances where an occupier might be liable for adopting deterrent measures inappropriate to the particular environment, as, for example, where he or she imbedded broken glass on a low wall adjoining the playground of a primary school where ballgames were played by very young children.  
53 *Murley v Grove* 46 JP 380 (1882).  
54 *Lowery v Walker* [1910] 1 KB 173, reversed on other grounds [1911] AC 10.  
55 *Coffey v McEvoy* [1912] 2 IR 290.  
56 See also *Kenny v ESB* [1932] IR 73; *Waters v O'Keefe* [1937] Ir Jur Rep 1.

conduct?; secondly, is the occupier to be liable only for the injuries caused to trespassers of whose presence he actually knows or is he also to be liable to trespassers whose presence he should reasonably expect?

In dealing with the above two problems, the Irish courts have not given separate answers but have preferred to treat the second question as one aspect of the first. They have defined recklessness from an objective point of view rather than from the subjective point of view of the occupier and in doing so the second question melts into, and is really only one aspect of, the first question. The higher the probability of trespassers being present, the greater the likelihood that the conduct of the occupier was reckless.<sup>57</sup>

The adoption of the objective standard of recklessness, as opposed to the subjective attitude of the occupier, may be seen as the development of a rule favouring the trespasser and this may especially be true when one looks at some of the cases where the defendant's conduct was construed as having being reckless.<sup>58</sup>

A realisation that "objective recklessness" is the criterion that has been used by the courts in this area, helps to clear away much of the confusion that surrounds the case-law here, for, in applying the criterion of "recklessness" all the considerations relevant to ordinary negligence became relevant except that the impact of their cumulative effect had to be greater if the trespasser (as opposed to the "legal neighbour") was to recover. Both the neighbour and the trespasser had the same hurdle to clear if they were to recover, but in the case of the trespasser the cross-bar was raised a little higher. And so considerations like the gravity of the risk, the likelihood of the injury, whether the trespasser was a child, the probability of his presence on the property, the cost of prevention, etc., were all relevant in the case of the trespasser as well as in the case of the "neighbour", and this factor may explain why so many of the cases in this area seem to have been decided on straight negligence principles rather than by the criterion of recklessness. The truth of the matter seems to be that the courts in these cases were not merely looking for negligence, despite some misleading language, but were in reality searching for "objective recklessness".

Nevertheless, in some of the cases, especially those which involve trespass on motor vehicles, one sometimes gets the distinct feeling that what the court was talking about was negligence rather than recklessness. This is not so surprising when one remembers that the area in which the negligence criterion is more frequently used in tort law

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57 Citing *Donovan v Landy's Ltd* [1983] IR 441, especially at 462. See also *Griffin v Daniels* 86 ILTR 38 (1952); *Breslin v Brennan* [1937] IR 350.

58 Citing e.g. *Breslin v Brennan* (*supra*); *Fleming v Kerry Co Council* [1955] Ir Jur Rep 71; *Griffin v Daniels* (*supra*); *Tiernan v O'Callaghan* (*supra*).

concerns motor collisions; perhaps the courts sometimes forgot that where a trespasser was injured by falling off a motor vehicle the principles that governed the situation were those concerned with occupier's liability, rather than straight negligence principles. Furthermore, it seems fair to say that in the case where the injury resulted from *an activity* (a misfeasance as opposed to a nonfeasance) the courts were more likely to apply ordinary negligence principles, or at least a more generous interpretation of recklessness, and in most of the trespass-on-vehicles cases the damage is, in fact, caused when the vehicle is put in motion."<sup>59</sup>

2.30 In his judgment in *Pannett v McGuinness*,<sup>60</sup> Lord Denning, in the course of analysing the judgment in *Herrington*,<sup>61</sup> stated that:

"'recklessness' in a classical sense has gone out of the window. By classical sense I mean the sense in which Salmon LJ used it in the Court of Appeal in *Herrington's* case.

'Recklessness ... is essentially different in kind from negligence ... it is ... akin to intentional wrongdoing.'

In order to make the Railways Board liable, Salmon LJ felt that it was necessary to find that the stationmaster was 'reckless' in that sense. The House of Lords rejected that finding. They did not find that the stationmaster was 'reckless'; nor anyone else who could be said to represent the mind and will of the board; nor indeed any servant of the company. Yet they found the Railways Board liable. There was nothing subjective about their fault. It was all objective. Lord Reid said:

'I would not single out the stationmaster for blame. The trouble appears to have been *general slackness* in the organisation.'

Lord Morris of Borth-y-Gest said:

'... the response guided by the promptings of common sense would be that having regard to the dangerous nature of the live rail and its perils for a small child, the [Railways Board] were grievously at *fault in allowing* a fence at the particular place in question to remain for a long time *in a broken down condition*.'

In short, they did not take such reasonable care as the circumstances of the case demanded."<sup>62</sup>

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59 McMahan and Binchy, 1st ed pps225-6, certain footnote references omitted.  
60 [1972] 3 All ER 137.  
61 [1971] 1 All ER 897.  
62 At 140, footnote references omitted.

2.31 Another area where one might have expected judicial activity in favour of trespassing plaintiffs is where the occupier maintains a dangerous condition close to the highway. To be injured, it is true, the road-user must leave the road and become a trespasser, but the trespass is only a "little one" and frequently the injury is serious.

2.32 The traditional cause for recovery here has been under the tort of nuisance. "A rotten fence close to a highway is an obvious nuisance. If I were on the highway and wanted to tie my boot, or got tired and leaned against the fence, should I not have been lawfully using the highway?"<sup>63</sup> "[T]he defendant in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road".<sup>64</sup> The law reports contain many similar statements.<sup>65</sup>

2.33 Contrary to what one might expect from the few cases that have come before the Irish courts, there has not been great enthusiasm on the part of the judiciary to extend the occupier's liability in this situation under the rubric of public nuisance. Indeed, there seems to have been a reluctance on the part of plaintiffs to proceed in public nuisance at all, and this is probably due to the fact that "if there was no liability in public nuisance, it was fatally easy to argue that there could be no liability at all".<sup>66</sup>

2.34 Dissatisfaction with the traditional criteria of liability towards trespassers ultimately began to manifest itself. At first, the process was somewhat indirect, but in time the rejection of the old approach came to be expressed in unqualified terms.

2.35 In *Purtill v Athlone UDC*<sup>67</sup> in 1968, a boy who had been on the premises of an abattoir and who had stolen some detonators from the premises was injured when he was exploding them at his home. The defendants argued that, since the boy was a trespasser at the time he stole the detonators, they owed him no duty of care in negligence, but rather were required to do no more than refrain from injuring him intentionally or from acting with reckless disregard for his presence. The Supreme Court rejected this contention. It approached the matter on the basis that the facts disclosed two possible characterisations of the relationship between the parties, both valid, but ultimately involving the triumph of one over the other. These two characterisations were (1) the relationship between the custodian of dangerous chattels and a child, and (2) the occupier - trespasser relationship. Walsh J, delivering the judgment of the Court, stated:

"When the danger is reasonably foreseeable, the duty to take care to

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63 *Harrod v Watney* [1888] 2 QB 320, at 322 (per A.L. Smith LJ).

64 *Barnes v Ward*, 9 CB 392, at 420, 137 ER 945, at 956 (per Maule J 1850).

65 If the plaintiff deliberately left the highway he may not be able to recover. Contrast *Smyth v Keys*, 46 ILTR 68 (1912) with *Fitzgerald v Brangan* 39 ILTR 116 (1905).

66 Marsh, *The History and Comparative Law of Invitees, Licences and Trespassers*, 69 LQR 182, at 187 (1953). With regard to damage done by things projecting over the highway see *McMahon & Binchy*, *op cit*, pp470-471.

67 [1988] IR 205.

avoid injury to those who are proximate, when their proximity is known, is not abrogated because the other party is a trespasser. The duty to those in proximity is not based on any implied term of an invitation or a licence, or upon any warranty for safety which might be thought to be inherent in any such invitation or licence. Rather it is based upon the duty that one man has to those in proximity to him to take reasonable care that they are not injured by his acts. What amounts to sufficient care must vary necessarily with the circumstances, the nature of the danger, and the age and knowledge of the person likely to be injured."<sup>68</sup>

2.36 In simple terms, the relationship of custodian of dangerous chattels and child, which would generate a duty of care on ordinary negligence principles, was held to take priority over the occupier-trespasser relationship, which involved the non-imposition of a duty of care on the occupier relative to the trespasser.

2.37 At first sight, *Purtil* might be regarded as a decision based on its exceptional facts, but closer examination reveals its truly radical nature and effects. To hold that a proximity-based duty of care "is not abrogated because the [plaintiff] is a trespasser" is to announce the victory of the law of negligence over the traditional *Addie v Dumbreck* immunity. For the traditional approach in relation to occupier's liability to trespassers involved, not merely the *failure* to impose a duty of care in negligence, but the *positive determination not to do so* because it was considered that occupiers *ought not* to be under such a duty.

2.38 Secondly, the seemingly exceptional nature of the particular relationship between the parties on the facts of *Purtil* turns out not to be all that exceptional in practice. Most of the cases where the claims of injured trespassers have a high level of intuitive appeal involve child trespassers. The old doctrines of "allurement" and implied licence reflected a sensitivity that these plaintiffs should have a chance of success. Conventional negligence principles in relation to the care and control of children can easily be invoked to warrant a specific basis of liability in any particular case.

2.39 The next crucial case was *McNamara v Electricity Supply Board*.<sup>69</sup> The plaintiff, an eleven-year old boy, having climbed over a wire fence which surrounded an electricity transformer station, was injured when, in an effort to catch the drain-pipe and slide down from a flat-roofed addition to the station, his hand came in contact with a high tension cable some thirteen inches distant from the drain-pipe. Since the original station was first built, in 1929, and since the flat-roofed addition was built in 1956, the area around the station had become considerably built-up and the danger which the station offered to children was well appreciated by the authorities. At the time of the accident the wire fencing surrounding the station was being repaired and, so far from acting

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<sup>68</sup> *Id.*, at 212.  
<sup>69</sup> [1975] IR 1.

as a barrier, actually facilitated access to the flat-roofed addition to the station. In the High Court the jury found that the defendant was negligent and that the plaintiff had not been negligent and awarded damages. The defendant appealed to the Supreme Court against the whole judgment. All the judges in the Supreme Court held that the damages were excessive and three of the five judges found that the jury below was wrong in finding that the plaintiff was not guilty of contributory negligence. A retrial on all issues was ordered. For our purposes, however, the interesting portions of the Supreme Court's judgment relate to the long discussion on the legal basis of the defendant's liability to injured trespassers. Only three judgments were issued in the case,<sup>70</sup> as Fitzgerald CJ concurred with Griffin J and Budd J concurred with Walsh J; the other judgment was issued by Henchy J.

2.40 Briefly, the three judgments were in basic harmony, not only that *Addie* (and *Donovan v Landy's Ltd*,<sup>71</sup> its Irish equivalent) should be abandoned, but also that the rule relating to the occupier's duty towards trespassers should be restated in a form that would better reflect modern concepts of justice on the matter.

2.41 Some difference of emphasis in the judgments is nonetheless apparent. Walsh J clearly favoured the complete abrogation of the former approach in favour of a negligence-based test. In so far as *Donovan v Landy's Ltd*<sup>72</sup> had decided that the only duty owed to a trespasser was one not to act with reckless disregard of his presence, Walsh J was of opinion that it had been "wrongly decided".<sup>73</sup> The Supreme Court had "laid down in *Purtill v Athlone UDC*<sup>74</sup> that the occupier of premises could not claim exception from liability on the grounds that the person injured by the occupier's acts or omission was a trespasser ..."

2.42 This summary of the Court's holding in *Purtill* suggests that Walsh J perceived that case, not as involving a requirement that an imposition of a duty of care be premised on a *special* relationship, independent of the occupier-trespasser relationship, but rather that it involved a more radical replacement of the former law as to the occupier-trespasser relationship by a new principle involving the application of a proximity test to *all* occupier-trespasser relationships. Such a test would not of course require the court to hold that every occupier owed every trespasser a duty of care: it is perfectly consistent

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70 Fitzgerald CJ did deliver a judgment in court but died before he was able to certify it. It seems that his view of the law, on the present issue, favoured a retention of the *Addie* formulation and he recommended a retrial on all issues. Judgments supplied by the Supreme Court Office merely state that Fitzgerald CJ concurred with Griffin J but do not give the Chief Justice's judgment as delivered in Court. A judgment culled from reporter's notes is given in the Irish Reports. See [1975] IR 1 at 4, McMahon & Binchy, *op cit*, 226.

71 [1963] IR 441.

72 *Ibid.*

73 The idea that *Donovan* had been wrongly decided is striking. In *Herrington v British Railways Board* [1972] AC 877, the House of Lords had not argued that *Addie v Dumbreck Collieries* had been wrongly decided but merely that the principles it endorsed had no application in the social context of nearly half a century later. Could Walsh J have sought to imply that *Donovan* was wrong, judged by the standards of 1964, or (as seems more likely) was his criticism more fundamental in attacking the fundamental legal basis of the decision?

74 *Supra.*

with all that was stated in *Purtill* and with all that Walsh J had to say in *McNamara* that in *particular* cases the court should hold that there was not sufficient proximity between the parties to generate a duty of care on the part of the occupier relative to the trespasser. What is crucial about Walsh J's approach is that it denies the converse proposition, namely, that the occupier, as occupier, never has a duty of care towards the trespasser.

2.43 Perhaps, however, Walsh J's reference to the *Purtill* decision in *McNamara* does not take sufficient account of the special facts of that case. It is important to quote the relevant passages in full:

"This Court laid down in *Purtill v Athlone UDC* that the occupier of premises could not claim exemption from liability on the grounds that the person injured by the occupier's acts or omissions was a trespasser, and that that was the position even when the occupier's act was not done with the deliberate intention of doing harm to the trespasser or done with reckless disregard for the presence of the trespasser. In my view, the learned trial judge was quite correct in holding that the defendants' claim to be exempt from any duty to the plaintiff, on the ground that he was a trespasser, was unfounded in law. As was pointed out in that case, when a danger has been created by a person and it was reasonably foreseeable that the danger might cause injury to those who were proximate to him, it is that person's duty to take care to avoid that injury, and that duty is not abrogated because the danger was created on his land and resulted in injury to the trespasser."<sup>75</sup>

2.44 We have already quoted the passage in *Purtill* in which the doctrine of proximity 'triumphs' over the old law relating to trespassers, but another passage in that judgement should not be overlooked. Addressing the question as to whether or not the plaintiff was a trespasser, Walsh J said:

"For the purposes of the present decision I do not think it is necessary to answer the question because it would only be relevant if the plaintiff had sustained injuries as a consequence of some defect or danger in the static condition of those premises, or if the defendants' liability is attributable only to their duty as occupiers. The plaintiff's claim against the defendants is not wholly, or even primarily, based upon the neglect of the defendants as occupiers of the premises so much as upon the neglect by the defendants of a duty which, it is claimed, they owed to the plaintiff and which did not depend upon the defendants being the occupiers of any premises but rather upon the defendants being the custodians of chattels which, if not properly controlled by them, might foreseeably cause injury to the plaintiff.

The liability, if established, is therefore one which arose by virtue of the

proximity of the parties and it would be the same wherever the parties might find themselves, provided their proximity to each other was the same. In other words the liability is not based upon any special relationship such as occupier and invitee, or licensee or even trespasser, but simply upon proximity."<sup>76</sup>

2.45 In contrast, we believe that most occupiers would, on a day to day basis be primarily concerned with their liabilities in respect of defects or dangers in the "static condition" of their lands in the context of adult trespassers.

2.46 Henchy J's judgment has complex features which render difficult the task of discerning a clear *ratio*. Let us first isolate these features before attempting to examine their common elements together.

2.47 Henchy J expressed dissatisfaction with the traditional categorical approach:

"Considering that in law the word 'trespasser' covers every person who enters on another's property in circumstances in which he is neither a licensee nor a invitee, it is difficult to see why the same inferior duty should be owed by the occupier to every person who comes within that category. Why, for example, should no higher duty be owed to a child openly but innocently trespassing in pursuit of a lost ball than to a burglar furtively and knowingly trespassing for the purpose of committing a crime? For the fact is that the wide and heterogeneous selection of people who fall into the category 'trespasser' are compressed into a simplistic stereotype when the law says that the occupier owes a common unvarying duty to each of them."

2.48 Henchy J went on to discuss the development of the law in England. He noted that in *Herrington*<sup>77</sup> the House of Lords had ruled that an occupier should be liable to a trespasser if, by the standards of common sense and common humanity, he could be said to be culpable in failing to take reasonable steps to avoid a danger to which the trespasser was likely to be exposed. He referred to Lord Denning MR's summary in *Pannett v McGuinness*<sup>78</sup> of what had been decided in *Herrington*:

"The long and the short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did."

2.49 Henchy J commented that the application of such a test did not mean that a trespasser would necessarily succeed if the injury was foreseeable by the occupier; it would be for the judge or jury (as the case might be) to say, in

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76 [1968] IR at 210-211.  
77 *Supra*.  
78 [1972] 2 QB 599, at 606 (CA).

the light of all relevant circumstances, whether liability should fall on the occupier. For the purpose of what follows, we consider it necessary for the purpose of fair comparison to quote first the relevant passage from Diplock LJ in *Herrington* and then the *entire* summary given by Lord Denning in *Pannett v McGuinness*.

2.50                      First, Lord Diplock:

"I would then seek to summarise the characteristics of an occupier's duty to trespassers on his land which distinguishes it from the statutory 'common duty of care' owed to persons lawfully on his land under the *Occupier's Liability Act, 1957*, and from the common law duty of care owed by one man to his 'neighbour', in the Atkinian sense, where the relationship of occupier and trespasser does not subsist between them. To do so does involve rejecting Lord Hailsham LC's formulation of the duty in *Addie v Dumbreck* as amounting to an exclusive or comprehensive statement of it as it exists today. It takes account, as this House as the final expositor of the common law should always do, of changes in social attitudes and circumstances and gives effect to the general public sentiment of what is 'reckless' conduct as it has expanded over the 40 years which have elapsed since the decision in that case.

First, the duty does not arise until the occupier has actual knowledge either of the presence of the trespasser on his land or of facts which make it likely that the trespasser will come on to his land; and has also actual knowledge of facts as to the condition of his land or of activities carried out on it which are likely to cause personal injury to a trespasser who is unaware of the danger. He is under no duty to the trespasser to make any enquiry or inspection to ascertain whether or not such facts do exist. His liability does not arise until he actually knows of them.

Secondly, once the occupier has actual knowledge of such facts, his own failure to appreciate the likelihood of the trespasser's presence or the risk to him involved, does not absolve the occupier from his duty to the trespasser if a reasonable man possessed of the actual knowledge of the occupier would recognise that likelihood and that risk.

Thirdly, the duty when it arises is limited to taking reasonable steps to enable the trespasser to avoid the danger. Where the likely trespasser is a child too young to understand or heed a written or a previous oral warning, this may involve providing reasonable physical obstacles to keep the child away from the danger.

Fourthly, the relevant likelihood to be considered is of the trespasser's presence at the actual time and place of danger to him. The degree of likelihood needed to give rise to the duty cannot, I think, be more closely defined than as being such as would impel a man of ordinary humane feelings to take some steps to mitigate the risk of injury to the

trespasser to which the particular danger exposes him. It will thus depend on all the circumstances of the case: the permanent or intermittent character of the danger; the severity of the injuries which it is likely to cause; in the case of children, the attractiveness to them of that which constitutes the dangerous object or condition of the land; the expense involved in giving effective warning of it to the kind of trespasser likely to be injured, in relation to the occupier's resources in money or in labour."<sup>79</sup>

2.51 The entirety of Lord Denning's summary is as follows:

"The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it. (2) You must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar. (3) You must also have regard to the nature of the place where the trespass occurs. An electrified railway line or a warehouse being demolished may require more precautions to be taken than a private house. (4) You must also take into account the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present. The more likely they are, the more precautions may have to be taken."<sup>80</sup>

2.52 Henchy J noted that the most recent statement of the test was to be found in the Privy Council case of *Southern Portland Company Ltd v Cooper*.<sup>81</sup>

2.53 Henchy J went on:

"In my opinion, such a test correctly represents the law. Whether on the ground of juridical consistency, the social obligations of occupiers of property, or plain justice, I think it should be preferred to the principle of liability enunciated by *Addie's Case*<sup>82</sup> and last restated by this Court in *O'Leary v Wood Ltd*.<sup>83</sup> If, instead of encountering and being injured by a dangerous object while trespassing on the premises, the plaintiff had found a dangerous object there which he had taken away and which later injured him, the plaintiff would be entitled to succeed against he

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79 [1972] 1 All ER at 795.  
80 [1972] 3 All ER at 141.  
81 [1947] A.C. 156.  
82 *Supra*.  
83 *Supra*.

occupier regardless of the fact that the plaintiff had been a trespasser, provided that he passed the test of proximity and foreseeability: this Court so held in *Purtill v Athlone UDC*.<sup>84</sup> I can think of no good reason why the law should be different when the injury happened on the premises."

2.54 Henchy J noted that the limits of the range of trespassers to whom an occupier owes a duty of care were set by the words of Lord Atkin in *Donoghue v Stevenson*.<sup>85</sup>

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question".

2.55 In a crucial passage Henchy J stated:

"As a general rule, trespassers do not come within that category since they are unpermitted and, usually, unexpected entrants on the property. Thus, a burglar who falls down an unlit stairs will normally have no cause of action against the occupier because the presence and conduct of the burglar put him beyond the scope of what a reasonable occupier should have guarded against in the circumstances. Apart from cases of injury caused intentionally or through recklessness (with which we are not concerned here), a trespasser injured on property while trespassing is not entitled to recover damages from the occupier unless he can satisfy the court of trial of all of the following matters: (1) that the injury was caused by a hidden or unexpected danger to which he was exposed; (ii) that the danger was one created, maintained, or at least tolerated by the occupier; (iii) that the circumstances were such as would not entitle a reasonable occupier to disregard the risk of injury to trespassers, or a particular class of trespassers such as children; (iv) that, having regard to such risk, the element of danger involved, the expense, difficulty or impracticability of eliminating or reducing the danger, and all other relevant factors, the occupier should have done more than he did in the interests of safety; (v) that the occupier's failure to take due precautions caused or contributed to the accident. It needs to be stressed that the existence of, or failure to observe, a duty of care should not be determined with the hindsight derived from the accident but in the light of the circumstances, actual and potential, that ought to have been present to the mind of a reasonably conscientious occupier of property before the trespass took place."

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*Supra*.  
[1932] AC 562, at 580.

2.56 This passage, in conjunction with the rest of Henchy J's judgment, gives pause for reflection. Clearly, Henchy J rejected the former approach, represented by *Addie*; but what precisely did he propose in its place?

2.57 Three possible interpretations may be canvassed. The *first* is that Henchy J favoured the approach adopted by the House of Lords in *Herrington*. Henchy J did, after all, state baldly that in his opinion "such a test correctly represents the law". As against this interpretation, it might be argued that the test to which Henchy J referred was not that in *Herrington* but the one stated by the Privy Council in *Southern Portland Cement Ltd v Cooper*.<sup>88</sup> There is a certain ambiguity as to which case was envisaged, but at the end of the day little hinges on this, as the Judicial Committee in *Cooper* was satisfied that the test it articulated was "substantially in line with the development in English law as expressed by the House of Lords in *British Railways Board v Herrington*."

2.58 It may be useful to quote the central passage from *Cooper* so as to compare it, not only with *Herrington*, but also with Henchy J's approach:

"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 allurements to children that may greatly increase the chance that children will come there.

Next comes the question to whom does the occupier owe a duty. 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

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88 *Supra*.

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 arrive. It is not enough to consider the point where the accident occurred if there are other danger points which the occupier would also have had to protect.

The problem then is to determine what would have been the decision of a humane man with the financial and other limitations of the occupier. Would he have done something which would or might have prevented the accident, or would he, regretfully it may be, have decided that he could not reasonably be expected to do anything? Their Lordships adopt the statement of Lord Uthwatt in *Read v J Lyons & Co Ltd*.<sup>87</sup>

'... there is demanded of him a standard of conduct no higher than what a reasonably minded occupier of land with due regard to his own interests might well agree to be fair and no lower than a trespasser...might in a civilised community reasonably expect"<sup>88</sup>

2.59 Several elements of this test find reflection in Henchy J's proposed criteria of liability.

2.60 A *second* interpretation of Henchy J's judgment is that he favours a straightforward application of the ordinary standard of care in negligence to all cases of occupiers' liability to trespassers. In support of this suggestion, it is worth recalling that Henchy J was apparently satisfied to endorse Lord Denning MR's simplistic gloss on *Herrington* to the effect that "[t]he long and the short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did." Such an approach would not appear to raise the question of proximity as a crucial threshold issue; rather does it proceed on the premise that the duty of care exists and the only question is whether the occupier has acted with sufficient care to *discharge* that duty.

2.61 Is this a correct interpretation of Henchy J's approach? Henchy J gave no *express* endorsement to Lord Denning MR's statement, though the context in which he referred to it certainly indicated no dissatisfaction with it. Indeed Henchy J seemed implicitly to support it when, having quoted Lord Denning's remarks, he commented that "[t]he application of such a test does not

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87 [1947] AC 156, at 185.

88 [1974] 1 All ER, at 97-98.

mean that a trespasser would necessarily succeed if the injury was foreseeable by the occupier but .... it would be for the judge or jury (as the case may be) to say, in the light of all relevant circumstances, whether liability should fall on the occupier". One could, however, argue that this seeming endorsement of Lord Denning's focus on the *standard* of care in fact incorporates both the elements of the duty and the standard of care.

2.62 The *third* interpretation of Henchy J's approach is that his five-point formula represents the sole test by which occupier's liability to trespassers should be determined. If this is so, it falls somewhat short of the conventional negligence test in a number of ways. The first requirement, that the injury be caused by "a hidden or unexpected danger", seems to incorporate the limitation central to the traditional duty owed to licensees. One consequence is that *no* liability could attach to the occupier where the trespasser was injured by a danger that was not "hidden or unexpected", however serious the danger may have been and however neglectful the occupier may have been.

2.63 Griffin J's judgment, like Henchy J's, contains some elements of ambiguity. It may best be interpreted as involving the imposition of a straightforward duty of care on occupiers relative to trespassers:

"... the test to be applied in the present case is to ask whether the defendants could reasonably have foreseen that child trespassers were likely to climb their fence at their sub-station, gain access to the roof, and sustain injury there; and whether, in all the circumstances of the case, the defendants took reasonable care to see that child trespassers were not injured".

2.64 Griffin J interpreted *Purtill* as having applied "the test of reasonable foresight". He noted that *Purtill* had been attacked by counsel for the defendants on the basis that it was breaking new ground and that the notion of proximity was being introduced for the first time in that case. He responded that this was not so as it was to be found in *Heaven v Pender*,<sup>89</sup> in *Le Lievre v Gould*<sup>90</sup> and in Lord Atkin's "well-known judgment" in *Donoghue v Stevenson*, "so that, like *Donoghue v Stevenson*, *Purtill's Case* could be said to be restorative rather than revolutionary".

2.65 These remarks suggest that Griffin J regarded the continuing failure to impose a duty of care on occupiers, subsequent to *Donoghue v Stevenson* (and perhaps even between the years of 1883 and 1932) as a judicial error: the proximity test having been established in *Heaven v Pender*, it should have been applied in relation to occupiers' liability towards trespassers and the judicial failure to do so should be characterised as a mistake. One may question whether this analysis gives sufficient weight, either to the notion of proximity or

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89 11 QBD 503 (1833).  
90 [1893] 1 QB 491.

to the principled basis of *Addie v Dumbreck*. To regard *Addie* as having mistakenly failed to apply the proximity test would be to misunderstand the process of judicial reasoning which it involved. The resolution of the question whether there is a sufficient relationship of proximity to warrant the imposition of a duty of care borrows of course from analogies with physical and temporal proximity in the physical world; but the determination that there is a *legal* relationship of proximity is in the normative order. It involves a value judgment that it is in all the circumstances just to impose a duty of care. In *Addie* the House of Lords addressed the question of whether to impose a duty of care on occupiers toward trespassers, and came to the conclusion that such a duty would be inappropriate in respect of all entrants of that category. Judged by the standards of today, that conclusion may seem harsh; but it cannot be faulted on the basis that it failed to address the proximity issue.

2.66 In another part of his judgment, Griffin J expressed approval for the test of reasonable foreseeability which the English Court of Appeal had adopted in *Videan v British Transport Commission*,<sup>91</sup> nor did he find difficulty in agreeing with Lord Denning MR's somewhat simplified summary of *Herrington in Pannett v M'Guinness & Co.*<sup>92</sup>

2.67 This again suggests that Griffin J was willing to adopt an approach that reduced the issue, in essence, to that of the standard of care, without any significant emphasis on the duty of care as involving a crucial threshold issue.

2.68 In attempting to assess the full implications of *McNamara*, a few general remarks may be appropriate. First, the Irish solution seems to avoid the problems that arose in England in the wake of *Herrington*, such as whether trespassing must be "extremely likely", whether a higher duty is owed when the occupier has "created" the danger, and whether non-occupying contractors owe a higher duty than the occupier. Secondly, the subjective element in *Herrington* - that the trespasser must take the occupier as he finds him and that more might be expected of an occupier with greater resources - does not seem to have found express favour in *McNamara*. Nevertheless, since the relationship of occupier and trespasser is one cast upon the occupier against his wishes, the courts must inevitably have regard to the occupier's resources in determining what is reasonable.

2.69 The statement of the law in *McNamara* was endorsed in *O'Keefe v Irish Motor Inns Ltd*<sup>93</sup> and in *Keane v ESB*.<sup>94</sup> It is interesting to note that in both of these cases the liberalisation of the law by the *McNamara* decision did not enable the trespassers to recover. Fears that *McNamara* would open the floodgates appear to have been unfounded. The Keane judgement, in

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91 [1963] 2 QB 850.  
92 [1972] 2 QB 595.  
93 [1978] IR 85.  
94 [1981] IR 44.

particular, should be comforting to occupiers as it is another case of a child trespasser sustaining injury at a rural E.S.B. sub-station. It is to be noted that Judges Henchy and Griffin were among the majority in all three cases.<sup>95</sup>

2.70 The greatest problem with *McNamara*, however, relates not to trespassers at all but to invitees and licensees. What is the effect of *McNamara* on the traditional rules relating to these latter two categories of entrant? In England when the House of Lords was addressing itself to the problem of the trespasser in *Herrington* it had a clear pitch on which it could do so. The problems relating to invitees and licensees had already been dealt with by the legislature in the *Occupiers' Liability Act, 1957*. In Ireland, however, the common law rules relating to invitees and licensees have never expressly been overruled. If the trespasser is elevated, the argument may be pressed that surely the invitee and the licensee must likewise be raised: it would certainly be anomalous if the invitee and the licensee had still to concern themselves with "unusual dangers" and "concealed dangers".<sup>96</sup>

2.71 Nowhere in the *McNamara* decision does the Court address itself to this problem, however. Subsequent decisions have not fully clarified the position. In 1983, in *Redford v Courtown (Co Wexford) Golf Club*<sup>97</sup> a visiting golfer who was injured when he mistook a glass panel for the door itself, was awarded substantial damages. The trial judge instructed the jury in the traditional terminology of invitees, "unusual dangers" and "ought to know". Similarly, in 1984, the Supreme Court, in an action taken by the widow of a deceased contractor who had fallen through a perspex skylight, dismissed her case on the grounds, *inter alia*, that the deceased was not an invitee and the danger was not an unusual one.<sup>98</sup> *Rooney v Connolly*<sup>99</sup> also saw the Supreme Court, albeit for curious procedural reasons, still willing to utilise in the old "licensee-concealed danger" terminology.

2.72 The *Rooney* case went to trial in the High Court before the decision in *Foley v Musgrave Cash and Carry Ltd.*<sup>100</sup> In this latter case the Supreme Court was prepared to extend the *McNamara* approach to the area of invitees. It appeared after *Foley* that the stratification of entrants with their distinctive rights had been swept away. In *Foley* an invitee tripped over a

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95 In *Ross v Curtis*, High Ct., Barr, J, 3 February 1988 (1987/1281P), an action by an intruder against the defendant (a supermarket owner) who, it was alleged, negligently discharged a .22 calibre rifle and injured him, failed. The Court accepted that the defendant believed he was being attacked and intended to fire a warning shot only. Unfortunately, the defendant had failed to aim the gun sufficiently high. Barr, J was satisfied that the defendant had acted reasonably in all the circumstances and had not been reckless. For analysis of *Ross v Curtis*, see Byrne & Binchy, *Annual Review of Irish Law 1988*.

96 But see *Coughlan v The Mayor, Aldermen and Burgesses of Limerick* 111 ILTR 141 (1977), a Circuit Court decision where the old approach seems to have survived. Also *Rooney v Connolly* [1987] ILRM 768.

97 Irish Times, 11 November 1983, p13.

98 *Daly v Avonmore Creameries Ltd* [1984] IR 131. Some passages of Henchy J are more ambiguous and could be interpreted as favouring the new approach.

99 *Supra*.

100 Unreported, Sup Ct, 20 December 1985, extracted in McMahon & Binchy, *A Casebook on the Irish Law of Torts*, p164 (2nd ed, 1991). See also *Murphy v O'Brien* 6 ILT (ns) 9 (Circuit Ct., 1987), where Judge Sheridan preferred to apply a straightforward negligence test in relation to an intoxicated plaintiff who fell in a pub. See R Byrne & W Binchy, *Annual Review of Irish Law 1987*, 324-325, 332 (1988), and McMahon & Binchy, *op cit*, pp 123-124.

shopping trolley in a wholesaler's cash and carry shop. The defendants appealed to the Supreme Court an award of damages made in favour of the plaintiff. McCarthy J in reply to the defendants' argument that there was no unusual danger, held that the courts should no longer be talking about "unusual dangers" in this type of case, and that the general negligence approach was to be preferred.<sup>101</sup> Griffin J, while admitting that the plaintiff was an invitee, stated that nowadays the duty of the defendant is to take reasonable care in all the circumstances to see that the premises are reasonably safe for the invitee. And in this, it mattered not to Griffin J whether one used this test or Walsh J's test in *Purtill*,<sup>102</sup> or Lord Atkin's test in *Donoghue v Stevenson*.<sup>103</sup> Finlay CJ the third member of the Court, agreed with both judgments but did not deliver a separate judgment of his own.

2.73 *Rooney*, delivered in 1986, caused greater uncertainty in this area. Clearly, general principles do not yet rule in respect of licensees, and it can be said that *Rooney* also casts doubt as to whether the general negligence principles apply to invitees in spite of *Foley*. The better view, however, is surely that *Rooney* is merely a temporary check on the inexorable march of general negligence principles which will assert themselves more clearly when the Supreme Court is given a suitable opportunity in the near future.

2.74 We now must consider an important recent Supreme Court case dealing with the duty owed to trespassers. In *Smith v Coras Iompair Eireann*,<sup>104</sup> the plaintiff was severely injured one summer's evening when struck by a train at Inchicore, not very far from Heuston Station. At the time he and a companion were chasing one of two youths who had been riding a mare owned by the plaintiff which was in an adjoining field. The plaintiff had already tripped and fallen but had picked himself up and continued to chase. While running along the uneven ground between two sets of tracks he saw a train, with lights, coming towards him. He again tripped and fell, having come in contact with a length of railway track which had been placed between the regular tracks roughly parallel to them. He was then struck by the train. In evidence he explained that his objective in trying to catch the youth was "to beat him up". He was running "flat out". His entire concentration was on the youth.

2.75 The plaintiff's action for negligence laid stress on the fact that the defendant had allowed a wall to become partially broken down with the result that local residents had carved out a short cut through it, down a precipitous embankment of about fifteen feet and across the railway tracks, to give them quicker access to a public house and some shops. This was the route availed of by the plaintiff, his companion and the youths they were chasing.

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101 Earlier, in *Daly v Avonmore Creameries Ltd*, *supra*, at 138 McCarthy J, in a dissenting judgment, had signalled his views: "I am by no means satisfied that the Court should look any longer to the artificial concepts derived from a common law founded upon property to determine issues of legal liability more properly related to the proximity between individuals be they private individuals or corporate ones."

102 *Purtill v Athlone UDC* [1968] IR 205.  
103 [1932] AC 582.  
104 Supreme Ct, 29 November 1990.

2.76 At the trial, the plaintiff had argued that the defendant should have been aware that he was likely to be proximate to them, that the danger of his running along the railway line should have been reasonable foreseeable, and that consequently it owed him a duty of care. At the close of the plaintiff's case, counsel for the defendant had sought a non-suit, not on the basis that any lower duty was owed to him by virtue of his status as a trespasser, but solely on the criteria of foreseeability and proximity. The trial judge, Egan J, had granted the non-suit, applying the test stated by McCarthy J in *Foley v Musgrave Cash and Carry Ltd.*<sup>105</sup>

2.77 The Supreme Court dismissed the plaintiff's appeal. Griffin J, delivering the judgment of the Court, said that, since counsel for the defendant had again relied on the issues of foreseeability and proximity, it was:

"not necessary for this Court to consider whether, and if so to what extent, the conventional law in relation to the classification of invitees, licensees and trespassers and the duties owed to each of them, is still applicable. That question should accordingly be reserved for an occasion on which it is fully argued and may be necessary for decision."

2.78 Griffin J went on to enlarge upon Walsh J's pioneering statement in *Purtill v Athlone UDC*<sup>106</sup> that:

"[w]hen the danger is reasonably foreseeable, the duty to take care to avoid injury to those who are proximate, when their proximity is known, is not abrogated because the other party is a trespasser. The duty to those in proximity is not based on any implied term of an invitation or a licence, or upon any warranty for safety which might be thought to be inherent in any such invitation or licence. Rather is it based upon the duty that one man has to those in proximity to him to take reasonable care that they are not injured by his acts. What amounts to sufficient care must vary necessarily with the circumstances, the nature of the danger, and the age and knowledge of the person likely to be injured."

2.79 Griffin J did not think that Walsh J there intended or purported to enumerate all the circumstances which were to be considered; those mentioned were the appropriate ones in that case. To them should be added those of time and place (including the nature of the surface of which use was being made), the persons who might be expected to be exposed to danger, and the presence and conduct of the person coming onto the premises.

2.80 Griffin J considered that *Foley* did not assist the plaintiff. In that case a customer in a supermarket had been injured when she fell over a trolley. Her 'proximity was known', said Griffin J. The Court had held that, as a customer, she could not reasonably be expected to look down at her feet while

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<sup>105</sup> *Supra.*  
<sup>106</sup> [1968] IR, at 212.

waking along an aisle looking at the shelves displaying the goods on sale.

2.81 In the instant case, the circumstances were entirely different. There was no evidence that the defendant was aware that persons used the railway as a short-cut. Even if the defendant had tolerated the crossing of the line for use as a short-cut, the question arose as to whether it was reasonably foreseeable to the defendant that any adult would go onto the railway line, not for the purpose of taking a short-cut, but to act and conduct himself in the manner which the plaintiff had done. To answer this question, all the prevailing circumstances had to be taken into account. These would include the time at which, and the state of light when, the events took place, the nature of the surface on which the plaintiff was running, the speed at which he ran, the fact that having fallen once he got up and started again, and that, although he saw a train approaching in close proximity to him, he continued to run as fast as he could when all he need have done to avoid any danger was to pull up or step to his left.

2.82 In Griffin J's opinion it would be perverse to hold that the defendant could or should reasonably have foreseen that any adult would have conducted himself as the plaintiff had done. In the circumstances, the defendant 'owed no duty to the plaintiff'.

2.83 The judgment gives rise to a number of observations. The first is to remark yet again on the curious reluctance of the Supreme Court to carry through the logic of the *Purtil* decision and sweep away the 'categorical' approach to occupiers' liability. To take this step would not mean that all entrants could insist on the same level of care: the court would be required to attach such significance as appeared appropriate to the purpose of the entrant in going on the defendant's property. Even under a simple negligence formula the court should distinguish radically between injuries sustained on a defective stair by a guest who has overstayed his welcome and injuries suffered by a burglar on the same stair during a nocturnal visit. That distinction is not reducible simply to the relative foreseeability of their presence on the property. I no more owe a duty of care to a man who announces his intention of breaking into my home and killing me than I do to one who comes suddenly through the window with the same purpose. What abolition of the categorical approach will accomplish is the removal of *undue* and inflexible attribution of significance to the question of the entrant's status, as well as the *arbitrary limitations attaching to the duty* owed to invitees and licensees, respectively.

2.84 The second feature worth noting about *Smith v Coras Iompair Eireann* is the judicial treatment of the concepts of duty, *proximity* and *reasonable foreseeability*. These are at the core of the negligence lexicon. According to the orthodox doctrine, the notion of a duty of care is an essential ingredient in liability, over and above carelessness on the part of the defendant resulting in reasonably foreseeable injury to the plaintiff.

2.85 When does a defendant owe a duty of care? The orthodox

answer goes back to the attempt by Lord Esher and AL Smith LJ in *Le Lievre v Gould*<sup>107</sup> (developing on what Lord Esher (then Brett MR) had said in *Heaven v Pendle*<sup>108</sup> to define the basis in terms of proximity. In *Donoghue v Stevenson*<sup>109</sup> Lord Atkin raised the robust formula to the metaphysical order: proximity should 'not [be] confused to mere physical proximity, but [should] be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act'. The Irish courts have been happy to endorse this approach.<sup>110</sup>

2.86 The concept of reasonable foreseeability, on the other hand, serves a different function. This is to define the scope of liability in negligence. A defendant is not liable to persons who are not reasonably foreseeable victims; even if they pass this barrier, the defendant will not as a general rule be liable for unforeseeable injuries which they sustain (subject to the 'egg shell skull' proviso).

2.87 The notion of reasonable foreseeability is in fact ambiguous. The decision of the Privy Council in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))*<sup>111</sup> has forced courts to consider as a single question what really involves two separate issues: first, whether the defendant acted unreasonably in the circumstances, and second, whether some or all of the injuries the plaintiff sustained ought reasonably to have been within the defendant's contemplation. The first issue raises question that are not reducible exclusively to what might be called an assessment of the *predictability* of the accident. That is of course a factor, but other matters must also be weighed, such as the *gravity* of the threatened injury (however unlikely its occurrence may be), the social utility of the defendant's conduct and the cost of preventing an accident.

2.88 The relationship between the concepts of reasonable foreseeability and duty should be noted. There are cases where a defendant, even if guilty of careless conduct resulting in reasonably foreseeable injury to the plaintiff, will not be liable because he owed him no duty of care. A drunken advocate can shelter behind the immunity afforded by *Rondel v Worsley*.<sup>112</sup> Of course it is always possible to say that a defendant who has not risked or caused reasonably foreseeable injury to the plaintiff owed him no duty of care in that, for a duty to arise in the first place, the plaintiff must have been within the radius of the risk of reasonably foreseeable injury; but this is a tautological conclusion which does not contribute to the clarity of analysis.

2.89 Against the background of this summary of orthodox doctrine

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107 [1893] 1 QB 491.  
108 11 QBD 503 (1883).  
109 [1932] AC, at 580.  
110 See McMahon & Binchy, *op cit*, 95-96.  
111 [1961] AC 388.  
112 [1969] 1 AC 191.

it is useful to examine Griffin J's handling of these concepts. It would appear to involve some degree of elision between them. The conclusion that a no-suit was warranted on the basis of the absence of such *reasonable foreseeability* seems eminently justified on the facts.

2.90 The duty of care issue also featured strongly in Griffin J's judgment. This is notable because the courts, since the changes brought about in *Purtill*, have not yet been faced with the claims of what might be called an unattractive adult trespasser whose presence was even arguably foreseeable, and that thus they have not had to consider whether the writ of proximity runs so widely as to embrace *all* trespassers.<sup>113</sup> It can hardly be the case that such a nexus should *inevitably* arise, requiring the issue to be resolved in terms of the test of reasonable foreseeability. An intending murderer entering a premises is *not* in a relationship with the occupier which generates any duty of care and the courts should say so without embarrassment.

2.91 In *Smith v CIE*, Griffin J rightly perceived that a genuine issue of proximity arose. Apart altogether from the question of reasonable foreseeability, a railway company (albeit one that may have tolerated the development of a short cut across their tracks) surely does not inevitably owe a duty of care to a person who goes onto that area, not for the purposes of a short cut, but to assault another person.

2.92 One can therefore understand why Griffin J might wish to hold that the defendant *owed no duty* to the plaintiff; it is also understandable, on the evidence, that the plaintiff's claim should have been dismissed on the basis of lack of reasonable foreseeability. From an orthodox doctrinal standpoint in tort law, there would be understandable resistance to the suggestion that the issues of duty, proximity and reasonable foreseeability should be merged into one.

2.93 In *Redmond v Equipment Company of Ireland*,<sup>114</sup> Budd J imposed liability on the occupier of premises where a security guard was injured by a tyre which was blown from a stack of tyres which was "higgledy-piggledy and too high".<sup>115</sup> Budd J considered that the plaintiff was "obviously an invitee on the premises and a person in respect of whom the [occupier] had a duty of care".<sup>116</sup> His analysis of the liability issue was based exclusively on a negligence test. Whilst Budd J did not characterise the stack of tyres as an unusual danger, and made no reference to *Indermaur v Dames*, it would seem relatively uncontroversial had he done so. The crucial question in the case was essentially one of causal identification: of whether the tyre had been dislodged because of the wind (which reached gale force on the day in question) or because it had been part of an unstable pile.

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113 Cf *O'Keefe v Irish Motor Inns* [1978] IR 85, where the plaintiff was a former invitee of the defendant, but remained in the vicinity of the hotel until the early hours of the morning, when he sustained injuries in a fall at the back of the hotel.

114 High Ct, 28 July 1992.

115 *Id.*, at p13 of Budd J's judgment.

116 *Id.*, p12.

2.94 Finally we should also note the Supreme Court decision in *Clancy v Commissioners of Public Works in Ireland*.<sup>117</sup> The plaintiff, a 13 year old boy, was injured when he fell through a large unprotected opening on the first floor of Donegal Castle, an ancient, partly ruined building. The defendants were the guardians of the building under the *National Monuments Act, 1930*. Section 16 of that Act provides as follows:

- "(1) Where the commissioners or a local authority are the owners or the guardians of a national monument, the commissioners or such local authority (as the case may be) shall, subject to the provisions of this section, admit the public to enter on and view such monument upon payment of such (if any) charge for admission and subject to such conditions and limitations as the commissioners or such local authority shall prescribe.
- (2) Where the commissioners or a local authority are the guardians of a national monument by virtue of a deed made under an Act repealed by this Act, the public shall not be admitted to such monument under this section without or otherwise than in accordance with the consent of the owner of such monument given by such deed or otherwise".

2.95 Finlay CJ (Hederman J concurring) construed this section as imposing an *obligation* on the defendants to admit the public to enter on and view the Castle, subject to such conditions and limitations as they should prescribe. They were accordingly entitled to confine the public, if they saw fit, to viewing the castle only from outside its actual buildings or to permit access to the first floor only. The Chief Justice was satisfied that these conditions and limitations had to be carried out "reasonably and with care, so as to avoid danger or injury to persons who it could reasonably be foreseen would be effected by the discharge of that duty". He rejected the argument that the conditions and limitations could relate only to *preservation of the fabric of the monument*; such an interpretation would lead to the "extraordinarily anomalous position" that if part of the monument fell, by reason of decay, on a member of the public, the defendants would be liable but if a member of the public fell through a hole in the monument which was not attributable to non-repair, he would have no claim.

2.96 The Chief Justice was satisfied that, in carrying out their statutory duty under section 16, "the Commissioners were obliged to take such reasonable steps as were necessary to avoid foreseeable risk to persons likely to be affected by the discharge of that duty, that is to say, to persons who might gain access to the national monument by virtue of the admission of the public to enter upon and view it". He accepted that in general the Commissioners, in admitting members of the public to enter upon and view national monuments, "should not be equated, in regard to standards of care, with the obligation which

may be imposed on persons such as hotel owners or shop owners in relation to the care which would be taken of members of the public having access to buildings in use for purposes connected with commerce or trade". Anyone entering upon and viewing a monument of a partly ruined building expected to find openings which were unprotected and staircases which did not contain a bannister or side rail. It was a matter of determination in each individual case as to whether protection should be provided or whether, in the alternative, where it was not reasonably possible, the public should be prevented from having access to some particular part of the building.

2.97 In the present case, the opening was large-seven feet by three feet; it was in a dark coloured stone floor over a dark coloured stone floor; was 16 feet above ground level and was apparently straddling the path from the top of the stairs to the most obvious viewing point, the bay window. Such a situation, in Finlay CJ's view, created "very real and present risk or injury" to persons gaining access to the castle. This fact imposed on the Commissioners an obligation either to close the aperture by a grill (as they had subsequently done) or to prevent access to the first floor. The defendants had failed in this obligation and accordingly Barr J had been correct in holding them guilty of negligence and breach of duty.

2.98 This analysis is probably best understood as involving a matter of statutory interpretation rather than as impacting on the common law rules relating to occupier's liability. Nothing in Finlay CJ's comments suggests that he was seeking to take a definitive stand on the matter. *Clancy* can therefore be treated simply as a case limited to its distinctive statutory context.

#### ***Statutory Duties on Occupiers***

2.99 The provisions of the *Safety, Health and Welfare at Work Act, 1989* should, directly or indirectly, make lands and premises safer for entrants. Although "work" is undefined, "place of work" is defined in s2(1) as including "any place, land or other location, at, in, upon or near which, work is carried on whether occasionally or otherwise". Section 6 of the Act, is a "General Duties" section which makes it an offence for an employer not to ensure, as far as is reasonably practicable, the safety, health and welfare at work of employees. The duty extends, *inter alia*, to the design, the provision and the maintenance of the place of work, in a condition that is safe and of safe means of access to and egress from such place.

2.100 Section 9 provides for a corresponding duty on employees to take reasonable care for their own safety.

## CHAPTER 3: THE LAW IN SOME OTHER JURISDICTIONS

3.1 In this chapter we examine briefly the law in other jurisdictions, concentrating on aspects of the subject that are of particular interest in the context of the crucial issues arising for consideration when making proposals for reform of the law.

### *NORTHERN IRELAND*

3.2 The law in Northern Ireland derives from English legislative initiative in 1957 and in 1984. Both of these are discussed below, so there seems little point in duplication here.

### *ENGLAND*

3.3 The *Occupiers' Liability Act, 1957* introduced statutory reform, but only so far as the occupier's duty to invitees and licensees was concerned; trespassers were left to continue to receive such limited protection as the common law afforded them under the *Addie v Dumbreck Collieries*<sup>1</sup> test. It was not until 1984 that trespassers received statutory protection: we examine that legislation presently.

3.4 Section 2 of the 1957 Act is the crucial provision for our purposes. An occupier of premises owes the same duty, the "common duty of care", to all his "lawful visitors"-entrants formerly categorised as contractual entrants, persons entering as of right (such as firefighters and employees of public utilities), invitees and licensees-except in so far as he is free to and does

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<sup>1</sup> [1929] A.C. 358. The Law Reform Committee in its Third Report, *Occupiers' Liability to Invitees, Licensees and Trespassers* (Cmd 9305, 1954), was not in favour of bringing trespassers within the range of the occupiers common duty of care. Its analysis was summary and unconvincing: see para 80.

extend, restrict, modify or exclude his duty to them by agreement or otherwise.<sup>2</sup> The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to ensure that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.<sup>3</sup>

3.5 The circumstances here include the degree of care, or of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases-

- (a) an occupier must be prepared for children to be less careful than adults; and
- (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.<sup>4</sup>

3.6 In determining whether the occupier has discharged the common duty of care to a visitor, regard is to be had to all the circumstances so that (for example) -

- (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
- (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.<sup>5</sup> Voluntary assumption of risk constitutes a defence.<sup>6</sup>

3.7 Section 3 deals with the situation where an occupier is bound by contract<sup>7</sup> to permit persons who are strangers to the contract<sup>8</sup> to enter or use the premises. The duty of care that he owes them as his visitors cannot be

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2 Subsection(1). The 1957 legislation did not extend to trespassers, those exercising private or public rights of way or authorised ramblers entering property under the *National Parks and Access to the Countryside Act, 1949*.

3 Subsection(2).

4 Subsection(3).

5 Subsection(4).

6 Subsection(5).

7 Where by the conditions of a tenancy either the landlord or tenant is bound, otherwise than by L, to permit persons to enter or use premises of which he or she is the occupier, section 3 applies as if the tenancy were a contract between the landlord and the tenant: section 3(4).

8 A "stranger to the contract" is a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it: section 3(3).

restricted or excluded by the contract.<sup>9</sup> Indeed his liability can range more broadly than the duty of care imposed on him by section 2. Subject to any provision of the contract to the contrary, he has the duty to perform his *obligations under the contract*, whether undertaken for the protection of these strangers or not, in so far as those obligations go beyond the obligations otherwise involved in his duty of care arising under section 2.<sup>10</sup>

3.8 Unless it expressly so provides, a contract, by virtue of section 3, does not have the effect of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of works of construction, maintenance or repair or other like operations by persons other than the occupier himself, his servants and persons acting under his direction and control.<sup>11</sup>

3.9 Section 4 deals with the position of landlords. Its crucial provision is subsection(1), which states that, where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord owes to all persons who (or whose goods) may from time to time be lawfully on the premises the same duty in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract).

3.10 Section 5 deals with the position of contractual entrants. Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, is the common duty of care.<sup>12</sup> This provision does not affect the obligations imposed on a person by any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by any contract of bailment.<sup>13</sup>

3.11 The *Occupiers' Liability Act 1984* replaces the common law rules so far as they determined whether any duty was owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things due or omitted to be done on them. Thus trespassers, as well as authorised ramblers under the 1949 legislation and those exercising private rights of way, are protected under the 1984 Act. Those exercising *public*

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9 Section 3(1).  
10 *Id.*  
11 Section 3(2).  
12 Section 5(1).  
13 Section 5(3).

*rights of way are not included.*<sup>14</sup> Liability in respect of *property* damage continues to be dealt with under common law principles.<sup>15</sup>

3.12 It is useful to quote the central provisions of the Act. Section 1 provides in part as follows:

- "(1) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if -
- (a) he is aware of the danger or has reasonable grounds to believe that it exists.
  - (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and
  - (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
- (2) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.
- (3) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.
- (4) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

3.13 Note that the three elements mentioned in subsection (3) are *cumulative*: the occupier must be aware of the danger or have reasonable

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14 Cf. *RWM Dias & BS Markesinis, Tort Law* (2nd ed, 1989), p208: "Their exclusion was prompted by the fear that any contrary decision would have resulted in large expenditure being incurred by the owners of the servient land".

15 Section 1(8) or damage would not go uncompensated if liability under common law principles could be established.

grounds to believe it exists; he must also know or have reasonable grounds to believe that the non-visitor is either in the vicinity of the danger or may come into that vicinity; and (crucially) the risk must be one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer the non-visitor some protection. This seemingly "risk-centred" approach might mislead the casual reader into failing to appreciate that the third factor requires the court to make a value judgment relating, not centrally to risks at all, but rather to the claim of the non-visitor in the circumstances of the case to protection. True, that claim must be for protection from the risk in question, and the value judgment cannot be made without regard to that risk, but it is equally true, and ultimately of surely greater weight in most cases, that the nature and circumstances of the trespass will predominate in the judicial analysis of whether or not the non-visitor passes the hurdle presented by subsection(3).

3.14 The failure of the section to take any definitive position on the eligibility of a claim by a child trespasser or criminal trespasser, for example, was the result of a conscious decision, based on the views of the English Law Commission. The Commission was of opinion that giving such specific guidelines in the legislation would "lead to undesirable complications and requirements in much the same way as the former distinction between invitees and licensees confused the law governing the liability of occupiers to lawful entrants".<sup>16</sup> Nevertheless, there seems considerable merit in the critical observations by a commentator that:

"the adoption of a generalised approach would seem to expose the Act to the objection that its own formulation .... does not represent a significant advance upon the supposedly uncertain and unpredictable principles of 'common humanity' laid down in *Herrington's case*".<sup>17</sup>

### **SCOTLAND**<sup>18</sup>

3.15 Scotland, when it legislated on the subject three years after England's pioneering legislation of 1957, adopted a more radical approach by bringing trespassers within the scope of the occupier's duty of care. Section 2(1) of the *Occupiers' Liability (Scotland) Act, 1960* provides that:

"[t]he care which an occupier of premises is required by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or

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16 WP No 52, (1973).

17 Buckley, *The Occupiers' Liability Act 1984 Has Herrington Survived?*, [1984] Conv. 413, at 418.

18 See WP No 52, pp65-68.

damage by reason of any such danger".<sup>19</sup>

3.16 The limited case law<sup>20</sup> "hardly suggests that the ... Act imposes an impossibly high standard of care on the occupier ...."<sup>21</sup>

3.17 In *McGlone v British Railways Board*<sup>22</sup>, where the pursuer, a 12 year old boy, was injured on a transformer, having got through barbed wire, the House of Lords held that the defendant had rightly been held not liable under the Act. Lord Reid stated:

"In deciding what degree of care is required, in my view regard must be had both to the position of the occupier and to the position of the person entering his premises, and it may often be reasonable to hold that an occupier must do more to protect a person whom he permits to be on his property than he need do to protect a person who enters his property without permission".

3.18 This suggests that the absence of permission is undoubtedly a factor to be taken into account in determining the nature of the duty of care in the particular circumstances of a case. Lord Reid went on to observe that,

"[i]n a case like this an occupier does in my view act reasonably if he creates an obstacle which a boy must take some trouble to overcome before he can reach the dangerous apparatus".

3.19 In a real sense section 2(1) did no more than restore the traditional approach, prior to the fateful decision of *Addie v Dumbreck Collieries Ltd.*<sup>23</sup> As *Walker* explains:

"Prior to 1929 the Scottish courts had recognised that the strictness of the duty of care incumbent on the occupier of premises varied according to the circumstances in which the injured party had entered on the premises, and on the extent of his right, or lack of it, to enter. The extent of right, and consequently the stringency of the duty of care, and the question whether care sufficient in the circumstances had been shown, were in each case questions of fact to be determined with regard to the circumstances of the case".<sup>24</sup>

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19 The onus of proof of fault is on the plaintiff: *Wallace v City of Glasgow District Council*, 1985 SLT 23 (Second Division, 1984).

20 Cf *McGlone v British Railways Board*, 1966 SC (HL), in which the House of Lords held against a 12 year old boy who (as in *Purtil* and *McNamara*) had been injured when climbing on a structure supporting a transformer (having got through a gap in fencing). See also *Titchiner v British Railways Board* [1983] 3 All ER 770 (HL(Sc)).

21 English Law Commission WP No 52, p88.

22 *Supra*.

23 [1929] A.C. 358.

24 *Supra*.

## SCANDINAVIA

3.20 Norway and Sweden (but not Denmark) have always had a customary law - *allemannsretten* - whereby the public has a right of access to privately owned land.<sup>25</sup> In Norway, the Open Air Recreation Act of 1957 gives statutory effect to this right. One commentator has summarised the effect of the Act as follows:

"Anyone may walk on cultivated land between October 15 and April 30, provided the ground is frozen or covered with snow. Of course, there are exceptions with respect to farmyards, gardens and similar areas. The farmer also may prohibit any passage that might cause significant damage. Camping, picnicking, sunbathing, and staying overnight [are] not permitted without the owner's consent.

On uncultivated private land, the public has a right to walk the year round, but riding a horse or a bicycle and sledging are permitted only on roads and in mountains. Camping and picnicking are allowed but only for periods not longer than two days.

A land owner always can forbid the use and parking of motor vehicles on his private roads. The public has no right to fish or hunt in waterstreams and lakes. In addition, sailing is allowed only on navigable waters".<sup>26</sup>

3.21 Swedish customary law is largely similar; it has been summarised in the following terms:

"You may walk, ride, or cycle on all private land with two very important exceptions: you have no access to the area near inhabited buildings, and you must not disturb the peace or in any way interfere with the farmer's right to use his land for farming or for any other kind of production or cause any necessary loss or inconvenience to the farmer. Consequently, the public has no right of access to cultivated land unless it is frozen or covered with snow. Camping and picnicking [are] allowed only for short periods depending on how much [these activities] interfer[e] with the farmer's right to peace and a clean area. The owner always can forbid the use of motor vehicles on private roads.

The public has no right to hunt or fish on the farmer's property. There is a public right to sail and bathe in the rivers, waterstreams and lakes."<sup>27</sup>

3.22 In Denmark, in contrast to the position in Norway and Sweden, the farmer generally has power to prevent anyone coming on his land without his

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See Wulff, *Recreational Access to Agricultural Land: The European Experience*, 24 *Indiana L Rev* 1641 (1991).  
*Id.*  
*Id.*

permission. The Nature Conservation Act of 1987 creates important exceptions to this rule. The public have a right to walk across unfenced, uncultivated land and on the roads of a forest (but not to walk in areas off the road).<sup>28</sup>

3.23 As to delictual liability in Scandinavia, the *culpa* principle applies. It has been noted that:

"[t]here are very few court decisions in this area, but the landowner has a special duty to protect people that he has permitted to enter his land such as hunters and fishermen.

The farmer also has some duties to trespassers. If he actually knows that people have entered his land, he must warn them if he realizes that they are likely to be injured from animals, hunting, or felling of trees. If he knows that trespassers often use part of his land, such as for a short cut from a bus station to their homes, he must take care that they are not harmed from the felling of trees, excavation, and so forth."<sup>29</sup>

3.24 In Denmark, those who enter lands under the Nature Conservation Act do so at their own risk. It has, however, been observed that, "even if the Act is silent on this point, it is safe to assume that the landowner must warn the public against special dangers."<sup>30</sup> If the landowner makes *special* arrangements for the public, such as a toboggan run, he is under a special duty to take care that they do not present any risk to those who use them.<sup>31</sup>

## ONTARIO

3.25 Following the *Report on Occupiers' Liability* published in 1972, but by no means implementing all of the recommendations faithfully, the *Occupiers' Liability Act, 1980* sets out a statutory code on the subject.

3.26 Section 2 abrogates the common law rules relating to all entrants. Section 3(1) provides that an occupier of premises owes a duty to take:

"such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises".

3.27 This duty this applies to *all* entrants, including trespassers. The legislation thus follows the Scottish rather than the English model.

3.28 Subsection (2) of section 3 provides that the duty of care applies

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28 *Id.*  
29 *Id.*  
30 *Id.*  
31 *Id.* 3112

whether the danger is caused by the condition of the premises or by an activity on the premises. The provision represents a change from the English, Scottish and New Zealand models.<sup>32</sup>

3.29 Section 4 is of considerable interest. It provides as follows:

- "(1) The duty of care provided for in subsection (3) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or danger to the person or his property and not to act with reckless disregard of the presence of the person or his property.
- (2) A person who is on premises with the intention of committing, or in the course of, a criminal act shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1).
- (3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1),
  - (a) where the entry is prohibited under the *Trespass to Property Act*;
  - (b) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or
  - (c) where the entry is for the purpose of recreational activities and
    - (i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and
    - (ii) the person is not being provided with living accommodation by the occupier.
- (4) The premises referred to in subsection (3) are,
  - (a) a rural premises that is,

- (i) used for agricultural purposes, including land under cultivation, orchards, pastures, woodlots and farm ponds,
  - (ii) vacant or undeveloped premises,
  - (iii) forested or wilderness premises,
- (b) golf courses when not open for playing;
  - (c) utility rights-of-way and corridors, excluding structures located there on;
  - (d) unopened road allowances;
  - (e) private roads reasonably marked by notice as such; and
  - (f) recreational trails reasonably marked by notice as such".

3.30 The first point to note is that the *minimum* duty which an occupier owes may not be reduced below that of being obliged not to injure the entrant intentionally nor act with reckless disregard of the entrant's person. This minimum duty cannot be shaken off, even in respect of those entrants who are actually or constructively *volens*. This approach is broadly similar to that adopted in section 5 of Western Australia's legislation.

3.31 It might be argued that the combined effect of subsections (1) and (2) of section 4 is to place the occupier in a dilemma as regards his response to a criminal trespass. If he shoots a burglar who is trying to kill him, is he liable for having "create[d] a danger with the deliberate intent of doing harm" to the trespasser? Perhaps the common law defences of self defence<sup>33</sup>, defence of third parties<sup>34</sup> and defence of property<sup>35</sup> are to be deemed to have implicit continuing vitality; perhaps the *ex turpi causa* principle could be invoked to override unpalatable implications of statutory construction of the *volenti* defence, as has happened in England. (It is noteworthy that this issue was dealt with specifically in section 3(7) of the Law Reform Commission of Saskatchewan's proposed legislation.)

3.32 Next it is worth examining subsections (3) and (4). They have the effect of applying the limited minimal duty as to intentional and reckless conduct to three types of entrant onto agricultural, vacant, undeveloped, forested or wilderness premises as well as a miscellany of other non-residential property. The first type of entrant is one whose entry is prohibited under *The Trespass to Property Act 1980*. Section 2 of this Act makes it an offence (with a fine of up to a thousand dollars) to enter premises without the express permission of the

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33 Cf *McMahon & Binchy*.  
 34 Cf *id.*  
 35 Cf *id.*

occupier when entry is prohibited under the Act.<sup>36</sup> Section 3(1) provides that entry on premises may be prohibited *by notice* to that effect and that entry is prohibited *without any notice* on premises:

- (a) that consist of a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or
- (b) that are enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

3.33 Subsection (2) establishes a presumption that access for lawful purposes to the door of a building or premises by a means apparently provided and used for the purpose of access is not prohibited.

3.34 Section 4 deals with *limited permission* and *limited prohibition*. Under subsection (1), where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises is to be construed to be for greater certainty only. Under subsection (2), where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited.

3.35 The second type of entrant mentioned in section 4 (3) of the *Occupiers' Liability Act* is one who has entered premises where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry. Such a situation could arise without the entry being a prohibited one under *The Trespass to Property Act* where, for example the premises, though falling within the scope of subsection (4), do not come within the description provided by section 3(1) of the trespass legislation.

3.36 The third type of entrant is one proposing to engage in a recreational activity for which the occupier charges no fee.

3.37 Section 5(1) of the *Occupiers' Liability Act*, in common with the legislation in England, Alberta, British Columbia, South Australia and Western Australia, prevents the restriction of the statutory duty of care by a contractual provision in defiance of the privity rule. It provides that:

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<sup>36</sup> The entrant must not have been acting under a right or authorisation conferred by law: section 2(1). A reasonable belief in such title or in an interest in the land entitling the entrant to act as he or she did constitutes a defence: section 2(2).

"[t]he duty of an occupier under this Act, or his liability for breach thereof, shall not be restricted or excluded by the provisions of any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises".

3.38 Thus, the rule is *Fosbroke-Hobbes v Airwork Ltd*<sup>37</sup> is reversed.

3.39 Section 5(2) deals with extension of liability by contract. It provides that a contract is not by virtue of the Act to have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care liable to any person not a party to the contract for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than himself, his servants or persons acting under his direction and control. This provision mirrors section 3(2) of the English legislation of 1957. Its effect is to enable certain strangers to the contract to enforce a term of the contract, in breach of the normal privity rule.

3.40 Finally, in regard to contractual provisions, we may note section 5(3), which requires an occupier who is free to restrict, modify or exclude his duty of care or his liability for breach of that duty to take reasonable steps to bring that restriction, modification or exclusion to the attention of the person to whom the duty is owed. There is an equivalent provision in almost all occupier's liability legislation elsewhere; Victoria is an exception.<sup>38</sup>

3.41 Section 6 deals with the liability of an occupier for the negligence of an independent contractor. Subsection (1) provides that the occupier is not liable merely for having employed the independent contractor if in all the circumstances he acted reasonably in entrusting the work to the independent contractor, if he took reasonable steps to satisfy himself that the contractor was competent and that the work was properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken. Subsection (3) provides that nothing in the section affects any duty of the occupier that is non-delegable at common law or any provision in any other Act that makes the occupier liable for the negligence of an independent contractor. Subsection (2) results from the concern of the Ontario Law Reform Commission that an anomaly might exist without its inclusion in cases where there is more than one occupier. The fact that the occupier employing the contractor satisfies the requirements of subsection(1) would leave *that* occupier immune but would not, of itself, protect the *other* occupier from liability.<sup>39</sup> Subsection (2) accordingly provides that, where there is more than one occupier of premises, any benefit occurring by reason of subsection (1) to the occupier who employed the independent contractor is to accrue to *all* occupiers of the

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[1937] 1 All ER 108.

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Cf Handford, *Occupiers' Liability Reform in Western Australia and Elsewhere*, 17 W Australia L Rev 182, at 197 (1987).

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Cf page 20 of the Report.

premises.<sup>40</sup>

3.42 Section 8, in common with most legislation on the subject, reserves the common law rule<sup>41</sup> that the lessor of premises is under no liability to any one on the premises, save a tenant, for damage caused by the breach of the lessor's covenant to repair.

3.43 Section 9 prescribes higher obligations. It provides as follows:

- "(1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on him by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of
- (a) innkeepers, subject to *The Innkeepers Act*;
  - (b) common carriers;
  - (c) bailees,
- (2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from a master and servant relationship where it exists..."

3.44 Finally, it may be noted that section 9(3) preserves<sup>42</sup> the defence of contributory negligence in actions relating to occupiers' liability.

#### **ALBERTA**

3.45 The *Occupiers' Liability Act 1973* came into force on 1 January 1974. Its greatest interest for our purposes lies in the distinction it draws between the duty owed to *visitors*, on the one hand, and the duty owed to *trespassers*, on the other.

3.46 A *visitor* is:

- (i) an entrant as of right;
- (ii) one lawfully present on premises by virtue of an express or implied term of a contract;

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40 One might debate the merits of this provision. If two occupiers jointly engage an independent contractor in circumstances where one of them was not aware of the contractor's propensity for carelessness but the other did know of it, why should the innocence of the first occupier relieve from liability the second occupier?

41 Cf *Cavaller v Pope* [1906] AC 428.

42 Cf *Whitehead v North Vancouver* [1939] 3 OLR 83; *Brown v BF Theatres* [1947] SCR 486.

- (iii) any other person whose presence on premises is lawful; or
- (iv) one whose presence on premises becomes unlawful *after* his entry on those premises and who is taking reasonable steps to leave the premises.<sup>43</sup>

3.47 To the visitor, the occupier owes a duty to take such care as in all the circumstances of the case is reasonable to see that he will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there.<sup>44</sup> This duty applies in relation to:

- (a) the condition of the premises,
- (b) activities on the premises, and
- (c) the conduct of third parties on the premises.<sup>45</sup>

3.48 The statutory reversal of *Horton v London Graving Dock Co*<sup>46</sup> effected by section 2(4)(a) of the English legislation of 1957 is reflected in section 9 of the Albertan legislation. Voluntary assumption of risk is a defence to an action by a visitor. The occupier may extend, restrict, modify or exclude his liability under the Act relative to a visitor, subject to two qualifications: reasonable steps must have been taken to bring this change to the attention of the visitor,<sup>47</sup> and no such entitlement avails an occupier in relation to entrants as of right.<sup>48</sup>

3.49 Where an occupier is bound by contract to permit strangers to the contract to enter or use the premises, the occupier's liability under the Act to a stranger may not be enlarged, restricted or excluded by the contract.<sup>49</sup>

3.50 An occupier is not liable under the Act where the damage is due to the negligence of an independent contractor engaged by the occupier if:

- (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and
- (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.<sup>50</sup>

3.51 This does not, however, abrogate or restrict the liability of an

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43 Section 1(e) of the Act.  
 44 *Id.*, section 5. See *Preston v Canadian Legion, Kingsway Branch No 175*, 123 DLR (3d) 645 (Alta CA, 1981).  
 45 Section 6 of the Act.  
 46 *Id.*, section 7.  
 47 *Id.*, section 8(1).  
 48 *Id.*, section 8(2).  
 49 *Id.*, section 10.  
 50 *Id.*, section 11(1).

occupier for the negligence of his independent contractor imposed by any other Act.<sup>51</sup>

3.52 The legal position relative to *trespassers* is quite different. The general rule is that the occupier does *not* owe a duty of care to a trespasser on his premises,<sup>52</sup> though he must not engage in wilful or reckless conduct resulting in death or injury to the trespassers.<sup>53</sup> Where an occupier knows or has reason to know<sup>54</sup>:

- (a) that a *child* trespasser is on his premises, and
- (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,

the occupier owes a duty to the child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.<sup>55</sup> In determining whether that duty has been discharged, consideration is to be given to:

- (a) the age of the child;
- (b) the child's ability to appreciate the danger; and
- (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.<sup>56</sup>

3.53 Finally it should be noted that the claims of both *visitors* and *trespassers* are subject to the defence of contributory negligence.<sup>57</sup>

### **BRITISH COLUMBIA**

3.54 The *Occupiers' Liability Act 1974*, as amended, deals with the occupiers' duty of care in section 3, as follows:

- "(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person and his property, on the premises, and property on the

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51 *Id.*, section 11(2).

52 *Id.*, section 12(1).

53 *Id.*, section 12(2). Note that section 12 establishes no duty to avoid injuring the trespasser's *property*, even through wilful or reckless conduct. It would seem (though the matter is far from clear) that this immunity is not defeated by section 14(1) which *in general terms* brings property, even of trespassers, within the remit of compensation.

54 An occupier has reason to know that child trespassers are on his premises if he has knowledge of facts from which a reasonable man would infer that children are present or that their presence is so probable that the occupier should conduct himself on the assumption that they are present.

55 *Id.*, section 13(1).

56 *Id.*, section 13(2).

57 *Id.*, section 15.

premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.<sup>58</sup>

- (2) The duty of care referred to in subsection (1) applies in relation to the:
  - (a) condition of the premises;
  - (b) activities on the premises; or
  - (c) conduct of third parties on the premises.<sup>59</sup>
- (3) Notwithstanding subsection (1) an occupier has no duty of care to a person:
  - (a) in respect of risks willingly accepted by that person as his own risks, or
  - (b) who enters premises that the occupier uses primarily for agricultural purposes and who would be a trespasser under the *Trespass Act*,

other than a duty not to

- (c) create a danger with intent to do harm to the person or damage to his property, or
  - (d) act with reckless disregard to the safety of the person or the integrity of his property.
- (4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person".

3.55 What is notable about this approach is that, while it integrates trespassers within the class of entrants to whom a duty of care is owed by the occupier, it makes an exception in the case of criminal trespassers on premises used primarily for agricultural purposes. This exception is similar to, but less extensive and more simply expressed than, section 4 of the Ontario legislation.

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58 Cf *Keralf v Grunerud*, 87 DLR (4th) 475 (BCCA, 1990) (student's backward fall down unlit stairs after having taken drink when attending party not foreseeable in the circumstances). Section 3 clearly does not create a presumption of negligence: *Bauman v Stein*, 78 DLR (4th) 118 (BCCA, 1991).

59 Cf *Siegl v Sylvester*, 47 DLR (4th) 97 (BC Sup Ct, Legg J, 1987) (bar staff should have ejected violent patron before he injured plaintiff).

## **MANITOBA**

3.56 The Manitoba Law Reform Commission addressed the subject in some detail in its *Report on Occupiers' Liability*<sup>60</sup> in 1980. Of greatest interest for our purposes is its analysis of the position of trespassers. The Commission recommended that they should not be subject to a restrictive duty of care, such as applied in Ontario and had been proposed for Saskatchewan. It considered that the flexibility of the negligence standard, the requirement of foreseeability and the presence of apportionment legislation sufficiently responded to the concern that the adoption of ordinary negligence principles would impose a more onerous obligation on occupiers.<sup>61</sup> It rejected the option (adopted in Ontario) that entrance with a criminal purpose should warrant an express statutory restriction of the duty of care; it agreed<sup>62</sup> with the comments of Salmond LJ in *Herrington v British Railways Board*<sup>63</sup> where he stated that "a burglar in your house can hardly be regarded as your 'neighbour' within the meaning of that word ..." Nor did it accept that entrants breaching petty trespass criminal legislation should be owed a restricted duty. In its view,

"the privileges attached to the occupation of land and the right to enforce these liberties through trespass legislation are both separate factors from the duty to act reasonably towards others. Consequently, the duty of care issue should be treated independently from these two matters".<sup>64</sup>

3.57 The only restriction that the Commission favoured was in respect of *snowmobile drivers*. It laconically commented that it did "not perceive the need to extend further the restrictive duty to all recreational activities conducted on a limited group of premises".<sup>65</sup>

3.58 This recommendation was given statutory effect by section 3(4) of the *Occupiers' Liability Act 1983*, which provides that the occupier owes no duty of care towards a person driving or riding on or being towed by an off-road vehicle on the premises without the occupier's express or implied consent, save the duty (a) not to create a danger with deliberate intent of doing harm or damage to the person or the person's property and (b) not to act with reckless disregard of the presence of the person or the person's property.

## **SASKATCHEWAN**

3.59 The Law Reform Commission of Saskatchewan, in its Report, *Proposals for an Occupiers' Liability Act* in 1980, recommended a statutory model not dissimilar as to that adopted in Ontario, but differing in some notable respects. The key provision is section 3, which provides as follows:

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60 Report No 42 (11 August 1980).  
61 *Id.*, p31.  
62 *Id.*, p40.  
63 [1971] 2 WLR 477, at 482.  
64 *Report*, p41.  
65 *Id.*, p42.

- "(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will be safe in using the premises.
- (2) Without restricting the generality of subsection (1), in determining whether the duty of care under subsection (1) had been discharged consideration shall be given to
- (a) the gravity and likelihood of the probable injury;
  - (b) the circumstances of the entry onto the premises;
  - (c) the nature of the premises;
  - (d) the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;
  - (e) the age of the person entering the premises;
  - (f) the ability of the person entering the premises to appreciate the danger;
  - (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.
- (3) The duty of care referred to in subsection (1) applies in relation to
- (a) the condition of the premises; or
  - (b) the activities on the premises; or
  - (c) the conduct of third parties on the premises.
- (4) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.
- (5) The knowledge of any person of dangers on the premises, whether because of a warning given by the occupier or otherwise, shall not alone absolve the occupier from discharging his duty under this Act towards that person.
- (6) For the purposes of subsection (4), a person who is on premises

with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks except the risk of dangers created and acts done by the occupier with the intent of doing harm or damage to persons or property or with reckless disregard of the presence of the person or his property.

- (7) Notwithstanding subsection (6), nothing in this Act shall be construed so as to affect the law with respect to self defence, defence of others and defence of property.
- (8) For the purposes of subsection (4), a person who, in the course of hunting, or driving or riding on or in a motor vehicle or being towed by a motor vehicle, enters or uses the premises unconnected with any business, shall be deemed to have willingly assumed all risks except the risk of dangers created by the occupier with the intent of doing harm or damage to persons or property and the risk of damage from acts of the occupier done with reckless disregard of the presence of the person or his property.
- (9) Where in addition to amounts recoverable for personal injury by any person by virtue of this Act, property damage has been caused to that person by the same act that caused the personal injury, such property damage may be recoverable".

3.60 Subsection (6) echoes Ontario's approach in reducing the scope of liability to entrants committing or intending to commit a criminal act. Subsection (7) is a useful drafting clarification, making it clear that the occupier may still invoke the defences of self-defence, defence of others and defence of property.

3.61 Subsection (8) reduces the scope of liability to recreational users of land, but not to every such entrant. Only those who are *hunting* or are driving, riding or being towed by a *motor vehicle* - in practice mainly snowmobiles - fall within the limited liability. Having regard to the vast size of holdings in Canada and the long distances between towns - especially in a province such as Saskatchewan - the problem of injuries on agricultural land occurring to pedestrian trespassers must be relatively minor.

### ***SOUTH AFRICA***

3.62 The South African law of occupiers' liability is based on principles of Aquilian *culpa* rather than the English categorical approach.<sup>66</sup> In

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<sup>66</sup> See Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers II*, 69 LQ Rev 359, at 382-384 (1953); more generally see P. Boberg, *The Law of Delict*, vol 1 (1984).

one of the leading cases, *Farmer v Robinson Gold Mining Company Ltd*<sup>67</sup>, whose facts were not dissimilar to those in *Addie's* case, Innes C J said:

"In most cases the presence of trespassers cannot reasonably be foreseen; but if in any instance a reasonable man would anticipate such presence, then it seems to me that the owner should observe toward the trespasser due and reasonable care. The measure of that care would depend upon all the circumstances, among them being the probability of the exercise of greater circumspection by the trespasser than by the person using his accustomed rights. This principle no doubt covers ground which in English law is occupied by the decision as to mere licensees and much assistance is to be derived from those decisions. But we will do well, as it seems to me, to adhere to the general principles of the Aquilian law, to leave the enquiry as elastic as possible, and to determine on the facts of each case whether or not there has been *culpa*. The result will be probably that in most instances we shall be led to the same conclusion as an English Court would reach under the same circumstances. But there are advantages in avoiding these rigid limitations".

3.63 This approach still commands judicial support.<sup>68</sup>

#### **THE UNITED STATES OF AMERICA**

3.64 Courts in the United States of America until relatively recently applied the common law principles relating to categories of entrant in much the same way as Irish courts did. The claims of contractual entrants, invitees, licensees and trespassers were disposed of on substantially similar legal principles. There were, of course, some differences of emphasis but what is striking is the similarity of approach on a subject where differing socio-economic factors might have been expected to result in substantial differences in legal approach.

3.65 It was not until 1968<sup>69</sup> that a fundamental judicial reform took place. The Supreme Court of California, in *Rowland v Christian*,<sup>70</sup> analysed in detail the principles and policies underlying the traditional approach and found them wanting. Peters J stated:

"Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which

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67 [1917] AD 501, at 523.

68 See eg *Sasverblj Beleggings & Verdiskonterings Maatskappy BPK v Van Rhynsdorp Town Council*, 1980 (1) SA 621 (WLD), *King v Arlington Court (Muizenberg) (Pty) Ltd*, 1952 (2) SA 23(C), *Ablert-Morgan v Whyte Bank Farms (Pty)*, 1988 (3) SA 531 (ECD).

69 The United States Supreme Court, in an admiralty case nine years previously, had anticipated this change: *Kermarec v Compagnie Generale*, 358 US 625 (1959).

70 Cal 2d 108, 443 P 2d 561, 70 Cal Rptr 97 (1968).

has arisen is not due to difficulty in applying the original common law rules - they are all too easy to apply in their original formulation - but is due to the attempts to apply just rules in our modern society within the ancient terminology.

Without attempting to labour all of the rules relating to the possessor's liability, it is apparent that the classifications of trespasser, licensee and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.

Although in general there may be a relationship between the remaining factors and the classifications of trespasser, licensee, and invitee, there are many cases in which no such relationship may exist. Thus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite may be true. The same may be said of the issue of certainty of injury. The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to trespassers than with respect to invitees, but it by no means follows that this is true in every case. In many situations, the burden will be the same, i.e., the conduct necessary upon the defendant's part to meet the burden of exercising due care as to invitees will also meet his burden with respect to licensees and trespassers. The last of the major factors, the cost of insurance, will, of course, vary depending upon the rules of liability adopted, but there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost.

Considerations such as these have led some courts in particular situations to reject the rigid common law classifications and to approach the issue of the duty of the occupier on the basis of ordinary principles of negligence ... And the common law distinctions after thorough study have been repudiated by the jurisdiction of their birth. (Occupier's Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31.)

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission

but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

It bears repetition that the basic policy of this state set forth by the Legislation in section 1714 of the Civil Code is that everyone is responsible for any injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative".<sup>71</sup>

3.66 *Rowland* had a major impact at a scholarly level, but it would be wrong to regard it as representing the centre of gravity of the contemporary law of the United States. True, a relatively small number of States followed its lead in completely abandoning categorical distinctions for *all* entrants,<sup>72</sup> and some others have abolished the distinction between invitees and licensees, leaving the old rules as to trespassers unchanged;<sup>73</sup> but there is still continuing vitality

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71 70 Cal Rptr, at 103-104.

72 See Harper, James & Gray, *The Law of Torts* para 27.1 (2nd ed, 1986) and 1990 Cumulative Supplement No 2, p533. States taking this approach include Alaska (*Webb v City and Borough of Sitka*, 561 P 2d 731 (1977)), Colorado (*Millie High Fence Co v Radovich*, 175 Colo 537, 489 P 2d 308 (1971)), Hawaii (*Pickard v City and County of Honolulu*, 51 Haw 134, 452 P 2d 445 (1969)), Louisiana (*Cates v Beaugregard Electric Corp Inc* 328 So 2d 367 (1976)), Montana (*Limbertand v Big Ditch Co*, 218 Mont 132, 706 P 2d 491 (1985)), *Berge v Boyne USA Inc*, 779 F 2d 1445 (9th Cir, 1986)), New Hampshire (*Ouellette v Blanchard*, 116 NH 552, 364A 2d 631 (1978)), New York (*Barker v Parnossa, Inc*, 39 NY 2d 926, 386 NYS 2d 576, 352 NE 2d 880 (1976)), *Scurti v City of New York*, 40 NY 2d 433, 387 NYS 2d 55, 354 NE 2d 794 (1976)) and Rhode Island (*Marlorenzi v Joseph Diponte DNC*, 114 RI 294, 333A 2d 127 (1975)). Missouri indicated strong *obiter* support for this change in *Heald v Cox*, 480 SW2d 107 (1972), but this did not ultimately prevail: *Singletan v Charletons Construction Co*, 690 SW2d 845 (1985), *Gillis v Collins*, 770 SW2d 503 (1989), *Taylor v Union Electric Co*, 826 SW2d 57 (1992).

73 E.g. Florida (*Wood v Camp*, 284 So 2d 691 (1973)), Maine (*Poulin v Colby College*, 402 A 2d 846 (1979)), Massachusetts (*Schofield v Merrill*, 388 Mass 244, 435 NE 2d 339 (1982) (bringing *child* trespassers within the scope of the duty of care)), Minnesota (*Peterson v Balach* 294 Minn 161, 199 NW2d 639 (1972)), North Dakota (*O'Leary v Coenen*, 251 NW2d 746 (1977)), Oregon (*Ragnone v Portland School District*, 291 Or 817, 633 P 2d 1287 (1981)) Tennessee (*Hudson v Galton*, 675 SW2d 699 (1984) and Wisconsin (*Antoniewicz v Reszeynski*, 70 Wis2d 836, 236 NW2d (1975)). For consideration of the volatile position in the District of Columbia, cf Harper, James & Gray, *op cit*, para 27.1, fn 19.

in the old approach. Indeed, it may well be that the enthusiasm for the *Rowland* approach was a passing fad. As was noted in a recent Oklahoma decision:

"in contrast, a number of courts which have *more recently* considered the issue have expressed continued adherence to the common law principles of duty based on status as a proper balance between the rights of a landowner and those of the general public".<sup>74</sup>

3.67 A phenomenon of crucial significance for our purposes is the development of *recreational use statutes*.<sup>75</sup> These are now a feature of almost every state.<sup>76</sup> The primary policy underlying these statutes is to encourage landowners to provide their lands for public recreation without fear of having to take out heavy insurance protection against legal liability for accidents that may befall entrants on their property. A closely related objective "derives from the notion that it would be burdensome and unfair to impose upon farmers and other owners of vast tracts of land a duty of reasonable care to visitors who enter for recreational purposes, unless the owner received some substantial benefit from the visitor's presence."<sup>77</sup> A third policy underlying at least some of these statutes was to encourage landowners "to allow sportsmen to hunt on forest land for the purpose of thinning out excessively large herds of animals which were inhibiting forest reproduction."<sup>78</sup>

3.68 The statutes vary somewhat in their details but their overall thrust contains remarkably constant features. A few examples may be helpful. The Texas legislation provides as follows:

**"75.001. Definitions**

In this chapter:

- (1) 'Agricultural land' means land that is located in this state and that is suitable for:
  - (a) use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibres, floriculture, viticulture,

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74 *Lohrenz v Lane* 787 P 2d 1274, at 1276 (1990) (citations omitted).

75 See generally Joseph A Page, *The Law of Premises Liability*, para 5.13 - 5.23 (2nd ed, 1986) and 1992 *Cumulative Supplement*, Knowles, *Landowners' Liability Toward Recreational Users: A Critical Comment*, 18 Idaho L Rev 59 (1982), Lewis, *Recreational Use Statutes: Ambiguous Laws Yield Conflicting Results*, Trial, December 1991, p68, Noble, *Recreational Access to Agricultural Land: Insurance Issues*, 24 Indiana L Rev 1615 (1991), Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective Is the Protection?* 24 Indiana L Rev 1587 (1991), Butler, *Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act*, [1988] Utah L Rev 47, Goldstein Telfer & Kennedy, *Recreational Use Statutes - Time for Reform*, 3 Probate & Prop No 4 at 8 (July/August 1989), Ford, *Comment, Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, [1991] Wis L Rev 491, Miller, *Annotation: Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 ALR 4th 262 (1988 & Supp 1990).

76 Only Alaska, North Carolina and the District of Columbia lack statutes of this type: Ford, *op cit*, at 498, fn 24.

77 Page, *op cit*, para 5.14 (citation omitted).

78 *Id* (citation omitted).

horticulture, or planting seed;

- (b) forestry and the growing of trees for the purpose of rendering those trees into lumber, fibre, or other items used for industrial, commercial, or personal consumption; or
  - (c) domestic or native farm or ranch animals kept for use or profit.
- (2) 'Premises' includes land, roads, water, watercourse, private ways, and buildings, structures, machinery, and equipment attached to or located on the land, road, water, watercourse, or private way.
- (3) 'Recreation' means an activity such as hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, and waterskiing and other sports.

**75.0002. Liability Limited**

- (a) An owner, lessee, or occupant of agricultural land:
- (1) does not owe a duty of care to a trespasser on the land; and
  - (2) is not liable for any injury to a trespasser on the land, except for wilful or wanton acts or gross negligence by the owner, lessee, or other occupant of agricultural land.
- (b) If an owner, lessee, or occupant of agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:
- (1) assure that the premises are safe for that purpose;
  - (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
  - (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.
- (c) If an owner, lessee, or occupant of real property other than

agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:

- (1) assure that the premises are safe for that purpose;
  - (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
  - (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.
- (d) Subsections (a), (b), and (c) shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith.

**75.003. Application and Effect of Chapter**

- (a) This chapter does not relieve any owner, lessee, or occupant of real property of any liability that would otherwise exist for deliberate, wilful, or malicious injury to a person or to property.
- (b) This chapter does not affect the doctrine of attractive nuisance, except that the doctrine may not be the basis for liability of an owner, lessee, or occupant of agricultural land for any injury to a trespasser over the age of 16 years.
- (c) This chapter applies only to an owner, lessee, or occupant of real property who:
  - (1) does not charge for entry to the premises; or
  - (2) charges for entry to the premises, but whose total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year.
- (d) This chapter does not create any liability.

3.69 The New York statute provides as follows:

**S.9-103. No duty to keep premises safe for certain users; responsibility**

**for acts of such users**

- (1) Except as provided in subdivision two,
  - (a) an owner, lessee, or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning as defined in section seventy-one of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledging, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes;
  - (b) an owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.
  - (c) an owner, lessee or occupant of a farm, as defined in section six hundred seventy-one of the labour law, ..... owes no duty to keep such farm safe for entry or use by a person who enters or remains in or upon such farm without consent or privilege, or to give warning of any hazardous condition or use of or structure or activity on such farm to persons so entering or remaining. This shall not be interpreted, or construed, as a limit on liability for acts of gross negligence in addition to those other acts referred to in subdivision two of this section.
- (2) This section does not limit the liability which would otherwise exist
  - (a) for wilful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or

- (b) for injury suffered in any case where permission to pursue any of the activities enumerated in this section was granted for a consideration other than the consideration, if any, paid to said landowner by the state or federal government, or permission to train dogs was granted for a consideration other than that provided for in section 11-0925 of the environmental conservation law; or
  - (c) for injury caused, by acts of persons to whom permission to pursue any of the activities enumerated in this section was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.
- (3) Nothing in this section creates a duty of care or ground of liability for injury to person or property".

3.70

Finally the California Civil Code provides as follows:

**S.846. Permission to enter for recreational purposes**

An owner of any estate or any other interest in real property, whether possessory or non possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A 'recreational purpose', as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner or any estate or any other interest in real property, whether possessory or non-possessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner, by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property".

3.71 Recreational use statutes have spawned a huge volume of litigation. Perhaps this should not be surprising. These statutes, after all, represent a statutory subtraction from the totality of liability developed (mainly by the courts) in relation to occupancy duties. Defining the boundary lines of statutory modifications will inevitably raise troublesome controversies. We address some of these controversies in the next chapter.<sup>79</sup>

#### **NEW ZEALAND**

3.72 The *Occupiers' Liability Act, 1962* is substantially modelled on the English legislation of 1957. Some differences of drafting are apparent. Section 3(1) adds the words "in his capacity as an occupier" to the provision equivalent to section 1(1) of the 1957 Act. The idea was to make plain the policy believed to underlie the English provision.<sup>80</sup> Section 4, dealing with the extent of the occupier's ordinary duty of care, omits any express prescription that the occupier must be prepared for children to be less careful than adults<sup>81</sup> and may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.<sup>82</sup> On the other hand, section 4 provides (somewhat redundantly) in subsection (3) that the circumstances relevant to the determination of the duty of care of the occupier include the degree of care, and of want of care, which would ordinarily be looked for in the visitor in question.

3.73 In relation to persons entering premises under a contract, section 7 of the New Zealand Act differs from section 5 of the English legislation of 1957 in a number of respects. *First*, it limits the scope of the provision to occupancy duties. *Secondly*, it contains an extra provision, in subsection (4), that, in determining whether in any case the occupier has discharged the common duty of care, so far as it is applicable, the existence and nature of the contract are to be included in the circumstances to which the court is to have regard. *Thirdly*,

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79 See below, pp100-110.

80 Cf the Law Reform Commission of New South Wales's *Working Paper on Occupiers' Liability*, paragraph 57 (1989).

81 Cf section 2(3)(a) of the 1957 Act.

82 Cf *id.*, section 2(3)(b).

it omits the words in section 5 in relation to the duty implied by a contract.<sup>83</sup>

## AUSTRALIA

3.74 The development of the law relating to occupiers' liability in Australia was significantly inhibited by the Privy Council, prior to the abolition of appeals from the High Court of Australia in 1975.<sup>84</sup> From as long as four decades ago, the High Court had sought to modify the harsh approach to trespassers by developing the notion of *coexisting* duties: the occupier *as occupier* might owe a restricted duty to the trespasser, but this should not prevent the imposition of a general duty of care upon the occupier if the parties were also in *some other type of relationship* to which the *Donoghue v Stevenson* neighbour principle might appropriately be applied.<sup>85</sup> As we have seen, this is the approach that eventually triumphed in Ireland in *Purtil v Athlone UDC*<sup>86</sup>.

3.75 In *Commissioner for Railways v Quinlan*<sup>87</sup> the Privy Council evinced no support for this solution. The High Court unashamedly clung to it in *Munnings v Hydro-Electric Commission*<sup>88</sup> in 1971. The following year, the House of Lords transformed the English Law on the subject in *Herrington v British Transport Commission*.<sup>89</sup> Opposition to the Australian approach was therefore weakened in the Privy Council case of *Southern Portland Cement v Cooper*<sup>90</sup> in 1974. After appeals to the Privy Council had been abolished in 1975, the High Court no longer regarded itself as bound by these former shackles.<sup>91</sup> It reasserted the coexisting duties approach in *Hackshaw v Shaw*<sup>92</sup> and *Papatonakis v Australian Telecommunications Commissioner*.<sup>93</sup> In both of these decisions, Deane J went so far as to take the more radical position that there was but *one* duty, based on *Donoghue v Stevenson*, applicable to the relationship between the occupier and *all* entrants, including trespassers, and that there was accordingly no need to invoke a coexisting duty rationale.<sup>94</sup>

3.76 This development towards increasingly judicial frankness culminated in the decision of the High Court in *Australian Safeway Stores Pty v Zaluzna*<sup>95</sup> in 1987. The case concerned a slip-and-fall injury of an invitee in a supermarket. The Court, in a joint judgment of Mason, Wilson, Deane and Dawson JJ, concludes as follows:

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83 See further the Law Reform Commission of New South Wales's *Working Paper on Occupiers' Liability*, para 70.  
84 Privy Council (Appeals from the High Court) Act 1975.  
85 Cf *Thompson v Bankstown Municipal Council*, 87 CLR 619 (1956), *Ritch v Commissioner for Railways (NSW)* 101 CLR 135 (1959), *Commissioner for Railways (NSW) v Cardy*, 104 CLR 274 (1960). See Handford, *Occupiers' Liability Reform in Western Australia And Elsewhere*, 17 W Austr L Rev 182, at 210 (1987).  
86 [1968] IR.  
87 [1964] AC 1054.  
88 125 CL RL (1971).  
89 [1972] AC 562.  
90 [1974] AC 623.  
91 *Viro v Reg*, 141 CLR 88 (1978).  
92 155 CLR 614 (1984).  
93 156 CLR 7 (1985).  
94 See further Handford, *op cit*, at 211 - 212.  
95 69 ALR 615 (1987).

"Does a theory of concurrent general and special duties... serve any useful purpose as the law of negligence is now understood? Is there anything to be gained by striving to perpetuate a distinction between the static condition of the land and the dynamic situations affecting the land as a basis for deciding whether the special duty is more appropriate to the circumstances than the general duty?... If it were always the case that the formulation of an occupier's duty in specific terms contributed to the easy ascertainment of the law, there would be a case for their retention,... but the pursuit of certainty in this way loses its attractions if its attainment depends on the resolution of difficult questions based on artificial distinctions. It seems to us that the utility of the theory of concurrent duties could be accepted only if a situation could arise in which it was possible to establish a cause of action in reliance upon *Indermaur v Dames*<sup>96</sup> which could not be pursued by reference to the general duty of care postulated in *Donoghue v Stevenson*. And yet case after case affirms ... that the special duties do not travel beyond the general law of negligence. They are no more than the expression of the general law in terms appropriate to the particular situation it was designed to address ... There remains neither warrant nor reason for continuing to search for fine distinctions between the so called special duty invoked by Willes J [in *Indermaur v Dames*] and the general duty established by *Donoghue v Stevenson*. The same is true of the so-called special duties resting on an occupier of land with respect to persons entering as licensees or trespassers".<sup>97</sup>

#### **AUSTRALIAN CAPITAL TERRITORY**

3.77 The Community Law Report Committee of the Australian Capital Territory, in its Report No 2, *Occupiers Liability*, published in 1991, recommended that legislation be enacted to remove any doubt as to the eclipse of the rule in *Cavalier v Pope*<sup>98</sup> by the decision of the High Court of Australia in *Australian Safeway Stores v Zaluzna*.<sup>99</sup> This recommendation was given legislative effect by the ACT Assembly.<sup>100</sup> The relevant provision is to the effect that:

"[a] lessor of premises is not exempt from owing a duty of care to persons on those premises by reason only that the lessor is not the occupier of those premises."

#### **TASMANIA**

3.78 In 1988, the Law Reform Commission of Tasmania published a

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96 LR ICP 274 (1866).  
97 69 ALR, at 619-620.  
98 [1906] AC 428.  
99 *Supra*.  
100 *Law Reform (Miscellaneous Provisions)(Amendment) Act 1991*.

Report on *Occupiers' Liability*.<sup>101</sup> This derived from a Reference to the Commission in 1983. In the meantime, of course, the High Court of Australia had delivered its judgment in *Australian Safeway Stores Pty Ltd v Zaluzna*.<sup>102</sup>

3.79 The Commission identified four unresolved questions after *Zaluzna*:

- "1 Is the occupier under a duty to cover the negligent acts of independent contractors and invitees? Although the majority of the Justices in *Zaluzna* left this question to another day, the absorption of the occupiers' liability rules into ordinary negligence law logically requires the courts to consider the problem of independent contractors according to the latter.
2. The landlord's immunity from liability in respect of rented premises may still need to be considered.
3. Although it would seem from reading the judgments in *Zaluzna's* case that the ordinary negligence law will apply to persons entering as trespassers, should there be an exception in relation to adult trespassers with criminal intent, or will the 'reasonable care in all the circumstances' test exclude the owing of any duty of care to such a person?
4. Is it desirable to encompass the *Zaluzna* decision in legislation in Tasmania?"<sup>103</sup>

3.80 The Commission went on to make<sup>104</sup> *seven* recommendations:

*First*, that the common law doctrine relating to liability generally<sup>105</sup> be replaced by a simply worded statutory provision.

*Second*, that this provision should impose on the occupier of premises a duty to:

"take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises".

*Third*, that all other common law rules affecting the relationship between an occupier and a visitor on his premises should be preserved.

*Fourth*, that a reference to "premises" in the statute should include a reference

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101 Report No 53.

102 *Supra*.

103 Page 5 of the Report.

104 *Id*, page 6.

105 Subject to the Commission's *seventh* recommendation.

to any fixed or movable structure, including any vessel, vehicle or aircraft.

*Fifth*, that the court, when considering the question whether the occupier had discharged his responsibility of care, should give consideration to the following matters:-

- (a) the gravity and likelihood of the probable injury;
- (b) the circumstances of the entry onto the premises;
- (c) the nature of the premises;
- (d) the knowledge which the occupier had or ought to have of the likelihood of persons or property being on the premises;
- (e) the age of the person entering the premises;
- (f) the ability of the person entering the premises to appreciate the danger; and
- (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.

*Sixth*, that the same duty of care should apply to the Crown where the Crown was an occupier or landlord of premises.

*Seventh*, that an occupier's duty to cover the negligent acts of independent contractors and invitees, and the landlord's immunity from liability in respect of rented premises should be the subject of further consideration by the Commission or the law reform body which replaced it.

No legislation has yet implemented the proposals contained in this Report.

#### **WESTERN AUSTRALIA**

3.81 The *Occupiers' Liability Act, 1985* deals with the subject in Western Australia<sup>106</sup>. This resulted from informal consultation between the State legislature and the Law Reform Commission of Western Australia. The Commission advised that it should be possible to draft a Bill without a formal reference to the Commission in the light of the other Acts and Reports available in England, Scotland, Canada, New Zealand and elsewhere. The Commission provided advice on drafts of the Bill when submitted to it<sup>107</sup>.

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See Handford, *Occupiers' Liability Reform in Western Australia And Elsewhere*, 17 W Austr L Rev 182 (1987).  
See *id*, at 188. The stimulus for reform was an incident in which a woman slipped and injured herself in a shopping arcade; the occupiers claimed that they owed her only the duty appropriate to a licensee.

3.82 Section 4, which is based largely on the equivalent provision in the Scottish legislation,<sup>108</sup> provides as follows:

"(1) Sections 5 to 7 shall have effect, in place of the rules of the common law, for the purpose of determining the care which an occupier of premises is required by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect of dangers -

(a) to that person; or

(b) to any property brought on to the premises by, and remaining on the premises in the possession and control of, that person, whether it is owned by that person or by any other person,

which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible.

(2) Nothing in sections 5 to 7 shall be taken to alter the rules of the common law which determine the person on whom, in relation to any premises, a duty to show the care referred to in subsection (1) towards a person entering those premises is incumbent".

3.83 Section 5 spells out the occupiers' duty of care as follows:

"(1) Subject to subsections (2) and (3) the care which an occupier of premises is required by reason of the occupation or control of the premises to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement or otherwise, his obligation towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

(2) The duty of care referred to in subsection (1) does not apply in respect of risks willingly assumed by the person entering on the premises but in that case the occupier of premises owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or

his property.

- (3) A person who is on premises with the intention of committing, or in the commission of, an offence punishable by imprisonment is owed only the duty of care referred to in subsection (2).
- (4) Without restricting the generality of subsection (1), in determining whether an occupier of premises has discharged his duty of care, consideration shall be given to -
  - (a) the gravity and likelihood of the probable injury;
  - (b) the circumstances of the entry onto the premises;
  - (c) the nature of the premises;
  - (d) the knowledge which the occupier of premises has or ought to have of the likelihood of persons or property being on the premises;
  - (e) the age of the person entering the premises;
  - (f) the ability of the person entering the premises to appreciate the danger; and
  - (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person".

3.84 The factors set out in subsection (4) are borrowed from the Victorian legislation. Paragraph (b) may be particularly noted. If the court is to give consideration, *inter alia*, to "the circumstances of the entry into the premises", does this not resurrect the former distinctions between invitees, licensees, contractual entrants and trespassers? One commentator suggests that there is "no warrant"<sup>109</sup> for such an apprehension. No doubt this is entirely correct so far as the revival of a *strictly* categorical approach is concerned; but it would be quite another thing to argue that the *factual circumstances* which placed an entrant into a particular category under the former law should be incapable of having *some weight* in the formulation of the duty of care. In short the normative implications of the factual differences between burglary and party-going, for example, will still be reflected in the duty of care. The crucial change brought about by the legislation is not that these factual differences are to be ignored but rather that they are no longer to be treated as *crucial in themselves* in the determination of the duty owed.

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109 Handford, *op cit*, at 195.

3.85 The defence of assumption of risk is worthy of particular attention. Section 5(2) is based on section 4 of Ontario's *Occupiers' Liability Act*. The duty of care in section 5(1) does not apply in respect of risks willingly assumed by the entrant but nonetheless in such circumstances the occupier must not create a danger with the deliberate intention of doing harm or damage to the entrant or his property, nor act with reckless disregard of the presence of the entrant or his property.

3.86 S5(3) is of even greater interest. It was inspired by the Ontarian legislation, which provides that a person who is on premises with the intention of committing, or in the course of, a criminal act is deemed to have willingly assumed all risks and can benefit only from the duty resting on the occupier not to subject the entrant to intentional or reckless harm<sup>110</sup>. It has been said of section 5(3) that, "instead of the rather unsatisfactory idea of a 'criminal act', [it] substitutes the much more certain criterion of an offence punishable by imprisonment"<sup>111</sup>.

3.87 One matter not addressed by the commentators relates to the *intended object of the criminal act*. Section 5(3) does not require that the act be done (or intended to be done) on the premises in question; perhaps this can be implied. But what is the position where the intended object of the criminal act has only a contingent connection with the premises? Why should the occupier owe no full duty of care to the criminal entrant in such circumstances? The fact that the entrant is an actual or intended criminal arguably should be no more relevant in relation to occupiers' liability than would the fact that the pedestrian negligently injured on the highway is shown to have been on his way to carrying out a burglary fifty yards away.

3.88 On the question of occupiers' liability for independent contractors, section 6(1) provides as follows:

"An occupier is not liable under this Act where the damage is due to the negligence of an independent contractor engaged by the occupier if -

- (a) the occupier exercised reasonable care in the selection of the independent contractor; and
- (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken".

3.89 Section 6(2) provides that subsection (1) neither abrogates nor restricts the liability of an occupier for the negligence of an independent contractor imposed by any other Act.

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110 Cf *id.*, at 201.  
111 *Id.*

3.90 The effect of section 6 is to reverse *Thomson v Cremin*<sup>112</sup> and to give legislative form to the principles founded in *Haseldine v CA Daw & Son*<sup>113</sup>.

3.91 Section 7 deals with the question of privity of contract in respect of restriction or exclusion of liability. Subsection (1) provides that:

"[t]he duty of an occupier of premises under this Act, or his liability for breach thereof, shall not be restricted or excluded by the provision of any contract to which the person to whom the duty is owed is not a party, whether or not the occupier of premises is bound by the contract to permit such person to enter or use the premises."<sup>114</sup>

3.92 Section 7 is based on section 5 of the Ontario legislation. It differs from the largely equivalent English provision in two important respects. First, it does not go so far as to prescribe that the occupier's duty of care includes "the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as these obligations go beyond the obligations otherwise involved in that duty"<sup>115</sup>. Secondly, section 7 (in contrast to the English provision) applies whether or not the occupier is *bound* by contract to permit strangers to the contract to enter or use the premises<sup>116</sup>.

3.93 Consistent with occupiers' liability legislation in other jurisdictions, section 8 preserves *higher* obligations of care on the part of the occupier. Based on Ontario's model, it provides as follows:

- "(1) Nothing in this Act relieves an occupier of premises in any particular case from any duty to show a higher standard of care than in that case is incumbent on him by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of common carriers and bailees.
- (2) Nothing in this Act shall be construed to affect the rights, duties and liabilities arising from an employer and employee relationship where it exists."

3.94 Section 9 deals with the rule in *Cavalier v Pope*<sup>117</sup>. The crucial provision, subsection (1), states that:

"[w]here premises are occupied or used by virtue of a tenancy under

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112 [1953] 2 All ER 1185, (1941).  
113 [1941] 2 KB 343. See further Handford, *op cit*, at 202-203.  
114 Subsection (2) gives the section retrospective effect.  
115 Section 3(1) of the English *Occupiers' Liability Act 1957*.  
116 See further Handford, *op cit*, at 204-205.  
117 [1908] AC 428.

which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibilities of maintenance and repair of the premises as is required under this Act to be shown by an occupier of premises towards persons entering on those premises".

3.95 Section 9 is based on the Scottish rather than the English statutory model.

3.96 Section 10 makes it plain that the defence of contributory negligence applies to claims under section 5 of the legislation.

3.97 Finally, the relationship between this statutory reform and the development of common law principles of negligence needs to be briefly considered. As we have mentioned, section 4 provides that sections 5 to 7 are to replace the rules of common law, for the purposes of determining the care required of an occupier, by virtue of the occupation or control of premises, in respect of dangers to persons or property due to the state of the premises or to anything done or omitted to be done on the premises. This draft, based on the English and Scottish models, is clearly designed to distinguish between *occupancy* and *activity* duties:

"Dangerous activities being carried out on the premises by the occupier generally entail liability because the occupier is carrying out that particular activity, and not by reason of the occupation or control of the premises".<sup>118</sup>

3.98 Although the High Court of Australia in *Australian Safeway Stores Pty v Zaluzna*<sup>119</sup> questioned the logic of concurrent duties, it would seem clear that the Western Australian legislation continues to apply this distinction.<sup>120</sup> The result in practice is scarcely likely to be different from what would result from a universally applicable *Safeway* test.

### **SOUTH AUSTRALIA**

3.99 In its *Twenty-Fourth Report on Occupiers' Liability*, the Law Reform Committee dealt with the law relating to invitees, licensees and persons entering land as of right. It recommended that the law should be amended to provide a general duty of care relative to those entrants. It was not united on the question of reform of the law relating to trespassers. All members of the Committee save one preferred to leave this to the courts to resolve. That one member recommended that trespassers should be dealt with according to the

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118 Handford, *op cit*, at 213.  
119 89 ALR 815 (1987).  
120 Cf Handford, *op cit*, at 209-215.

ordinary law of negligence.

3.100 The Committee returned to the matter in its Forty Eighth Report Relating to Owners or Occupiers of Land and Trespassers on Land in 1985. Its detailed recommendations are a matter of some comparative interest.

3.101 With regard to (i) *a trespasser with criminal intent* and (ii) *an adult trespasser who intends to trespass and has no reasonable and lawful excuse*, the Committee recommended that the only duty imposed on the owner or occupier should be not to injure the trespasser intentionally except in defence of person or property. The effect of this recommendation would be to *reduce* the legal entitlement of such trespassers, since they would lose the protection against conduct done in reckless disregard of their presence. With regard to *all other adult trespassers and child trespassers who lack criminal intent*, the Committee recommended that the ordinary rules of negligence should apply.

3.102 As regards deterrent dangers, the Committee thought that, if the injury was caused by reasonable precautions to safeguard the protection of property, and due notice was given of the precautions or the plaintiff knew of the existence of the precaution, the plaintiff should have no cause of action. It also recommended that the knowledge to be imputed to the occupier in all cases of claims by trespassers should be *actual, and not constructive, knowledge*.

3.103 The *Wrongs Act Amendment Act 1987* gives substantial legislative effect to the Committee's proposals.

#### ***NEW SOUTH WALES***

3.104 In 1969, the Law Reform Commission of New South Wales published a detailed *Working Paper on Occupiers' Liability*. It produced nothing subsequently, and of course matters have been overtaken by the *Safeway* decision of the High Court of Australia. Nevertheless the Working Paper is of some interest for our purposes. Predating the judicial responses of *Herrington* and *McNamara*, it offers a fascinating insight into how the issues were perceived at a time when it was accepted that the traditional formulae were inadequate but it was far from clear where the path of reform lay.

3.105 The Commission considered, but quickly rejected, the possible solution of a strict liability regime:

"It is not considered that there would be any pressure in New South Wales for the imposition of strict or absolute liability independent of negligence in this area overtly or covertly. For while it is true that most industrial enterprises would carry public risk insurance, or be large enough to dispense with it, and while it is true that a private person may obtain substantial personal liability cover at modest cost (in the area of six to eight dollars annual premium for a liability cover of \$100,000 to \$200,000), a comparatively small number of such personal liability

policies are in fact issued. If injustice were to be avoided after liability was revolutionised - a step which would itself necessarily make a difference to the cost of such insurance which it is difficult to estimate - it would be necessary at least to institute a campaign to popularise such insurance if not to ensure that the defendant is insured by compelling the householder to do so, perhaps along with his local rates. Either course would necessarily mean that prospective plaintiffs and juries in an action of this sort would come to expect the defendant to be insured and this seems more likely to lead, through an increase in the number of actions and the scale of damages, to increases in the cost of insurance against liability than tightening the conditions of liability in itself. We do not feel disposed to suggest entry on this treadmill".<sup>121</sup>

3.106 It must be admitted that this analysis scarcely constitutes a principled examination of the case for strict liability. The possibility of an increase in the cost of insurance would not seem so potent a factor as to render moot such a consideration as whether it is just to place on those whose business involves subjecting entrants to the risk of injury the obligation to compensate them without proof of fault.<sup>122</sup>

3.107 The Commission was not greatly enamoured of the approaches of in the English and Scottish Acts. It saw dangers in letting the mere fact of an occupier-visitor relationship generate a duty of care:

"The question of the reasonableness of the defendant's behaviour is in effect made a matter going exclusively to the question of whether there was a *breach* of the duty. When it is recalled that the existence of the duty is a question for the judge and the question whether there was a breach is one for the jury ... this matter is seen to be of importance for the issue whether the introduction of such legislation here would be likely to lead to juries imposing absolute liability in circumstances which could not be controlled. An argument can be made that the effect of the terms of these statutes is to give the defendant the worst of two possible worlds where trial is by judge and jury. Under the older approach to the duty question which the common law rules concerning occupiers represent, it is probably the case that a duty must be held to arise as soon as the occupier-invitee or occupier-licensee relationship is established, but the law then protects the defendant by limiting the character of the duty. Under the newer approach represented by *Donoghue v Stevenson*,<sup>123</sup> the mere fact that the parties fall into a category of relationship which normally gives rise to duties is not conclusive if the 'neighbour' relationship is lacking in relation to the act or omission in question ... [I]t is a large step, when a statute replaces the restricted duties with duties of reasonable care at large, to make the

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121 Working Paper, para 43.  
122 Cf *Mullen v Quinnsworth (No 1)* [1990] IR 59.  
123 [1932] AC 562.

circumstances in which the duty comes into existence as broad as those which brought the old category duties into existence. This is to remove from the judge the power which *Bourhill v Young*<sup>124</sup> shows he has, under the *Donoghue v Stevenson* approach, of holding that there was no duty, despite the fact that the parties fell into a category where duties may arise, because the plaintiff was not a person put into danger by the conduct or omission of the defendant in question and therefore not in that respect his neighbour. It may appear to some that a judge's conviction that the plaintiff was not endangered by the defendant's acts could be given effect to by an exercise of the judge's power to hold that there is no evidence of negligence to go to the jury. But insofar as the question of danger to the plaintiff arises under the latter head it arises in the form of the question whether a reasonable man in the position of the jurymen could properly come to the conclusion that the plaintiff was endangered. This is a question which may often call for a positive answer from the judge, resulting in the submission of the case to the jury, where the question whether on the undisputed facts or the facts as they might be found the plaintiff was a person endangered, would bring a negative answer from the same judge. Thus it appears that the course taken in the United Kingdom and New Zealand legislation involves real and not merely formal limitations on the judge's powers as they exist under the modern common law approach to negligence actions.<sup>125</sup>

3.108 In view of these considerations, the Commission provisionally proposed that legislation should be introduced requiring the judge to determine whether a duty of care by the occupier to the visitor arose in the circumstances of the case on modern common law principles, and providing that where such duty was determined to exist it should be an ordinary duty of reasonable care.<sup>126</sup>

3.109 The Commission was satisfied that confining the duty of an occupier to a trespasser to *intentional* harm was "unacceptable alike to the judiciary and the general community".<sup>127</sup> It was disposed to think that the proper course was to provide for an ordinary duty of reasonable care to be imposed in appropriate circumstances. The question then became whether an attempt should be made to define these circumstances or to leave them largely to judicial development, untrammelled by the old rules which had been distorted in an unsuccessful attempt to make them meet the present needs of the community. The Commission was inclined to prefer the solution of leaving it to the judiciary to develop the law in modern terms:

"For the fate of rigid rules in this area of the law has been sad and the fate of litigants caught in their toils more so".<sup>128</sup>

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124 [1943] AC 92.  
125 *Working Paper*, para 45.  
126 *Id.*, para 48.  
127 *Id.*, para 50.  
128 *Id.*

3.110 Translating its general approach into more tangible terms, the Commission expressed the provisional opinion that the statutory test might be whether the entrant in all the existing circumstances was reasonably entitled to expect that the occupier would, as a reasonable man, regulate or modify his conduct in respect of the protection of the entrant from the damage which he suffered.<sup>129</sup>

3.111 The Commission was satisfied that the rule in *London Graving Dock Co Ltd v Horton*<sup>130</sup> should not be perpetuated. It provisionally proposed that a modified form of section 2(1) of the *Occupiers' Liability (Scotland) Act, 1960* should be incorporated into legislation to the effect that, where a duty exists, it should be one to exercise such care as in all the circumstances of the case could be reasonably expected of the occupier in respect of the protection of the entrant from the damage which he had suffered. The basis of the proposed modification was to avoid any hint of an implication that, wherever the occupier came under any duty at all, it was a duty to use his best efforts to do whatever was necessary to ensure the plaintiff's safety:

"This would obviously be unreasonable in some circumstances, where all that, for example, a trespasser could reasonably expect would be such restriction of the danger as was consistent with the defendant carrying on necessary activity without serious interruption. Hence we prefer not to include the words 'to see that the person will not suffer injury or damage' which appear in the Scottish definition".<sup>131</sup>

3.112 On the troubling question of the distinction between *activity* and *occupancy* duties, the Commission proposed a somewhat different solution from that favoured in the legislation in England, Scotland or New Zealand:

"We think the limitation to the scope of the proposed statute in the present respect should be that it should deal only with the subject of duties owed to an entrant by an occupier in which the fact of occupation is the circumstance giving rise to the obligation and that its breach may cause the entrant damage in the use of the premises.... We do not as at present advised propose to limit the application of the legislation to acts, whether of the occupier himself or others, done or omitted on the land. Suppose an occupier is warned of an approaching bush fire and he fails to warn a visitor due at his home. It would seem quite artificial either to deny that a duty arose under the Act because the danger was not due to a state of his premises and nothing was done or omitted by the occupier on the land, or to make the matter depend on whether the telephone from which he could have warned the caller was on his land or a public telephone in the street."<sup>132</sup>

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129 *Id.*, para 54. Cf the approach adopted in England's *Occupiers' Liability Act 1984*.

130 *Supra*.

131 *Working Paper*, para 56.

132 *Id.*, para 58.

3.113 The Commission favoured<sup>133</sup> the wide definition of premises and structures adopted by section 1(3) of the Scottish legislation of 1960. It accepted that criticism of undue breadth in this context had some validity but it considered that, in the context of its recommendations regarding the duty of care, a wide definition would be justified.

3.114 As regards the possibility of the statute's elaborating upon what constitutes reasonable care, the Commission proposed<sup>134</sup> only that there should be an equivalent of paragraph (b) of section 2(3) of the English legislation (which was omitted from section 4(3) of the New Zealand Act). This paragraph makes it clear that the principle in *Christmas v General Cleaning Contractors*<sup>135</sup> is to remain undisturbed. The Commission considered, in relation to the occupier's liability for independent contractors, that a provision along the following lines might be appropriate:

- "(1) Nothing in this Act shall affect the duties at common law of persons making premises available from time to time for public or limited use for short periods.
- (2) [Subject to other provisions] it is declared that, where danger to an entrant is due to the negligence of an independent contractor employed by an occupier of premises, the occupier shall not on that account be answerable for the damage if he exercised whatever care was reasonable in the selection and supervision of the independent contractor".<sup>136</sup>

3.115 Subsection (1) was designed to save the principle recognised by the High Court of Australia in *Voli v Inglewood Shire Council*.<sup>137</sup> Subsection (2) sought to ensure that the notion of non-delegable duties should not be permitted to modify the duties prescribed by the legislation, as had been suggested in England.<sup>138</sup>

3.116 As regards entrants on private property either under a right comprised in a public right of way or one in the nature of a servitude, such as a private right of way or other easement or a profit, the Commission did not wish that this position should be affected in any way by its proposed legislation. Accordingly it recommended<sup>139</sup> the inclusion of a specific provision to the effect that:

"[n]othing in this Act shall be construed to affect the law relating to liability of a highway authority for the state of a highway nor to attach

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133 *Id.*, para 61.

134 *Id.*, para 63.

135 [1952] 1 KB 141.

136 *Id.*, para 64.

137 100 CLR 74 (1963)

138 Cf *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, at 801-802 (Mocatta J).

139 *Working Paper*, para 68.

new incidents to the rights given by easements or profits or public rights of way".

3.117 The Commission was also satisfied that the position of other classes of entrants, such as employees working in factories, should not be *weakened* by its proposed legislation. It preferred the Scottish draft, to the effect that nothing in the main operative section of the Act should relieve an occupier of any duty to show in any particular case any higher standard of care than that which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.<sup>140</sup>

3.118 On the question of modification of the duty of care by agreement or otherwise, the Commission considered that a provision on the following lines might be appropriate:

- "(1) Subject to subsection (2) of this section an occupier may extend, restrict, modify or exclude by agreement or otherwise the duties imposed by this Act in so far as he is entitled by law to do so.
- (2) The liabilities in tort imposed by this Act on an occupier shall not be extended, restricted, modified, excluded or confirmed by contract unless
  - (a) the contract makes express provision to that effect; or
  - (b) the contract makes implied provision to that effect and it appears from the express terms of the contract or from the circumstances in which the contract was made that the parties directed their minds to the matters and intended to agree on the provision".<sup>141</sup>

3.119 The idea underlying subsection (1) was to prevent actions in tort from being converted into actions in contract through artificial implications of terms not in fact in the minds of the parties.

3.120 On the question of the position of *third parties* to a contract or tenancy, the Commission was content to follow the lead of England and New Zealand in ensuring that a tort duty arising under the legislation relating to occupiers' liability, relative to third parties, should not be excluded or restricted by any provision of the contract or tenancy to which they were not privy.<sup>142</sup> It did not, however, think it desirable to abrogate the rules relating to privity of contract (as England and New Zealand had done) so as to enable third parties to obtain the benefit of some *higher* duty imposed by the contract.<sup>143</sup>

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140 *Occupiers' Liability (Scotland) Act 1960*, section 2(3).

141 *Working Paper*, para 70.

142 *Id.*, para 71.

143 *Id.*

3.121 On the question of voluntary assumption of risk, the Commission considered that the statute should be silent:

"If, as is often considered to be the case, this is a matter going to the existence of a duty<sup>144</sup> or even if it technically is not ordinarily to be so regarded, the considerations involved in it would appear to be sufficiently incorporated in the test we propose of the existence of a duty. If it is not a matter of duty, but is to be considered [a] matter of defence, it does not seem appropriate to single out a particular defence for special statement that it is preserved without special reason, lest other conclusions should be drawn about other defences not mentioned".<sup>145</sup>

3.122 Similarly, the Commission provisionally leant<sup>146</sup> towards the exclusion of any reference to the defence of contributory negligence, lest singling it out for preservation should carry the implication that other defences and modifications of liability were not intended to be preserved.

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144 Citing Mr Justice Blackburn's article, *Volenti Non Fit Injuria and the Duty of Care*, 24 ALJ 351.  
145 *Working Paper*, para 73.  
146 *Id.*, para 74.

## **CHAPTER 4: PROVISIONAL RECOMMENDATIONS FOR REFORM**

4.1 In this chapter we examine problems, mostly of perception, which arise under the present law and make provisional recommendations for reform. The subject is a large one and criticisms of the existing law range from a major questioning of the fundamental principles of liability to more precise suggestions as to how to fine-tune specific aspects of the law.

4.2 Perhaps the best way to approach the matter is, first, to confront the major question as to fundamental principles and then to consider more specific issues. We therefore analyse first the following options, which range from minimal to maximal liability:

- (a) Restoration of the former law, which prevailed prior to *Purtill* and *McNamara*;
- (b) Prescribing negligence as the sole test of liability in respect of all entrants;
- (c) Not legislating and leaving the law to evolve;
- (d) Imposing strict liability on occupiers.

4.3 Having examined these general options, we go on to examine specific issues relating to a particular category of entrant or to a particular circumstance of entry onto particular types of land. These issues are:

- (a) Whether, by way of exception to a general rule of negligence, as proposed under option (b), the occupier should be under only a restricted duty to certain trespassers;

- (b) Whether, again by way of exception to such a general rule, those in occupation of certain lands, such as land devoted to agricultural uses, should owe only a restricted duty to entrants using the lands for recreational purposes, such as hiking or picnicking;
- (c) Whether there should be a special exemption for viewing national monuments.

4.4 These questions go to the heart of the values underlying occupiers' liability. Having addressed each of them in detail, we address recent proposals for reform, including a Private Members Bill from Deputy Jimmy Deenihan, we examine again the law in England and the law in Alberta and we then make our own provisional proposals for reform. We then go on to examine a number of specific, somewhat more technical, issues. These are as follows:

- (1) The scope of the definition of "premises";
- (2) The question of who should be characterised as an occupier;
- (3) Elaboration of what constitutes reasonable care;
- (4) Modification or exclusion of liability;
- (5) Vicarious liability for independent contractors;
- (6) Liability for attacks on entrants to premises by dogs;
- (7) Preservation of higher obligations resting on occupiers.

### **GENERAL OPTIONS**

#### **(a) Restoration of the Former Law**

4.5 We here consider whether there might be merit in restoring the former law on occupiers' liability which existed prior to *Purtil* and *McNamara*. At first sight, there might appear to be something curious about looking to the past to find a solution for the future; but the law of negligence has more than once involved flows followed by ebbs of liability. In the area of liability for economic loss, for example, the House of Lords has recently<sup>1</sup> repudiated the extension of liability which it had not so long previously favoured.<sup>2</sup> More generally, the House of Lords has effectively rejected<sup>3</sup> the broad principles for determining whether a duty of care arises, which Lord Wilberforce had adopted fifteen years ago;<sup>4</sup> in their place, the House now favours a narrower,

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<sup>1</sup> *Murphy v Brentwood DC* [1990] 2 All ER 808.

<sup>2</sup> *Anns v Merton London BC* [1978] AC 728.

<sup>3</sup> in *Murphy, supra*.

<sup>4</sup> in *Anns, supra*.

"incremental", approach whereby many cases that would have succeeded under the Wilberforce formula are destined (for some time at least) to fail.

4.6 If we do not therefore reject *a priori* the option of reviewing the former legal principles, we are able to examine them on their merits. What do we find? The corpus of law is so large that we must consider it separately in relation to each of the categories.

(i) *Trespassers*

4.7 Under the former law, as we have seen, an occupier was liable to a trespasser only where he *intentionally* injured the trespasser or *acted in reckless disregard* of the trespasser's presence. Could it be argued today that this test incorporated the correct value judgment as to the occupier's duty?

4.8 In defence of this test, it is plain that it has one important advantage. It removes from doubt the fact that an occupier will not be liable in negligence to a burglar or other similarly unmeritorious trespasser. A significant weakness of the post-*McNamara* law is that a legal adviser cannot give a watertight guarantee to an occupier that he will *never* be liable in negligence to unmeritorious trespassers. All that the adviser can say is that the case would be a very rare one and that the occupier would have to have been careless in the extreme before a court would find in favour of such trespassers. To this the occupier may respond that, if there is even a slight risk, it is one against which he must insure. Moreover, he may point out that, while *he* would not contemplate acting with great carelessness, he cannot be so sure that all of his employees, for whose conduct he is vicariously liable, will act with this level of care. Further, since the negligence test enables an unmeritorious litigant to *initiate* litigation, the occupier will be put to the expense of defending the case with little prospect of having it dismissed *in limine* and with some apprehension that his insurance company may be tempted to settle for a low amount rather than fight, leaving the occupier with a much heavier premium burden in years to come.

4.9 Perceptions of their legal position by would-be defendants have a social importance which does not depend on their accuracy. If occupiers *believe* that the present law imposes too high a burden on them relative to trespassers, they will be disposed to act in ways that have significant social consequences, some of which are likely to be detrimental. Occupiers may actively seek to prevent a range of persons from coming onto their property, where formerly what may have been technical trespassers were tolerated. One thinks here of the minor, generally harmless, incursions of walkers and picnickers in rural areas. If farmers are to turn their fields into fortresses and to treat as enemies all entrants who have not been invited onto their property, the community - and especially those coming from urban areas will greatly suffer. To argue that this suffering is ultimately needless because it is based on an inflated apprehension of legal liability is beside the point.

4.10 To repeat the advantage of the former law in this context: it removes any concern on the part of occupiers that they will be subjected to an all-embracing negligence standard. No occupier could reasonably complain about a legal restraint against intentionally injuring a trespasser<sup>5</sup> or acting in reckless disregard of a trespasser's presence. This limitation is likely to prove acceptable for two reasons: first because the test is scarcely too onerous and secondly because it imposes liability only where the occupier (or one for whom he is vicariously responsible) has consciously chosen to engage in the impugned conduct in the knowledge of the trespasser's certain or virtually certain presence.

4.11 As against this defence of the former law, the obvious riposte might seem to be that it was a good deal less certain in its application than the categories suggested. As we have seen, the notion of implied licence enabled courts, often by a fictitious ascription of permission, to elevate the status of a deserving trespasser - often a child - to that of licensee, with the practical result that liability would be imposed on the occupier. Occupiers are concerned solely with their exposure to liability; they have little or no interest in the legal concepts which courts may use on their journey to imposing liability.

4.12 The courts have looked benevolently on injured child-plaintiffs, particularly where the defendant appears to be a mark for damages, or insured. We think that it can be said with complete confidence that a law imposing a somewhat more stringent duty on occupiers relative to child trespassers than relative to adult trespassers would withstand constitutional challenge under Article 40.1. The reason is clear: children have a natural propensity towards incaution; they tend not to heed warnings (assuming that they have the capacity or inclination to read them carefully); they tend, moreover, to be attracted by dangerous machinery, and to overestimate their ability to avoid injury. When approaching the question of children's own negligence and contributory negligence, the law is fully conscious of these realities. While some would say that in the context of occupiers' liability the law has traditionally shown a similar wisdom, others would say that the development of the law has left occupiers at children's mercy.

4.13 The practice of transferring children into the category of implied licensees was in the nature of a legal fiction. A statutory provision could be introduced rendering overt what is contained in the operation of the fiction. Section 13 of Alberta's *Occupiers' Liability Act, 1973* provides a model:

- "(1) Where an occupier knows or has reason to know
- (a) that a child trespasser is on his premises, and

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<sup>5</sup> There might be some merit in the legislation clarifying the position relating to the defences of self-defence, defence of others and defence of property. Patently, these should continue to be available to an occupier. Cf section 3(7) of the *Draft Occupiers' Liability Act*, drawn up by the Law Reform Commission of Saskatchewan in its *Proposals for an Occupiers' Liability Act: Report to the Attorney General*, in 1980. We discuss below the question of the scope of the defence of 'defence of property'.

- (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,

the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.

- (2) In determining whether the duty of care under subsection (1) has been discharged consideration shall be given to
  - (a) the age of the child,
  - (b) the ability of the child to appreciate the danger and
  - (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of danger to the child.
- (3) For the purposes of subsection (1), the occupier has reason to know that child trespassers are on his premises if he has knowledge of facts from which a reasonable man would infer that children are present or that their presence is so probable that the occupier should conduct himself on the assumption that they are present."

4.14 Regardless of whether this step is taken, the case in favour of the former law relating to trespassers rests in essence on the *clarity* which it (importantly) gives to occupiers as regards the position of undeserving trespassers and the *justice* it offers (tacitly or, on a section 13 model, overtly) to child trespassers. These are formidable merits which should not easily be dispatched by an emotive caricature of the former law which pays no regard to how it operated in practice.

4.15 Some might remark that one subgroup which the former law left relatively unprotected was that of "deserving" adult trespassers. These were given protection merely on the intention/recklessness test, which imposed on the occupier no duty of care to protect them against injury. Was this a defect in the former law? The law reports are not weighed down with unsuccessful claims by adult trespassers, deserving or undeserving. This of itself proves not a great deal, since there would be no point in initiating litigation that was bound to lose. An adult entrant, capable of being described as deserving in that he intended no harm for the occupier, could seek to assert that he was an implied licensee. Most people who come to our doors, even to engage in a transaction that we may not welcome, such as to make a political or religious solicitation, will be likely to be characterised as licensees. While mistake does not of itself defuse a trespass, so that I cannot automatically claim that I was a licensee on my neighbour's premises on the basis that I mistook it for my own, nevertheless, in many of these

cases, the mistaken entrant could come within the bounds of implied licence. Few enough people so detest their neighbours that they would not impliedly consent to their coming up their driveway in the belief that they had reached home. Of course it is possible to envisage cases of "deserving" adult trespassers who could not easily be transferred to the category of implied licensee e.g. the straying hill-walker, just as it is possible to envisage similar cases in relation to child trespassers. But these cases are few enough, and arguably should not have warranted the wholesale abandonment of a series of principles which in their totality delivered a largely just and workable liability regime. A trespasser remains a trespasser, an unlawful entrant. Organised recreational users are quite happy to be treated as trespassers and to take responsibility for themselves or to become licensees on terms agreed with the occupier.

**(ii) Invitees**

4.16 We now turn to consider the former law relating to invitees. To describe it as the "former" law is in one sense questionable since, as we have seen, it has not yet been replaced definitively by an all-embracing negligence test. For our purposes, the description is unimportant: what we are here concerned with is the question whether the traditional approach to invitees, whatever its exact present legal status should be supported as the best solution.

4.17 Let us summarise the main features of the traditional test as set out in *Indermaur v Dames*<sup>6</sup>: the occupier must take *reasonable care* to protect the invitee from injury from *unusual dangers* of which the occupier is, or ought to be, aware. As may be seen this is in effect a negligence test in every respect save one: the restriction of the duty of protection to dangers that are *unusual*. As has been indicated, the notion of an unusual danger is somewhat opaque: it is not reducible to mere factual rarity, since it contains an important normative element. An unusual danger is not so much one that the invitee *does not* expect as one that he has a *right not to expect*. If legislation were to replace the notion of an unusual danger it would not in practice alter the traditional approach to any significant extent by a straightforward negligence test. This being so, the traditional approach can be defended on the basis that it imposes a satisfactory duty upon the occupier relative to a person whose presence on the property is permitted and which confers a material benefit on the occupier.

**(iii) Licensees**

4.18 Let us turn now to the former approach relating to the occupier's liability towards licensees. Again we hesitate to describe it as "former", but again the point is irrelevant for present purposes. It will be recalled that, under this approach, an occupier owes a duty to *warn* a licensee of *hidden dangers* on the premises of which the occupier is *actually aware*.

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6 LR 1 CP 274 (1868).

4.19           The values underlying this approach were based on the judgment that the occupier should not be placed under an inordinate burden towards those who were entering his premises for *their* purposes and not those of the occupier. The occupier should protect them from being injured by traps of which he was aware but he should be under no duty to check for traps, nor to protect licensees from obvious dangers. If they sought to use the premises for their own purposes, they, and not the occupier, should have the primary function in relation to their protection.

4.20           In one sense the traditional approach sought to articulate a form of implied voluntary assumption of risk in respect of the relationship between the occupier and the licensee. That relationship was one *chosen* by the licensee for his own purposes. If the licensee did not like the idea of having to confront obvious dangers on the premises as well as hidden dangers of which the occupier was unaware, then he had the simple solution of not entering the premises. The difference between gratuitous users and users for consideration has long been recognised in the law and has a defensible normative basis. The fact that, in the United States and (to a somewhat lesser extent) Canada, legislation has been enacted restricting the liability of certain, mainly rural, landowners, relative to certain licensees indicates that too ready an absorption of licensees into the range of negligence claims will sooner or later meet with social resistance, culminating in at least a partial restoration of the *ancien regime*.

4.21           Of course, legitimate criticisms may be made of the traditional approach to licensees, but on closer inspection they may be seen to address, not the core of the law, but rather some of the more peripheral aspects which could arguably better be dealt with by fine-tuning the traditional approach rather than rejecting it completely. Perhaps the most convincing criticism relates to social guests. Under the traditional approach they are classed as licensees rather than invitees. The rationale is that they do not confer a material benefit on the occupier.

4.22           To modern eyes, the idea that a host should owe a restricted duty of safety towards a guest seems bizarre. A mechanical application of the concept of material benefit does perhaps justify pigeonholing social guests as licensees, but, in engaging in such a process, courts lost sight of the original, quite defensible, rationale of the distinction between the duties owed to invitees and licensees respectively. It is one thing to go on premises for the benefit of the occupier; it is quite another to go on them for one's *own* benefit. A strong argument can be made that a less extensive duty should be owed in the latter case. The social guest clearly does not enter for his sole benefit. The nature of sociability is that it is a two-way process. The benefit that the occupier derives from being a host may have no tangible commercial dimension - indeed usually he will be at some financial loss - but there is a real benefit nonetheless in that friendship and hospitality are essential aspects of human flourishing. To treat this relationship in the same way as a relationship where permission to enter is given to one whose purposes are entirely selfish, having nothing to do with the occupier, seems clearly mistaken.

4.23 The argument would thus be that the traditional approach to licensees was a defensible one, and that the categorisation of social guests as licensees was to be criticised for having failed to adhere to the true values underlying the distinction between invitees and licensees.

**(b) Negligence as the Sole Test**

4.24 We now must consider an approach that would make negligence the *sole* test of liability towards all entrants. As we have seen, it may be that this is where the *Purtill* and *McNamara* decisions have already brought the law, though the Supreme Court has been reluctant to say so in express terms. Certainly it would be hard to defend a system that imposed a full duty of care on an occupier relative to a trespasser while retaining limitations on a full duty of care relative to invitees and licensees.<sup>7</sup>

4.25 In favour of a universally applicable negligence criterion relative to all entrants it may be argued that this is the *fairest, least complicated* and *most honest* test: fairest, because it is capable of delivering justice without the obstacle of technical rules which are capable of throwing up anomalies; least complicated, because the test is a straight-forward one capable of application regardless of the factual complexities; and most honest because it has no need to resort to legal fictions such as that of implied licence.

4.26 More fundamentally, it may be argued that trespassers should not be denied the entitlement of due care by reason merely of the absence of the occupier's permission to be on the premises. A point of some considerable importance in this context is that the proposal that the negligence criterion applies to trespassers is *not identical with the proposition that every occupier should owe every trespasser a duty of care*. It is essential that this distinction be clearly understood since otherwise opposition to this option will be more vociferous, based on misconceived alarm. The crucial test is that of proximity of relationship. Of the category of trespassers, by no means all would be likely to be held to be in a sufficiently proximate relationship with the occupier to warrant the imposition of a duty of care on the occupier. It may be confidently predicted that a would-be assassin who breaks through the occupier's front door will not be held to be in a relationship of proximity with the occupier.

4.27 Let us now consider the case *against* this option. The principal practical objection is one that has already been adumbrated: that occupiers will be so intimidated by this level of liability that they will seek to prevent socially desirable access to their lands. If, for example, recreational use of agricultural lands were to become a thing of the past, this would have damaging social implications. At a theoretical level, the crucial notion of proximity of relationship

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<sup>7</sup> While it would be hard to make such a defence it would not be impossible to put forward a reasonably attractive argument on these lines. As we shall mention, the duty of care takes account of *all* the circumstances, including those relating to the reason why the entrant came on the property. It would be wrong, therefore, to think that, merely because a duty of care is owed to a trespasser, it necessarily translates into a significantly more wide-ranging entitlement to recover than would the traditional duties owed to invitees and licensees.

can be stigmatised as being intellectually dishonest or at least disingenuous. It is no more than a metaphor, incapable of *generating* a resolution of competing social and moral factors in the form of a value judgment but *seeming* to have that function. It is simply a label which the court attaches to a decision arrived at by other means. This is not to suggest that such a decision is necessarily a wrong one: it may well be that it represents a sensible determination of the boundaries of liability in a particular context. What is important to appreciate is that the lexicon of negligence here operates *ex post facto*.

4.28 If this is so, the question arises as to why these resolutions of competing social and moral considerations should be done by judges *sub rosa*. If the mask is torn away, to reveal troubling issues which are not in fact being resolved by the legal concepts with which judicial analysis is adorned, why should not the legislature confront these issues squarely and openly rather than leave them to the judges to resolve secretly and with the misleading appearance of being governed by legal principle?

4.29 A related line of argument relates to the problem of differing values among judges which would not be likely to surface and so would be likely to be perpetuated without correction. Take a simple case: a 15 year old thief stealing lead off a roof falls through the slates which are in an extremely dangerous state but one which no one climbing on the roof could appreciate. Judge A might hold against the thief in his action for damages against the occupier, because of lack of foreseeability of his presence or because of a more fundamental absence of proximity capable of generating a duty of care. Judge B might hold in his favour on the basis of sufficient foreseeability - let us assume lead on the roof had frequently been stolen in the past and that the area was one of high crime -and on the basis of sufficient proximity, in view perhaps of the young thief's immaturity.<sup>8</sup> The two judges would thus be in fairly fundamental disagreement on the crucial value judgment as to the duty owed to thieves, yet the language of proximity and more particularly, foreseeability, might not fully reveal their differences. Unfortunate litigants would be subjected to the lottery of predicting how a case would be decided, with the personality of the judge playing a significant role. Cases would no doubt be initiated, and settled, precisely on the basis of the uncertainty resulting from the possibility of differing judicial value judgments on the moral claim of thieves to compensation for injuries. It may be argued that this is a matter on which there should be a *clear* value judgment, *consistently applied* in legal proceedings. The legal lexicon of "proximity", "duty of care" and "reasonable foreseeability" - integral to the negligence test - has the effect of denying clarity and consistent application.

(c) **Not Legislating and Leaving the Law to Evolve**

4.30 The fact that there is concern about a particular situation or regime governed by law does not necessarily lead to a need to reform the law.

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One may hazard an uncertain guess as to how the *ex turpi causa* principle would operate in such a case.

Consultation and explanation may put minds at rest. The decisions in *Purtill* and *McNamara* may have signalled a departure from old norms but in fact it can be said that they simply swept away part of a superstructure of different categories of entrant and left the essentials, negligence and a duty of care towards one's neighbour, intact. No new precedent has been set specifically for adult trespassers and the decisions in *Keane*<sup>9</sup> and *O'Keeffe*<sup>10</sup> have shown that plaintiffs, even child plaintiffs, can lose. Some of the old superstructure - the distinction between invitees and licencees - still remains but the clear trend in the decisions is to make the old classification more and more unreal.

4.31           Whereas farmers and recreational users are organised and have articulate and concerted stances on the relevant issues, the vast majority of potential plaintiffs have not given the matter of their rights as potential entrants a second's thought. Indeed it can be said with no little force that many recreational users, quite happy to take responsibility for themselves in theory, might well change their attitude if they actually sustained injury.

4.32           The law is evolving at its own pace and at the moment it can be said it is maintaining an acceptable balance between property's rights and duties.

**(d)    Strict Liability**

4.33           We now must consider whether there would be merit in replacing the present system of essentially negligence-based liability by a strict liability regime. This option is undoubtedly a radical one but nonetheless merits discussion.

4.34           A threshold question concerns the *type* of strict liability that is here envisaged. Clearly it would dispense with the requirement of proof of negligence on the part of the occupier; but that of itself does not fully clarify the nature of the strict liability that would be imposed on the occupier. One model - which we may call the "pure" variety - would impose liability in all cases where a person sustained injury on premises, provided the sustaining of that injury was attributable to the occupier's occupation of the premises. Of course, this model would be subject to a series of full or partial defences, which might include the act of a third party (for whom the occupier is not vicariously responsible), *vis major*, voluntary assumption of risk and contributory negligence. Another model would base liability on the failure by the occupier to deliver the degree of safety which the entrant is entitled to expect in all the circumstances.

4.35           Let us consider these models in turn. The pure variety of strict liability might seem to have the advantage over the alternative model in actually representing a truly strict, as opposed to a tacitly fault-based, test Act. There are of course already examples of pure strict liability in tort law: the rule in *Rylands*

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9           [1981] IR 44.

10          [1978] IR 85.

*v Fletcher*<sup>11</sup> the *scienter* principle<sup>12</sup> and section 21 of the *Control of Dogs Act 1986*<sup>13</sup>, for example. A difficulty in the context of occupiers' liability is that it would be necessary for the legislation to define with clarity the precise scope of the strict liability regime to be established. As we have seen, there has always been some uncertainty in determining when precisely "occupancy duties" give way to "activity duties" or "current operations". Under the traditional approach, the question arose in a context where the law relating to "activity duties" was *more* burdensome on the occupier than the law relating to occupancy duties. Under a strict liability regime, it could hardly be contended that all activities, merely because they happened to take place on premises occupied by the person engaging in those activities, should be subject to strict liability of the pure variety. For example, it would seem curious that, in a case where a passenger is given a lift by a driver to the driver's home, the driver's control of the vehicle should be judged by a negligence standard until he reached his front gate but judged by a strict liability standard as he drove up the avenue.

4.36 The alternative model of strict liability is based on that adopted by the EC Products Liability Directive,<sup>14</sup> which was expressly incorporated into Irish Law in 1991.<sup>15</sup> Article 1 of the Directive provides starkly that "[t]he producer shall be liable for damage caused by a defect in his product". Article 6 provides that a product is defective when it does not provide the safety which a person is entitled to expect, taking all the circumstances into account. This is not *stricto sensu* a negligence test, since such reasonable expectation is not identical with the requirement of due care on the part of the producer; but the test is clearly less demanding than the pure variety of strict liability.

4.37 It may be argued that both of these models of strict liability have some attractions. A person who goes on premises is not dissimilar to one who uses a product: in both instances there is a reasonable expectation that the experience will not involve him in physical injury.

4.38 This argument would, however, seem most difficult to sustain in respect of entries that confer no benefit on the occupier. The idea that a person using premises for his sole benefit should be able to insist on a standard of strict liability would strike many people as absurd; *a fortiori*, of course, if applied to trespassers. But in relation to entrants conferring a benefit on the occupier the argument seems a good deal more attractive. We have seen that in *Mullen v Quinnsworth Ltd, t/a Crazy Prices (No 1)*<sup>16</sup> McCarthy J was disposed to canvass the possibility of imposing "absolute" liability on the proprietors of large supermarkets on an analogy with the rule in *Ryland v Fletcher*. That a Supreme Court judge should go so far as to discuss the merits of a judicial (as opposed

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11 LR 3 HL 300 (1888), affg LR 1 Ex 265 (1886) See McMahon & Binchy, *op cit*, ch 25.

12 See McMahon & Binchy, *op cit*, pp 509-512.

13 See *id*, pp 512-516. Subsection (3), exceptionally, restricts liability to that of negligence where a dog attacks a trespasser.

14 See A Schuster ed, *Products Liability* (Papers From the I.C.E.L. Conference March 1989); Binchy, *The EEC Directive on Products Liability*, 80 *Incorp L Soc of Ireland Gazette* 37,73 (1986).

15 *Liability for Defective Products Act, 1991*.

16 [1990] 1 IR 59.

to legislative) development on these lines, though clearly giving it no express endorsement<sup>17</sup>, is surely some indication that strict liability is a credible option in at least this limited context.

4.39 It is worth examining the reason why large supermarkets rather than all premises should thus be singled out. It has been suggested that, if a strict liability regime were to be imposed in regard to occupiers' liability, a minimum requirement is that the occupier should receive a benefit from the entrant's presence on the premises. In traditional language, the entrant would have to be either an invitee or contractual entrant. But this would surely not be sufficient. All kinds of entrants onto domestic premises are invitees: it might seem oppressive to impose strict liability on a private householder where, for example the milkman slips on the driveway.

4.40 Strict liability has a strong claim when it is in essence based on the broader principle of enterprise liability. Just as producers are strictly liable for their products, so it might be considered fair to make large stores strictly liable for injuries occurring when people come onto the premises. The "product" here is the entire purchasing experience, which depends on the consumer's active participation, selecting the goods and presenting them at the checkout. Unless the consumer exposes himself to the risk of the types of injury that are integral to the supermarket phenomenon - slip-and-fall injuries - the supermarket proprietor will make no profits. It might be thought fair that the supermarket proprietor, rather than the customer, should bear the loss of these accidents, which are attributable either to negligence on the part of the supermarket or to the inevitable risk inherent in such a mode of business operation.

4.41 The argument against imposing strict liability, even in the limited context of these slip-and-fall injuries, is that there is nothing distinctive about this category of injuries which justifies the imposition of strict liability where in other cases proof of fault would be essential. If large supermarket proprietors are to be strictly liable, why not also those who organise transport services or indeed those who offer *professional* services, such as physicians? There is an inevitable risk that traffic accidents may occur without negligence on the part of a driver or that the provision of medical or other professional services may turn out unhappily, even without any professional negligence. If one step, why not fifty? Perhaps the answer is that we should indeed at least contemplate those fifty steps, rather than decline to take the first of them. After all, there were preliminary draft proposals at EC level for a strict liability regime for the defective supply of services, modelled on the Products Liability Directive. Article 1 of the draft directive provided that the supplier of a service was to be liable for damage caused by a safety defect in his service; and Article 5 provided that:

"[a] service has a safety defect where it does not provide the degree of safety which may reasonably be expected as regards health and physical

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As McCarthy J was anxious to make plain in *Mullen v Quinnsworth Ua Crazy Prices (No. 2)* [1991] ILRM 439, at 448 (Sup Ct).

integrity of persons and the physical integrity of movable and immovable property including that forming the object of the service".

4.42 Moreover the idea that physicians should be strictly liable in respect of their services is now far from novel.<sup>18</sup>

4.43 Perhaps the reason why strict liability for slip-and-fall injuries in large supermarkets has such an attraction is that the process of selling in supermarkets is unusual, not because it is ultrahazardous or because it bears any useful parallels with the rule in *Rylands v Fletcher* but because it creates a real risk of injury in respect of which the conventional rule of "due care" in negligence does not adequately protect<sup>19</sup> the customer. A person who slips and falls on a dislodged product in a supermarket has the formidable task of proving the absence of an adequate "sweeper" system. Even if he can invoke the doctrine of *res ipsa loquitur*, there is no guarantee of a successful outcome.

4.44 It is worth noting that the case for a strict liability regime of occupiers commended itself nearly two decades ago to an American commentator<sup>20</sup>, who argued that it should be restricted to *business* premises. Defining the scope of this concept did not seem to him to pose significant problems:

"The entities which should be subject to [strict liability] share common characteristics. They create a reasonable expectation of safety in persons who enter their premises, and they are in a position to safeguard against accidents and to distribute those accident losses which, nevertheless, do occur. A line-drawing problem might be presented in the case of persons who work out of their houses. A court should not be hesitant to consider the presence of insurance in determining whether this strict liability doctrine should be applied to a given situation"<sup>21</sup>

4.45 This commentator perceived two benefits as flowing from a strict

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18 Cf, eg, Ehrenzweig, *Compulsory "Hospital - Accident" Insurance: A Needed First Step Towards Displacement of Liability for "Medical Malpractice"*, 31 Chicago L Rev 279 (1984); O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 Va L Rev 749 (1973). In *Hegarty v O'Loughran* [1980] 1 IR 148, at 164 (Sup Ct), McCarthy J observed that:

"[t]he case for a no-fault system of compensation for those who suffer injury as a result of medical treatment seems so strong as to be virtually unanswerable. That.... is a matter for the legislature".

What McCarthy J may have had here in mind is not a system of strict liability in tort but a system of accident compensation entirely independent of tort litigation as in New Zealand.

19 Of course if there is no evidence as to what the customer slipped on, it would be difficult to see why the supermarket proprietor should be strictly liable, any more that he would be liable in negligence. In *Foley v Quinnsworth Ltd*, High Ct 10 April 1982 (Circuit Appeal), when consulting a plaintiff who did not know what she had slipped on, Carroll J expressed the opinion that:

"the doctrine of *res ipsa loquitur* cannot apply where there is no known cause or reason for the accident. It would be tantamount to imposing absolute liability on a defendant. How could a defendant prove there was no negligence, if the cause of the accident is not known?"

20 Ursin, *Strict Liability for Defective Business Premises - One Step Beyond Rowland and Greenman*, 22 UCLA L Rev 820 (1975).

21 *Id.*, at 827-828, fn 37.

liability regime: risk *distribution* and *accident reduction*. In relation to the latter he observed:

"The goal of minimizing the total cost of accidents indicates the desirability of imposing strict liability on the business establishment. It is ordinarily in a better position than the plaintiff to know of the possible dangers and to evaluate various means of reducing them. It is in a better position to decide if an accident should be avoided whether the cost of accident avoidance is less than the cost of allowing an accident to occur. Furthermore, it can act to avoid accidents which should be avoided. The business enterprise initially chooses its place of business and decides to purchase the products (such as hair dryers, chairs, etc.) to which its patrons will be exposed. Subsequently, it decides how often and how carefully to use them. It must decide whether to repair or replace dangerous products, railings, and the like, add safety devices, or take other safety precautions. Imposing strict liability on the business enterprise would force it to consider the potential accident cost when deciding on which safety measures to undertake. Courts are likely to conclude that the business establishment is in a position analogous to the manufacturer of a defectively manufactured product - it can best find the optimal mix of accident and accident avoidance costs."<sup>22</sup>

4.46 Having considered the four options of restoration of the former law, the prescription of negligence as the sole test of liability, leaving the law as it is and the imposition of a strict liability regime, we now go on to examine three somewhat narrower options: whether the occupier should owe only a restricted duty to certain trespassers; whether there should be a restricted duty to entrants using certain lands for recreational purposes, such as hiking or picnicking; and whether there should be a special exemption in relation to national monuments.

### ***SPECIFIC ISSUES***

#### **(a) A Restricted Duty to Certain Trespassers**

4.47 We here consider whether there would be merit in restricting the duty owed to certain trespassers. This could be accomplished in one of two ways: either the legislation would prescribe a general negligence regime for trespassers qualified by a rule that an identified sub-category of trespassers is not to be owed the duty of care in negligence or it would provide that occupiers do not owe a duty of care to trespassers in general but that there should be a particular sub-category of trespassers entitled to the protection of a duty of care. These are of course merely different ways of accomplishing a similar result; what is at issue is not so much the way in which the result is achieved but rather the content of the particular sub-categories.

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22 *Id.*, at 830-831 (footnote references omitted).

4.48 As we have seen from our comparative survey, a number of jurisdictions, including Ontario, British Columbia and Western Australia, have prescribed that the occupier does not owe a duty of care to persons on the premises with the intention of committing, or in the commission of, a criminal act. To such entrants the occupier is under the obligation merely not to injure them intentionally nor act with reckless disregard for their safety.<sup>23</sup>

4.49 The advantage of this approach is that it makes it clear that burglars and others with criminal intent are not to be owed a duty of care. These are people who have the least claim to the benefit of such a duty. Other trespassers may be considered to fall into the "deserving" category: children and the odd unwelcome adult entrant who means no harm.

4.50 A disadvantage, which might be considered to be one primarily in the order of drafting rather than substance, concerns the remit of criminal intent or commission. Clearly a person who enters premises with the intention of killing the occupier or his family rightly falls within this category, but what about a person who, in the course of a meal at a restaurant, defrauds his gullible dining companion in relation to a business venture? What conceivable justification would the restaurant proprietor have to invoke this criminal conduct as a defence if the table at which the pair are dining falls on the rogue's foot?

4.51 There must surely be some necessary relationship between the criminal intent or act and the occupier other than the mere fact that the entrant has such intent or does such act on the premises. It is not easy, however, to prescribe appropriate parameters. To insist that the proposed or consummated criminal act be one involving the occupier or his family would seem too narrow; to extend it so that the identity of the victims is completely irrelevant would seem to go too far. The *type* of crime is also surely significant though again line-drawing is difficult. It would be wrong to limit the offence to one of violence: acts of theft and criminal damage would seem to call for inclusion, though perhaps these are less obviously appropriate since theft, for example, can range from "lifting" an ashtray in a hotel to the removal of the contents of a bank vault. The idea that the occupier should owe only a restricted duty to a petty thief may seem unduly harsh.

4.52 It should not be forgotten that the *ex turpi causa* principle has potential application in this context. Its precise remit is not easy to determine: as *Salmond & Heuston*<sup>24</sup> observe, this is "a rather obscure corner of the law". It seems reasonable to predict that a criminal injured on premises, would not normally be likely to succeed under the negligence test since he would scarcely be in a "proximate" relationship with the occupier. If, however, he surmounted that hurdle, the action might nonetheless be dismissed on the *ex turpi causa* principle; but for that principle to apply there would have to be the minimum

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23 The defences of self-defence, defence of others and defence of property should surely continue to apply (as section 3(7) of Saskatchewan's draft legislation expressly provides).

24 *Salmond & Heuston on the Law of Torts*, 495 (20th ed, by RFV Heuston & RA Buckley, 1992).

type of connection between the criminality and the occupier that we have been attempting to define. Lord Asquith's statement in *National Coal Board v England*<sup>25</sup> suggests as much (though the example he used was the mirror-image of the one that we are considering):

"[I]f A and B are proceeding to the premises which they intend burglariously to enter and, before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort".

4.53 We now turn to the other approach towards limiting the range of trespassers to whom the duty of care in negligence is owed. This does not involve *subtracting* a sub-category of trespassers from the total category, to which a duty would be owed, and prescribing for the sub-category only the entitlement to protection from intentional or reckless conduct. On the contrary, no general duty of care to trespassers would be prescribed, but such a duty would attach only to a limited sub-category of privileged trespassers.

4.54 Who should these privileged trespassers be? The answer given traditionally by the courts (albeit with resort to the fiction of implied licence) was that *children* should be entitled to such a duty. We have seen that this approach has received legislative endorsement in Alberta. There is of course much to be said for it. To argue in favour of any more restrictive entitlement is to contend that the law should show a degree of indulgence to occupiers more generous than the courts have in practice required for more than a century.

4.55 Just how burdensome is such a duty? To start with, it is the burden being borne at present with no apparent difficulty by every occupier in the land. It is the burden that led to young plaintiffs winning in *Purtill* (perhaps luckily in view of his age) and *McNamara* and losing in *Keane* and *Smith*. Young plaintiffs have won and lost before the same judges so we are not talking either about 'the luck of the draw'. While it is fair to say that the Courts have shown a tendency to be generous to young plaintiffs, it has not been open-season for them. There is no evidence that child trespassers have any history of winning *against the odds* in respect of accidents on agricultural land. Nobody is suggesting the introduction of strict liability in respect of child entrants, lawful or otherwise.

**(b) A Restricted Duty to Entrants using Certain Lands for Recreational Purposes?**

4.56 We now must consider whether the legislation should prescribe

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25 [1954] AC 403, at 428. Also relevant are *Salmond & Heuston's* question and answer (op cit, p485, fn 39):

"If the plaintiff in *Donoghue v Stevenson* had stolen the bottle of ginger-beer, would she have been successful? It is suggested that she would, because causally and morally, there is no significant relationship between the theft and the damage".

a restricted duty to entrants using certain lands for recreational purposes. What we have primarily in mind is a situation where a visitor to farm lands who is hiking or picnicking is injured as a result of encountering a danger on the property. Under the law at present the visitor would normally be characterised as a trespasser or licensee.<sup>28</sup> If the pre-*Purtill/McNamara* rules continue to apply to licensees, then, of course, the duty will be defined in terms of warning the licensee of hidden dangers of which the occupier is actually aware. If, however, *Purtill* and *McNamara* have had the effect of extending the negligence test to *all* entrants, then the occupier's duty is one of due care.

4.57 In favour of a restrictive duty towards what we shall designate recreational entrants, it may be argued that there are good social reasons why this change should be made. The primary one is that in times of increasing leisure and greater mobility, proprietors of rural lands should be encouraged by the law to permit access to their lands to strangers who are anxious to use them for recreational purposes, such as hiking and picnicking, rather than be discouraged by a tort liability regime which is so stringent as to force landowners, albeit reluctantly, to prohibit entry onto their lands for fear of being sued.

4.58 We have seen that, in the United States and Canada, legislatures have responded to this argument by introducing recreational use statutes, which either reduce the duty owed to such entrants or abolish it entirely. Several of these statutes pitch the level of liability at that equivalent to the traditional duty owed to licensees in our law, namely, that the occupier must merely warn the entrant of hidden dangers on the property of which the occupier is actually aware. Others pitch it at the level of liability owed to trespassers. Let us examine the strengths and weaknesses of the argument that such a change should be made in our law.

4.59 The first question concerns the *need* for such a change. This must depend on the inadequacy of the present law. To establish such inadequacy it would be necessary to show either that the present law *incorporates an unjust principle* or that it has been *applied unjustly*. When speaking of the present law here, we envisage a straightforward negligence test of liability rather than the traditional, more restrictive, duty.

4.60 In determining whether the present law incorporates an unjust principle, we must seek to identify an injustice that *applies distinctively to this group of entrants* as opposed to *all* licensees and trespassers. If the present law in relation to *all* such entrants is unjust, then it should, of course, be changed but that is a question of *general* import whose merits we have already addressed. What we are here concerned with is identifying why it should be unjust to impose a negligence standard with respect to recreational users of rural lands but not with respect to other entrants on such or other property who do not confer a

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28 Of course, if the occupier derives a material benefit from the visitor's entry, the visitor will be an invitee (or, in some instances, a contractual entrant). We refer again to the question of material benefit in this context later in our analysis.

material benefit on the occupier.

4.61 The case in favour of such a distinction is essentially that, unusually, there is here a positive social benefit in encouraging the facilitation of this category of gratuitous use of land in the occupation of another. If the standard of liability is so onerous as to require farmers to withdraw access to their lands to those wishing to engage in recreational pursuits there, the loss is one which is socially damaging. Access to the rural environment to engage in legitimate leisure activities is a resource that must be preserved. To require, in effect, that rural landowners foot the bill for such a social benefit is unjust, if not unconstitutional.<sup>27</sup>

4.62 We are not aware that the law has in fact been applied in a distinctively unfair way in practice as regards recreational users. As we have mentioned, we know of no appellate case in which it could be argued that such distinctive unfairness was apparent. What one does find when one examines the totality of occupiers' liability litigation, extending back over many years, is that certain types of entrant appear to have fared rather well. These most strikingly include children, regardless of their status; entrants (other than adult trespassers) on premises of a public nature or premises where the owner is likely to be insured have also often been treated kindly by juries.

4.63 Two points must here be noted. First, nothing in these decisions suggests that occupiers of rural premises have been in any way uniquely targeted by the courts in respect of recreational entrants. Secondly, the sympathy for some plaintiffs evident in these decisions has been a feature of the torts process in every jurisdiction permitting jury trial. Juries are conscious of the 'deep pocket' of insurance companies lurking (unmentioned) in the background to the litigation; jurors have had little hesitation about awarding high compensation to seriously injured plaintiffs without great attention to the issues of liability.

4.64 Whatever about the traditional disposition of juries, the picture has been radically altered in the past decade. In three decisions just under ten years ago,<sup>28</sup> the Supreme Court introduced a series of robust limitations on the quantum of damages, and in 1988 legislation<sup>29</sup> abolished juries in personal injuries and fatal accidents litigation in the High Court. Since juries had already been removed from this type of litigation in the Circuit Court, it is now the position that all personal injuries litigation is tried by judges.

4.65 We are unaware of any evidence suggesting that trial judges have shown unfair sympathies to recreational entrants or other plaintiffs. If a trial judge were to engage in such a practice, he can be overturned on appeal.

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27 Cf. the litigation on the Rent Restrictions legislation, where the Supreme Court held that the cost of financing a desirable social policy could not be charged to one group in society.

28 *Reddy v Bates* [1983] IR 131, *Cook v Walsh (No 2)* [1984] ILRM 208, *Sinnott v Quinnsworth Ltd* [1984] ILRM 523. For critical analysis, see McMahon & Binchy, *op cit*.

29 Courts Act 1988, analysed by Kerr, *Annotation*, ICLSA; Byrne & Binchy, *Annual Review of Irish Law 1988*, 454-456.

It would seem easier for the Supreme Court to uphold an appeal from a trial judge's judgement than that of a jury since, unlike a jury, which simply answered laconically questions framed by the trial judge, the trial judge now has to deliver a judgment explaining how he arrived at his conclusion as to liability. This makes the reasoning supporting the verdict more transparent and thus more eligible for reversal if it is mistaken in any way.

4.66 Without at this stage coming to any view on whether the case for a recreational use exception in the legislation has been made out, it may be advisable to address the specific views that would arise for consideration if such an exception were to be part of our law.

*1. The level of duty to be prescribed*

4.67 Perhaps the most important question relating to a recreational use statute is the level of duty it should prescribe. Among the range of possible solutions the following may be considered here:

- (a) a duty to warn the recreational user of hidden dangers of which the occupier is aware;
- (b) a duty not to injure the recreational user intentionally nor to act with reckless disregard for the recreational user's presence on the property;
- (c) a duty not to act with gross negligence relative to the recreational user;
- (d) a duty not to injure the recreational user intentionally;
- (e) no duty at all.

4.68 Option (a) is, of course, the duty traditionally owed to licensees and option (b) is the duty formerly owed to trespassers. Option (c) has been adopted in a number of jurisdictions in North America. Options (d) and (e) represent a degree of indulgence to an occupier never conceded by the common law, even in respect of trespassers.

4.69 Realistically the choice appears to be between options (a), (b) and (c).

*Option (a)*

4.70 In favour of option (a), it may be argued that it sets the test at a realistic level, which the occupier should find it relatively easy to discharge. Since the duty would be on him of *warning*, rather than of *protection*, it could be fulfilled by appropriately drafted notices positioned strategically.

4.71 As against this, it could be replied that option (a) sets too onerous a standard. It would require the occupier to communicate effectively

with all entrants in respect of every hidden danger. We have seen that even overt dangers can be hidden to children, not because they are unseen but because their dangerous quality is not appreciated by the child in question. How is a farmer to warn against all such dangers, which would include many aspects of ordinary farm life, where machinery is used? For example, is an electric fence a hidden danger to an urban child? If so, what kind of warning would need to be placed at how many intervals of yards to discharge the farmer's liability?

4.72 One solution to the problem of ubiquity of warnings would be for the legislation to give guidance to the occupier as to the manner of providing sufficient warnings. Such guidance could be framed in terms of specific detail or more general guidelines. An instance of the former approach would be a series of rules as to the location of such warnings (at the perimeter of the occupier's lands or at the place where the hidden danger is situated, for example, or at both such places), the number of such warnings and the language and terms in which they are expressed. The latter approach would adopt more general language which would seek to encapsulate the degree of effort required of the occupier rather than to anticipate and resolve in advance every permutation of factual circumstances that could arise.

***Option (b)***

4.73 In favour of this option, it can be argued that it avoids the difficulties identified with respect to option (a) in relation to the duty to *warn* of *hidden dangers*. But would this advantage be gained at a significant price? Would it be just or humane for the law to permit, without any civil sanction, an occupier to desist from warning a recreational user of the risk of death or serious injury from a hidden danger? If, for example, a farmer sees a recreational user drawing water from a stream which the farmer knows to be poisoned, the law would seem to be seriously remiss if it denies compensation to the family of the recreational user if he drinks the water in front of the farmer's eyes and subsequently dies. However, we are satisfied that such a failure to warn would be treated as reckless disregard for the safety of the trespasser.

***Option (c)***

4.74 This option would restrict liability to cases of gross negligence on the part of the occupier. The perceived advantage of this test is that it would ensure that the occupier was not held to an unduly onerous and unrealistic standard of care. Any temptation to make a generous finding of liability would be moderated, if not entirely thwarted, by the requirement that the occupier's negligence be gross.

4.75 The notion of *grossness* of negligence might be criticised for its uncertain quality. The term "gross negligence" has been stigmatised as being no more than "negligence with a vituperative element". This may be somewhat harsh but it does capture its elastic quality.

4.76 Perhaps the proper reply to this concern is that it would be mistaken to become too greatly exercised by the seemingly emotive and uncertain character of the term. The attribution of *negligence* involves the court in making a value judgment that the defendant ought not to have behaved as he did. The attribution of *gross negligence* involves the same process so that such a judgment will be made only in more serious cases.

4.77 Of these three options, we provisionally consider that the third option is the most attractive. As we have mentioned, we consider below the logically prior question of whether to recommend provisionally *any* exception in respect of liability towards recreational users.

## 2. *The persons who should be designated "recreational users"*

4.78 We now must consider the important question of who should be designated recreational users for the purposes of this possible exception. This is no easy task. The very clarity of the obvious example such as the hiker or picnicker - can give the false impression that it is easy to place appropriate boundaries to this category of entrant.

4.79 Two approaches might be considered, each with its distinct advantage and drawback. The first is the *general* approach. An example is provided by section 2(3) of model legislation proposed in the United States in 1979 on behalf of the National Rifle Association, the National Association of Conservation Districts, the International Association of Fish and Wildlife Agencies, the National Wildlife Federation and the Wildlife Management Institute.

4.80 It defines recreational use as "any activity undertaken for exercise, education, relaxation or pleasure". The advantage of this approach is, of course, that it avoids the possibility of a *casus omissus*. A possible drawback is the danger that it may be over-inclusive.

4.81 We have seen examples in chapter 3 of the second approach, which is to adopt a *specific listing* of the types of activities envisaged. The drawback with such an approach is the *casus omissus*; the advantage the assurance that the definition will not operate over inclusively.

4.82 Another approach is that in Idaho's legislation<sup>30</sup> which provides that the term "recreation purposes":

*"includes, but is not limited to, any of the following or any combination thereof: hunting, fishing, swimming, boating, rafting, tubing, camping, picnicking, hiking, pleasure driving, nature study, water skiing, animal riding, motor-cycling, snowmobiling, recreational vehicles, winter sports,*

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30 Revised Statutes, section 38-1804 (emphasis added).

and viewing or enjoying historical, archaeological, scenic, or scientific sites, when done without charge of the owner".

4.83                   What about the courting couple?!

4.84                   The absence of payment to the occupier is an important element in the definition of recreational use. If the user pays the occupier for the privilege, then it is very hard to sustain any argument that the occupier should not owe the entrant the full duty of care owed to entrants in general. Perhaps this might seem harsh in cases where the payment was nominal. Nevertheless, there would not be likely to be many cases of such a practice continuing if the legislation prescribed a recreational use exception contingent on the absence of any payment. Occupier's wishing to shelter behind the exception would simply desist from making nominal charges.

4.85                   The demand for recreational facilities can be met by the Government or local authorities or clubs acquiring or leasing lands or rights of way or entering into specific arrangements with occupiers about the maintenance of paths and tracks, stiles, stock-control gates and so on to ensure access to mountains, walking routes and historic sites. It is not unreasonable for a landowner to make his lands safe for his family and lawful visitors and expect unlawful visitors deserving or undeserving to look after and be responsible for themselves.

4.86                   No matter how reasonable the duty which might be imposed, one is still dealing with an imposition on owners of private property.

### 3.           *What categories of property should be included?*

4.87                   We now address the difficult question of which categories of property should be included in the possible recreational use exception. Again the clarity to the obvious case may serve to encourage the mistaken view that it is easy to draw lines in this context.

4.88                   If wide tracts of agricultural land are the clear case, what should be the approach to smaller parcels of land, such as an acre around a house in the country? Should the quality of the land such as mountain or pasture be relevant? Should only *rural* land be within the exception? Is it clear, for example, that whatever policies underlie the granting of an exception with respect to recreational users do not apply to relatively large holdings in a city (such as the Phoenix Park), town or village? And how should the distinction between urban and rural areas be made, if such a distinction were thought desirable?

4.89                   We see great difficulties in drawing lines in this context, and we apprehend that the shadow of unconstitutionality falls over any such process. If the policy underlying the proposed exception were clearcut, the task of establishing the parameter of its application would not be problematic; but the policy is in fact so lacking in sharp definition that any attempt to draw up

limitations to its application inevitably has an aura of arbitrariness.

#### 4. *What categories of occupier should be protected?*

4.90 A question related to the one just considered concerns the categories of occupier who should be protected by the exception. To a large extent this question will be determined by resolution of the earlier one; but let us assume for the purposes of present discussion that the exception is limited to rural land. What falls for consideration is whether the exception should apply to *all* occupiers of land falling within the prescribed category or whether it should apply only to some types of occupier.

4.91 First we must consider whether the exception should apply to *public* owners and occupiers of such land, such as the State or its agencies. This is, of course, an issue of very great importance. The answer is less than clear. Against including public occupiers, it may be argued that the policy reasons underlying any possible justification for the proposed exception do not apply in relation to them. The essential argument in favour of the exception is that the occupier lacks sufficient resources to render the premises capable of complying with a negligence test. It can hardly be argued that the State lacks the resources. The point is not that the financial resources of the State represent a bottomless well from which any plaintiff may draw to his contentment but rather that a distinctive plea of financial inability to meet the requirement of reasonable care towards the safety of entrants cannot be made out.

4.92 If public occupiers are not to benefit from the proposed exception, what should be the position of private owners? Should *all* of them come within its scope? Against their doing so, it may be argued that the mere fact that a person lives in the country rather than in the town does not render him financially incapable of making the property reasonably safe to entrants. Manifestly this is the case where the holding is small, an acre for example. If there is to be a minimum requirement as to the size of the holding, forty acres, for example - clearly some occupiers of lands of this size would have no financial problems in discharging their responsibility of due care were they now to shelter behind the immunity afforded them by the exception. For example, a multinational enterprise in a rural environment might well be surrounded by a hundred acres. Is it to obtain the benefit of the exception in spite of its possibly strong financial base?

4.93 The temptation may be to propose limiting the exception to those in occupation of farm land who derive the totality or substantial part of their income from farming. But such a limitation is scarcely satisfactory. There are some rich farmers in this State who cannot credibly assert lack of financial resources either to keep their lands reasonably safe or to pay an insurance premium. There are people who are *not* farmers who occupy farm lands, employing a **manager**. Are they to be denied the exception? Again constitutional doubts arise. Moreover, much rural land which recreational users enter is not farmland at all. Is it not to fall within the exception on the account?

4.94 Yet again the incoherence and lack of sharp definitions of the policies underlying the argument in favour of an exception render the task of distinguishing between those who should benefit from the exception an invidious one.

5. *Should the exception apply to activities conducted on the exempted premises?*

4.95 We now must consider whether the proposed exemption would apply only to static conditions on the occupier's lands or whether it would also apply to activities occurring on the land. This distinction has no particular significance where the general test with regard to both static conditions and activities is one of negligence but of course it becomes crucial when a distinction is drawn in relation to them.

4.96 A strong argument can be made that the exception should apply only to static conditions. It is hard to see why, for example, an occupier should be given *carte blanche* to drive his car or other vehicle negligently on his own property. Moreover, a substantial part of the case in favour of an exception is based on the practical impossibility for a farmer to ensure that areas of his land not under his immediate control and supervision are safe. Such a concern has no relevance to activities in which the occupier or those for whose conduct the occupier is responsible, engage.

4.97 As against this, it may be replied that such a distinction would be unjust and unworkable. Unjust, because many activities on a farm are highly and distinctively dangerous to recreational users. Farm machinery has a fatal fascination for youngsters. When it is in operation it is practically impossible for the operator and those working with him to ensure that it will not endanger entrants. The unworkable nature of the distinction springs from the artificiality in attempting to characterise certain everyday situations as falling within or outside the exemption. If, for example, a dangerous machine is used in a field, that is an activity and outside the exemption. If the operator turns off the engine for a quarter of an hour's break, and a child is injured, is the injury sustained during the course of an activity? Would the answer depend on whether the engine were left on or off? To take another example, if a farmer were to spray a field with poison when an entrant was in the field, an injury sustained at the time would presumably be activity related and thus fall outside the exemption. But what would be the situation if a recreational user entered the field half an hour later or the following day and was injured? Would the answer depend on the occupier's (or operator's) knowledge, or reason to know, of their probable subsequent entry?

6. *The constitutional dimensions of a recreational use restriction on liability*

4.98 We now must consider the important question of whether a restriction on liability towards entrants engaged in recreational pursuits would raise constitutional doubts. Two principal lines of attack might be developed:

denial of equal protection and denial of access to the courts.

4.99 As to the first, it might be argued that it would offend against Article 40.1 to distinguish between victims of negligence on the basis of the character of the premises and the purposes of their entry onto those premises. Frankly, we consider that such a contention would not have any appeal to the judiciary. A similar contention has failed in the United States.<sup>31</sup> One commentator summarising the judicial approach, has stated:

"Users of another's property' have always been considered a distinct class, with their rights distinguishable from the rights of other users. Opening up vast areas of vacant but private lands to the general public's use for recreational purposes is a legitimate state objective, and the statutory limitation of liability is rationally related to that purpose".<sup>32</sup>

4.100 In Ireland, of course, the size of the lands thus opened up would be far smaller but this alone would not appear sufficient to alter the analysis. If the shadow of unconstitutionality is to be cast over recreational use provisions on the basis of lack of equal protection, it would surely envelop the traditional judicial treatment of social guests; yet no one has suggested that the traditional approach is unconstitutional. The difference of "social function" to which Article 40.1 refers would appear to uphold the validity of a constriction of duty relative to recreational users.

4.101 Similarly it seems to us clear that a constitutional attack based on denial of access to the courts<sup>33</sup> would be likely to fail here, as it has in the United States.<sup>34</sup> It has there been observed that:

"[s]tatutory schemes, such as recreational use statutes, do not restrict the right to redress for an actionable injury; rather, they redefine the injury or the class of persons to which the constitutional right of redress attaches. Thus, the right of redress for injury is constitutional in nature, but the nature of a specific injury is a right derived from the common

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31 *Genco v Connecticut Light & Power Co*, 7 Con app 184, 508 A 2d 58 (1986).

32 *Becker, Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?* 24 *Indiana L Rev* 1587, at 1595 (1991). But cf Knowles, *Landowners' Liability Toward Recreational Users: A Critical Comment*, 18 *Idaho L Rev* 59, at 88-89 (1982). It should be noted that 'guest statutes' in the United States, restricting the duty owed by drivers to guest passengers, have been held to be unconstitutional.

In *Ramey v Ramey*, 273 SC 680, 253 SE 2d 883 (1978), the Supreme Court of South Carolina was of the view that:

'the 'protection of hospitality' rationale does not justify the statute's differential treatment of automobile guests as distinguished from all other recipients of a host's generosity. Our compulsory insurance law which requires every policy to afford uninsured motorist coverage to the insured defeats the hospitality argument upon which most prior cases have relied. If the hospitality justification were ever compelling, it has lost its force today'.

See also *Brown v Merlo*, 8 Cal 3d 355, 106 Cal Rptr 388, 506 P 2d 212 (1973).

33 Cf *Kelly, The Irish Constitution* (2nd ed, 1984).

34 *Abeln v Fischer*, 374 So 2d 1379 (Fla, 1979) rev'd sub nom *Sea Fresh Frozen Products, Inc v Abdlin*, 411 So 2d 218 (Fla Dist Ct App, 1982), petition denied, 419 So 2d 1195 (Fla, 1982).

law or statute. A statute limiting the liability of owners who provide the public with large areas for outdoor recreational purposes is a reasonable exercise of legislative power, and does not violate the constitutional requirement that courts be open to every person for redress of any injury".<sup>35</sup>

#### ***Our Provisional Conclusions***

4.102 We now must express our provisional conclusions in relation to the possible inclusion in the legislation of a recreational user exception. We are of the view that, while it presents certain problems of definition, it provides an attractive strategy. Undoubtedly the law should be fully solicitous about the pressing demands on occupiers of rural lands and the need for general principles of liability to operate fairly and sensitively in their context. This can, we believe, be achieved in other ways, which we address below.

#### ***(c) A Special Exemption in relation to National Monuments?***

4.103 We now must consider whether there should be a special exemption in the legislation in respect of national monuments. The matter was dealt with recently, as we have seen, in the Supreme Court decision of *Clancy v Commissioners of Public Works*.<sup>36</sup> In that case the Court built on section 16 of the National Monuments Act 1930 what was, in essence, a duty of due care on the part of the Commissioners towards those whom they permit to enter and view monuments. Section 16 deals only with cases where the Commissioners or a local authority are the owners or the guardians of a national monument. Two of its subsections are of relevance. Subsection(2) provides as follows:

"Where the Commissioners or a local authority are the guardians of a national monument by virtue of a deed made under an Act repealed by this Act, the public shall not be admitted to such monument under this section without or otherwise than in accordance with the consent of the owner of such monument given by such deed or otherwise."

4.104 And subsection (3) provides as follows:

"Where the Commissioners or a local authority are the guardians of a national monument by virtue of a deed made under this Act and containing a prohibition, whether absolute or qualified, against the admission of the public to such monument, the public shall not be admitted to such monument without or otherwise than in accordance with the consent of the owner of such monument or otherwise than in accordance with the provisions (if any) contained in such deed in relation to such admission."

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35 Becker, *op cit*, at 1595.  
36 [1991] ILRM 567.

4.105 Thus it may be seen that the owner of the monument is given the right to refuse to admit the public onto his property. Nevertheless there will be many cases, whether or not the Commissioners or a local authority are the owners or the guardians of the monument, where the occupier of the land will be under a moral obligation-reinforced perhaps by generations of tradition - to admit members of the public to view the monument.

4.106 A strong argument can be made that, where the occupier permits such entry, he should not have to foot the bill if a visitor is injured on, in or by the monument. The policy justification for relieving the occupier of liability in the present context is very pressing. There is a clear social interest in giving the public free access to these monuments.

4.107 Having said this, we acknowledge that the argument is in need of some refinement. First we must enquire what exactly should be prescribed on the liability issue: a complete absence of liability, so that a person injured by the occupier's negligence will have no redress against anyone, or an indemnity from the State? Next we may ask whether it is just or necessary to exempt an occupier from *all* liability, by either of the means we have mentioned. It is one thing to relieve an occupier from liability for structural dangers arising from the nature of the monument or the progressive deterioration of its physical condition. It is quite another to relieve the occupier from liability for injury resulting from his positive negligence, either in relation to his treatment of the monument or in regard to dangerous decisions as to how the public are to be permitted to view the monument. This distinction itself may be difficult to draw. In *Clancy*, liability was, on one view imposed, not simply because the monument was dangerous but because the public were permitted to see it without it having been rendered safe for them to do so. There was nothing "wrong with" the monument if the dimension of public access were taken out of the picture.

4.108 A further question arises as to whether any immunity or restricted liability should extend beyond the monument to other parts of the occupier's land. The occupier may reasonably protest at having the burden of keeping these other areas reasonably safe. Perhaps the immunity or restricted liability should extend to such other parts of the land as it is reasonable to foresee that entrants visiting the monument are likely to reach.

4.109 Finally in this context, the question of payment must be considered. Should the occupier be deprived of the exemption if he charges visitors to enter the lands? The idea that, having made money from their presence, he should avail himself of the exemption may seem fundamentally unjust. As against this, the occupier may have been charging very small sums simply to pay for the maintenance and supervision of the area. Perhaps the legislation could extend the exemption to cases where such modest charges are made; this would involve either some definitional uncertainty or arbitrariness but it might be considered preferable to a complete exclusion of the exemption.

## OUR OVERALL CONCLUSIONS

4.110 We now must determine the crucial question of what model of liability the legislation should adopt. We have considered a very wide range of options, extending from restoration of the former law on the one hand to strict liability on the other. We have also considered possible exceptions from a general rule of liability.

4.111 The Attorney General has asked us to review the law in this area because of the fear on the part of occupiers that they are or will soon be obliged to exercise the same duty of care towards all entrants, on their lands, the standard of care being a simple negligence standard. There is a corresponding fear on the part of recreational users and of all who seek to encourage tourism that this will lead to severe restrictions on access to mountains, tracks, beauty-spots and historic sites.

4.112 In a very helpful and constructive set of articles entitled "Reform of Occupiers' Liability" in the Solicitors Gazette,<sup>37</sup> written in the context of the Attorney General's reference of the topic to us, Eoin O'Dell considers the emerging Irish legal regime to have "one advantage and one disadvantage. The advantage is elegant simplicity. The disadvantage is that it can lead to injustice, or at the very least it can lead to the perception that it is unjust".<sup>38</sup> He refers to the fact that the House of Lords has emphasised that:

"the occupier is not an insurer in the sense that he is not required to insure against the whole world entering his premises. Whatever direction Irish law takes, it would do well always to keep this in mind as a guiding principle. Irish common law already shares much of the English position, and the remainder is well within the grasp of judicial development. However, it is this judicial development which has led (sic) to a perception that the law is unfair on this issue. If statutory reform does come to pass, and all that is achieved by it is the codification of the existing position, (perhaps taking the opportunity of adding certain of the attractive features of the English legislation), and as a consequence, the misperception of potential injustice is dispelled, then it will be successful."<sup>39</sup>

### *The English Approach*

4.113 We have discussed above,<sup>40</sup> the provisions in the English Acts of 1959 and 1984. We would certainly favour the elimination of the distinction between invitees and licensees on the general lines employed so to achieve this in the 1957 Act.

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37 Editions of October 1992, p.303 and November 1992, p.359.

38 At p.363.

39 *Id.*

40 *Supra*, para. 3.3 et seq.

4.114 As we have seen, the 1984 Act deals with the position of the trespasser. It attempts to reduce the decision in *Herrington* to statutory form and the result, allowing for differences of emphasis, resembles the law as set out by Lord Diplock in *Herrington*, by Lord Denning in *Pannett v McGuinness* and by Henchy J. in *McNamara*. It confines the damages which a trespasser can recover to damages for personal injuries. It provides for a defence of voluntary assumption of risk. As O'Dell says, the English model may be "less elegant" than the Irish Supreme Court model but "rather more just, at least in the context of trespassers" and "commends itself to that extent as a model which may with profit be adopted". While the English approach would not be the Commission's preferred option, it constitutes a reasonable and acceptable approach to occupier's liability. However, as we point out above<sup>41</sup> it can be criticised for being too generalised.

#### ***The Deenihan Bill***

4.115 In April of this year, Deputy Jimmy Deenihan introduced a Private Members Bill entitled the *Protection of Occupiers of Land Bill, 1993* which we must assume represents Fine Gael policy on these questions.

4.116 The bill provides for two categories of entrant, licensees and trespassers, defined in Section 2 of the bill as follows:

"'licensee' means one who enters on the land by the permission of the occupier granted gratuitously in a matter in which the occupier has no interest;

'trespasser' means one who enters on land without the permission (express or implied) of the occupier."

4.117 Section 3 of the bill provides:

"(1) The occupier of land shall not be under any obligation to a licensee to make it safe for use by him or in regard to anything that may be in, on or over the land and shall be obliged only to give warning of the existence of any concealed danger which exists on the land and which is actually known to the occupier.

(2) The occupier of land owes no duty of care to a trespasser but he is not entitled intentionally to harm a trespasser except in necessary self defence of himself or another or in defence of property."

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41 *Supra*, para. 3.14.

4.118 The policy of the bill is attractively simple although some may prefer to use the word 'stark'. It simplifies the classes of entrant. It reduces the duty of care to lawful visitors to that presently owed to licensees. However, the significant aspect of the Bill is the change proposed in the duty to trespassers by removing from the occupier the obligation not to show reckless disregard for them. This change would even turn the clock back on the common law duty of care and seeks to set at nought the development of the proximity, common humanity, neighbourly approach to the law. No child trespasser is to recover unless the occupier sets out deliberately to injure him.

***The Alberta Approach***

4.119 We are satisfied that the approach in the Alberta *Occupiers' Liability Act, 1973* discussed above<sup>42</sup> with some variations would 'freeze' the law, more or less, where it finds itself in Ireland at the present time and in so far as it is possible to do so, also provides a degree of certainty not afforded by the continuing evolution of the common law or the English, statutory, approach. It adopts the English approach to lawful entrants. It provides as follows:

- "(e) 'visitor' means
  - (i) an entrant as of right, or
  - (ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract, or
  - (iii) any other person whose presence on premises is lawful, or
  - (iv) a person whose presence on premises becomes unlawful after his entry on those premises and who is taking reasonable steps to leave those premises.

It defines entrant as of right as:

"entrant as of right' means a person who is empowered or permitted by law to enter premises without the permission of the occupier of those premises."

It adopts the 'traditional' approach to trespassers i.e. no wilful or reckless conduct but provides as follows for child trespassers:

- "(1) Where an occupier knows or has reason to know
  - (a) that a child trespasser is on his premises, and

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<sup>42</sup> *Supra*, para. 3.45 et seq.

- (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,

the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.

- (2) In determining whether the duty of care under subsection (1) has been discharged consideration shall be given to
  - (a) the age of the child,
  - (b) the ability of the child to appreciate the danger and
  - (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of danger to the child.
- (3) For the purposes of subsection (1), the occupier has reason to know that child trespassers are on his premises if he has knowledge of facts from which a reasonable man would infer that children are present or that their presence is so probable that the occupier should conduct himself on the assumption that they are present."

4.120 *We provisionally recommend that such an exception for child trespassers should be made but we would substitute "foreseeable" for "probable" in (3).*

4.121 The child trespasser has led to reform of the law throughout the world. Courts on both sides of the Irish Sea have abolished old distinctions and standards in order to pay him damages. Where necessary they have implied a licence on his behalf. We would consider it entirely unrealistic to try to reverse this situation as proposed in the Deenihan Bill and consider it best to 'sway with the punch' and make special provision for child trespass while shoring up the legal, as distinct from the physical, defences against adult trespass.

4.122 We would consider it unjust and unfair to transform all recreational or 'deserving', accidental trespassers into licensees. To do so would be to ignore the significance attached to the ownership of land in Ireland, the owner's right to quiet enjoyment of his land, his right to keep people off his land and to block paths and tracks where there are no rights of way. It would make little of the generosity of occupiers who permit entry for recreation on their lands. We feel it would be wrong to legislate away the occupier's negotiating position. The occupier's duty to his lawful visitors, to his employees, under the 1989 Act, and to his own family will ensure that most lands and premises are reasonably safe in any event. To make recreational users licensees would

introduce the problems of definition associated with such users discussed above and would reintroduce into the law a classification based on the nature of the danger rather than the weight of the duty.

4.123 We discussed above<sup>43</sup> the use of a "reckless disregard" or "gross negligence" standard towards trespassers and favoured the latter. Again, we would amend the Alberta approach in that respect.

#### ***National Monuments***

4.124 Unless a right of way already exists, an occupier should have no special or extra duty towards persons entering his land to view a national monument. As we have seen above,<sup>44</sup> he is perfectly entitled to deny access to such monument. Whether he does so or not, entrants other than lawful visitors to his lands would be trespassers and he would only be liable for gross negligence towards them together with the special duty towards readily foreseeable child-trespassers. If the State wishes to encourage access to national monuments, it should do so by making special arrangements with the occupier e.g. by providing or paying for insurance cover. Once visitors are allowed, the monument and access to it must be made reasonably safe for visitors. *As we see it, no special legislation is required in the light of the other provisional recommendations we shall make, but we welcome views.*

4.125 Thus, we favour two classes of entrant, the lawful visitor and the trespasser, with special provision for the child trespasser. This leaves the accidental adult trespasser in the same position as the criminal trespasser. This is the situation which has prevailed for years. Exception has only been made by the Courts for child trespass. It has to be said, however, that the Superior Courts on either side of the Irish Sea have never failed to display ingenuity in finding a way to look after a deserving plaintiff, whether by implying a licence or adopting some other ploy. This situation will not change whatever law is ultimately enacted.

4.126 *We provisionally recommend, subject to the child-trespass exception*

(a) *that the legislation should prescribe a common duty of care for occupiers in respect of all lawful entrants or visitors. The legislation, should define "lawful entrant" or "visitor" and should spell out in clear terms the specifics of that duty in certain contexts. By doing so, the legislation can ensure that the courts are made fully conscious of the need to balance important factors relating to the social interest in determining what constitutes due care.*

(b) *that an occupier should not injure a trespasser intentionally or act with*

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43 *Supra*, paras. 4.67, 4.73.  
44 *Supra*, para. 4.105.

*gross negligence towards him.*

4.127 We now move on to examine some technical issues which require consideration regardless of what general principles of liability may ultimately be incorporated in the legislation.<sup>45</sup>

## **TECHNICAL ISSUES**

### **(1) How should Premises be Defined?**

4.128 We now must consider how the legislation should best define "premises" in setting the parameters of occupiers' liability. The subject is one that has arisen at common law, with courts adopting a broad interpretation of the concept so as to apply occupiers' liability to cases involving boats and ships<sup>46</sup>, trains,<sup>47</sup> street cars,<sup>48</sup> portable derricks,<sup>49</sup> aeroplanes,<sup>50</sup> scaffolding,<sup>51</sup> electricity pylons,<sup>52</sup> platforms,<sup>53</sup> ladders,<sup>54</sup> lifts,<sup>55</sup> and motor vehicles,<sup>56</sup> for example.

4.129 The crucial matter, of course, in relation to these instances of liability, concerns the nature of the complaint that the plaintiff makes: if it is in regard to the *condition* of the particular structure, then it is appropriate to deal with the complaint under the principles of occupiers' liability. If it concerns the negligence of the operator - of a car or train, for example, that is a claim that should be dealt with under ordinary negligence principles. The place for drawing this distinction is in the specification of the duty appropriate to occupiers rather than in the definition of "premises".

4.130 The statutory definitions of "premises" around the common law would differ only slightly among themselves in points of detail. Our own preference, on the basis of its simplicity, is that found in section 1 of the Ontario's *Occupiers' Liability Act*, to the following effect:

"premises' means lands and structures, or either of them, and includes

(a) water,

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45 We appreciate that the question of the general model of liability can have an impact on how these specific issues should be resolved. Our discussion proceeds on the basis that the general principle of liability will embrace negligence as a universal, or at all events, predominant test.

46 *Long v Saorstat & Continental Steamship Co Ltd*, 83 ILTR 137 (1953), *Maguire v Pacific Steam Navigation Co Ltd* unreported, Supreme Ct, 26 May 1955, *King v Northern Navigation*, 27 OLR 79 (1913), *Webber v Toronto* [1955] OWRN 181.

47 *Grand Truck Railway v Barnett* [1911] AC 361, *Foulkes v Metropolitan District Railway Co*, 5 CPD 157 (1880).

48 *Gebbie v Saskatoon* [1930] 4 DLR 543.

49 *Redwell Servicing Co v Lane Wells*, 16 WLR 615 (1955).

50 *Fosbroke-Hobbes v Airwork Ltd* [1937] 1 ALL ER 108.

51 *Collen Bros (Dublin) Ltd v Scaffolding Ltd* [1959] IR 245.

52 *Kenny v ESB* [1932] IR 73, *McNamara v ESB* [1975] IR 1, *Keane v ESB* [1981] IR 44.

53 *Parkinson v Peelo*, 73 ILTR 218 (1939).

54 *Woodman v Richardson* [1937] 3 All ER 866.

55 *Haseldine v Daw* [1941] 2 KB 343.

56 *Lomas v M Jones & Son* [1944] KB 4.

- (b) ships and vessels,
- (c) trailers and portable structures designed or used for residence, business or shelter,
- (d) trains, railway cars, vehicles and aircraft, except while in operation".

4.131 *We provisionally recommend that "premises" be defined on these lines in the proposed legislation.*

**(2) Who should be Characterised as Occupier?**

4.132 Under the present law, the occupier is one who exercises *control* over the premises. This function may be shared among several persons, all of whom will thus be characterised as occupiers. In *Wheat v Lacon*<sup>57</sup>, Lord Denning MR said:

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

4.133 Thus, clearly an owner in occupation is the occupier; similarly a tenant with respect (at least) to the demised property<sup>58</sup>; so also a licensee (as in *Wheat v Lacon* itself); indeed any person who has the right to possession of the premises together with the right to invite or permit another to enter them<sup>59</sup> may have sufficient control to warrant being characterised as occupier. Occupation may be temporary as where a contractor is on the land for a limited period.<sup>60</sup>

4.134 When it comes to dealing with this matter in the legislation, several strategies have found favour. One is simply for the legislation to provide that the definition of who is an occupier is to continue to be determined by the common law rules. This, in effect, is the solution followed in England and Scotland. Another approach, adopted by the Uniform Law Commissioners in Canada, as well as in the legislation of Alberta, Ontario and British Columbia,

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57 [1968] AC 552, at 578.

58 The landlord will normally have sufficient control of the common areas (eg stairways) to justify his being characterised as occupier of them.

59 Cf, eg, *Humphreys v Dreamland (Margate)*, 100 LJKB 137 (1930).

60 *Hartwell v Grayson Follo and Clover Docks* [1947] KB 901, *Duncan v Cammell Laird and Co*, [1943] 2 All ER 621 (rev'd on other grounds [1946] AC 40).

is to define an occupier as meaning:

- "(i) a person who is in physical possession of premises; or
- (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises,

and, for the purpose of this Act, there may be more than one occupier of the same premises".

4.135 In an incisive analysis of this definition, the Manitoba Law Reform Commission expressed its reservations:

"Individuals who are in physical possession of premises need not necessarily be occupiers, as clause (i) .... stipulates. For instance, individuals may occupy premises vicariously (on behalf of their master). Although they are in physical possession of these premises, these individuals are not generally considered to be occupiers.<sup>61</sup> In addition, licensees of premises (lodgers and hotel guests) are in possession of certain premises but usually lack sufficient control to be held responsible at common law for injuries arising thereon. Moreover the definition derived in clause (ii) of this section may be drafted too restrictively. The purpose of this portion of the definition is to include those individuals who are not in actual possession of premises but are in sufficient control to be held accountable as occupiers for dangers sustained there on. ....[T]his definition [would not] include the defendant company in ... *Wheat v Lacon*<sup>62</sup> .... In [that] case Lord Denning MR held the company to be an occupier on the sole basis that it had the exclusive right under a licensing agreement to enter and use the premises where the injury was sustained. In addition, it is our view that there is some doubt as to whether the definition, as drafted, would include landlords. That is, they are generally held to be liable as occupiers of the common elements of a building. It is certainly doubtful, however, that a landlord has the right to control the visitors to his tenants' premises, as the definition specifies."<sup>63</sup>

4.136 The Commission preferred a definition of occupiers as:

"mean[ing] an occupier at common law and [one that] may include:

- (i) a person who is in physical possession of premises;

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61 Citing Viscount Dilhorne's comments in *Wheat v Lacon* [1968] AC, at 574.

62 *Supra*.

63 Manitoba Law Reform Commission, *Report on Occupiers' Liability*, pp46-47 (Report No 42, 1980) (certain citations omitted).

or

- (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises.

and, for the purposes of this Act, there may be more than one occupier of the same premises."<sup>64</sup>

4.137 This proposed definition has found its way to the Manitoba statute books.<sup>65</sup>

4.138 The obvious advantage to this approach is that it avoids the inadequacies of too strict an identification between control and occupation. The disadvantage is equally plain: it forces the court to examine pre-legislation case law.

4.139 Our own provisional preference is to adopt a definition that takes account of the dangers of an over-restrictive definition. We would wish, if possible, to avoid any reference in the legislation to the previous common law position, as this introduces gratuitous uncertainty. *Accordingly we provisionally propose that the legislation should provide that the term "occupier" means a person exercising such control over the premises that it is proper to impose on him a duty of care relative to persons entering thereon, and that, without prejudice to the generality of that definition, an occupier may, in the circumstances of any particular case, be:*

- (i) *a person who is in physical possession of premises; or*
- (ii) *a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises,*

*and that, for the purpose of the legislation, there may be more than one occupier of the same premises.*

**(3) Should the Legislation Elaborate on what Constitutes Reasonable Care?**

4.140 We now must consider whether it would be desirable for the legislation to elaborate on what amounts to reasonable care by occupiers relative to lawful entrants. Perhaps the best introduction to this topic is to quote subsections (3) and (4) of section 2 of the English Act of 1957:

- "(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be

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<sup>64</sup> Cf *id.*, pp42-43.

<sup>65</sup> Cf section 1(1) of Manitoba's *Occupiers' Liability Act*.

looked for in such a visitor, so that (for example) in proper cases -

- (a) an occupier must be prepared for children to be less careful than adults; and
  - (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
- (4) It determining whether the occupier of premises has discharged the common duty of care to a visitor regard is to be had to all the circumstances, so that (for example)-
- (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
  - (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

4.141 This specificity was partially reflected in section 4 of New Zealand's legislation, but found no favour with the Ontario Law Reform Commission, whose rejection was based on an apparent misunderstanding of the effect of the English Act:

"Subsection (3) of section 2 of the English Act ... provides a list of 'circumstances' which must be considered by a court in determining whether the common duty of care has been exercised by the occupier. The Commission felt that such an approach was too restrictive in that a court may wish to consider other circumstances in determining whether an occupier has discharged the common duty of care."<sup>68</sup>

4.142 The Commission's misunderstanding results from its failure to place proper emphasis on the word "include" in section 2(3), which must be read in conjunction with section 2(2), defining the common duty of care as a duty to take "such care as in all the circumstances of the case" is reasonable.

4.143 We agree with the criticism of one commentator<sup>67</sup> that clause (a) of section 3(3) is scarcely necessary, since it does no more than state a clearly established general rule in regard to the duty to care. As regards the other matters spelt out in section 3(3) and (4), however, we see merit in the proposed legislation's inclusion of equivalent provisions. Each of them articulates a rule clearly related to the particular context of occupiers' liability. In each instance, the rule either clarifies, reverses<sup>68</sup> or confirms the common law position. If the proposed legislation were to leave out these provisions, it could result in quite unnecessary litigation up to the Supreme Court.

4.144 *Accordingly we provisionally recommend that the proposed legislation should contain a provision to the effect that the circumstances relevant in determining whether the occupier has discharged his duty of care include the degree of care that would ordinarily be looked for in such a visitor, so that (for example) in proper cases an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so. The legislation should also provide that, where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable that visitor to be reasonably safe.*

4.145 We discuss below, *and provisionally recommend the inclusion in the legislation of a provision to the effect that an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*

#### **(4) Should the Occupier be Free to Modify or Exclude Liability?**

4.146 We now must consider a difficult series of interrelated issues relating to the entitlement of an occupier to modify or exclude the liability arising under the legislation. The law on this subject represents a crossroads between tort and contract, in which the underlying policies are not easy to reconcile.

4.147 The types of question we must address are as follows. Should the occupier be free to raise the defence of voluntary assumption of risk against entrants? If so, should that defence apply only where the entrant has suffered personal injury or death rather than mere property damage? If the defence has

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<sup>67</sup> Payne, *The Occupiers' Liability Act*, 21 Modern L Rev 359 (1958).

<sup>68</sup> In England, clause (a) of section 2(4) had the effect of overruling the House of Lords decision in *London Graving Dock Co v Horton* [1951] AC 737. As has been mentioned, the Supreme Court did not endorse the principles laid down in *Horton*.

any permitted sphere of operation should it be subject to a proviso that the entrant's agreement to waive a right of action be reasonable? Should the answer depend on the particular category of entrant or of occupier? Should a reasonable attempt by the occupier to bring a notice containing an exemption clause to the attention of the claimant suffice? Should exemption clauses necessarily be subject to a strict privity requirement? If so, should strangers to the contract be capable of losing their rights under the legislation by having an exclusion notice brought to their attention?

4.148 Clearly the answers to these questions cannot be hazarded on a piecemeal basis. We must seek to produce statutory provisions that have an underlying harmony of principle and policy.

4.149 Perhaps the best statutory point is in relation to the defence of voluntary assumption of risk. The matter in relation to negligence actions generally is dealt with by section 34(1)(b) of the *Civil Liability Act, 1961*, which provides that:

"this subsection [which deals with contributory negligence] shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the defendant might, apart from the subsection, have the defence of voluntary assumption of risk"

4.150 Since this provision was enacted, " what used to be called the defence of *volenti fit injuria* ... can now properly be described in the words of the ... Act ... as 'the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it'".<sup>69</sup>

4.151 The present position therefore may be summarised as follows. The defence of *volenti* is gone, but a defendant can escape any liability in two cases: (a) where he shows that by contract he is not liable; or (b) where he shows that the plaintiff before the act agreed to waive his legal rights in respect of it.<sup>70</sup> In either case the burden of establishing the defence falls on the defendant.<sup>71</sup>

(a) *Contract*

4.152 Contract<sup>72</sup> may exempt the defendant but the courts will not regard such a defence with any great enthusiasm. In *O'Hanlon v E.S.B.*<sup>73</sup> Walsh J. noted that:

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69 *O'Hanlon v E.S.B.* [1969] I.R. 75, at 90 (Sup. Ct., per Walsh J.).  
70 Cf. *Knox v Great Northern Railway Co.* [1886] 2 IR 832 (C.A., 1895, affg. Q.B. Div., 1894).  
71 *O'Hanlon v ESB*, *supra*, at 90 (per Walsh J.).  
72 "Contract" is defined as meaning a contract under seal or by parol: section 2(1).  
73 [1969] IR 75, at 91 (Sup. Ct.)

"it is already settled that such contracts are construed strictly against the party claiming the benefit of the exception and there are instances<sup>74</sup> where such contracts are actually prohibited by statute."

(b) *Agreement*

4.153 It is now clear that the "agreement" contemplated by section 34(1)(b):

"necessarily contemplates some sort of intercourse or communication between the plaintiff and the defendan[t] from which it could be reasonably inferred that the plaintiff had assured the defendan[t] that he waived any right of action he might have in respect of the negligence of the defendan[t]. A one-sided secret determination on the part of the plaintiff to give up his right of action for negligence would not amount to an agreement to do so. Such a determination or consent may be regarded as 'voluntary assumption of risk' in the terms of the Act but by virtue of the provisions of the Act for the purposes of the Act, this would be contributory negligence and not the absolute defence mentioned in the first part of sub-s.1(b) of section 34."<sup>75</sup>

4.154 There are very considerable difficulties in determining whether there was "some sort of intercourse or communication between the plaintiff and the defendan[t] from which it could reasonably be inferred that the plaintiff had assured the defendan[t] that he waived any right of action he might have....". Where the communication is expressed by means of language used by both parties, no particular problem arises, the court's task being merely one of interpretation, but where it is non-verbal, or where only one party speaks, the position is less clear.

4.155 If I say to a passenger to whom I am giving a lift: "I am a bad driver, and you may travel with me only if you do not sue me for injury I cause you by my negligent driving" and he says nothing but gets into the front seat, it would seem that there has been sufficient evidence of "communication" for the purposes of the statutory defence. But what is the position if there is merely a notice in the front window stating: "All passengers drive at their own risk", which the passenger reads?<sup>76</sup> In *McComiskey v McDermott*,<sup>77</sup> the Supreme Court held that such a notice did not bind the passenger, as it was (to the plaintiff's knowledge) already in the car when the defendant bought it, and as the defendant had not shown that he had adopted it "as coming from him" or that he intended it to bind the plaintiff or that the plaintiff so accepted it. Griffin J. cautioned, however, that "in an appropriate case the affixing of a notice to the dashboard might lead to the inference that there was agreement between the

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74 Cf. *Attorneys' and Solicitors' Act 1870*, section 7. See also the *Sale of Goods and Supply of Services Act 1980*, sections 40 and 46.

75 *O'Hanlon v E.S.B. supra* at 92.

76 Cf. Tan Keng Feng, *Dashboard Notices - Motor Insurers' Saviour* [1983] 1 *Malaya L.J.* cixix.

77 [1974] IR 75 (Sup. Ct., 1973)

passenger and the owner sufficient to set up the statutory defence ....<sup>78</sup>

4.156 In *Ryan v Ireland*,<sup>79</sup> in 1989, the Supreme Court rejected the *volenti* defence in relation to a soldier injured in the Lebanon, where he had enlisted for United Nations service. No express contract waiving his right to sue if injured by the negligence of his superior officers had been suggested. He had "accepted the risks inherent in the possibility of being involved in armed conflict",<sup>80</sup> but it could not be implied that he had accepted the risk of being unnecessarily exposed to injury by negligence. The Court did not refer to the possibility that the plaintiff had waived his right to sue by agreement other than of a contractual nature - presumably because no evidence to this effect had been tendered by the defendant.

4.157 One of the difficulties with the manner in which section 34(1)(b) has been drafted is that a free choice to undertake a particular risk caused by the defendant's negligence must be ignored, and the plaintiff permitted to recover in full, if that choice does not implicate the plaintiff with contributory negligence<sup>81</sup> and there is, in the circumstances of the case, no "intercourse or communication" between plaintiff and defendant on the issue.<sup>82</sup> The requirement of an agreement between the parties means that a defendant's liability is not affected by the plaintiff's free, but uncommunicated, choice to assume the risk. Of course, the courts may respond to the problem in specific cases by adopting a constricted "individuated" duty of care to take account of the willingness of the plaintiff to undergo the risk.<sup>83</sup>

4.158 How should all of these principles impinge on the law relating to occupiers' liability. Some basic issues of policy arise. Should an occupier be permitted by contract to exclude all or some of the liability that would otherwise attach to him under the proposed legislation? Is there any reason why occupiers' liability should generate distinct rules different from those applying to the voluntary assumption of risk defence in general? More radically, should the defence as a whole be modified?

4.159 Experience in other countries is helpful, but goes only some way towards resolving these questions, as the defence of voluntary assumption of risk in many of these countries ranges somewhat more broadly than section 31(1)(b) of the 1961 Act permits here. As a general rule, the legislation in most countries does at least two things: it provides in express terms for the defence of voluntary assumption of risk and it concedes some right to the occupier to modify or

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78 *Id.*, at 94. Cf. *Bennett v Tugwell* [1971] 2 Q.B. 267. *Birch v Thomas* [1972] 1 All ER 705 (C.A.), *Geier v Kujawa*, *Weston & Ware Bros. (Transport) Ltd* [1970] 1 Lloyd's L.R. 364. See also Symmons, 9 Ir. Jur. (n.s.) 79 (1974).  
79 [1989] IR 177.  
80 *Id.*, at 183.  
81 Cf. Simmons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 Boston U.L. Rev. 213, at 234 (1987).  
82 Cf. *id.*, at 226, fn 45.  
83 Cf. *McComiskey v McDermott*, *supra*. See also *Condon v Basi* [1985] 1 WLR 868 (CA), analysed by Ople, 15 Melbourne U.L. Rev 756 (1986).

exclude the tortious liability that would otherwise arise under the legislation. There is, however, much variation in detail in both these categories of provision, which overlap to a considerable extent.

4.160 In relation to voluntary assumption of risk, some jurisdictions limit the capacity of an entrant to consent only to relieve the occupier of a duty of care in his regard; the occupier remains liable for intentionally harming the entrant or for acting with reckless disregard for his presence.<sup>84</sup> It has been suggested that this limitation goes no further than the position at common law.<sup>85</sup> It seems clear that the notion of voluntary assumption of risk is not generally considered to depend on the "intercourse or communication" which section 34(1)(b) demands. This explains why the legislation in so many jurisdictions contains a provision dealing with voluntary assumption of risk *in addition to* one relating to contracting out.<sup>86</sup> For example, section 4(1) of Ontario's legislation provides that the statutory duty of care does not apply in respect of risks "willingly assumed by the person who enters on the premises..." The Ontario Law Reform Commission, when recommending the inclusion of this provision, explained that it sought to prescribe the rules of common law concerning the application of the *volenti* principle, "even though its scope has been significantly narrowed by recent Canadian decisions".<sup>87</sup> There is nothing in the Commission's analysis that suggests its objection in principle to the application of the defence of voluntary assumption of risk in cases *not* involving some "intercourse or communication" between the parties from which waiver might be inferred. Indeed, none of the law reform agencies proposing the inclusion of the *volenti* defence in occupiers' liability legislation seem to have been in any respect exercised by such a concern. As matters have turned out in Canada in recent years, the courts have expressed a preference for a delimitation not much broader than our section 34(1)(b). In *Dube v Labar*<sup>88</sup>, the Supreme Court of Canada emphasised the requirement of bargaining away rights rather than of mere foolhardiness. Estey J observed that the acceptance of risk:

"may be express or may arise by necessary implication from the conduct of the parties, but it will arise.....only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to."<sup>89</sup>

4.161 Statutory provisions dealing with the modification and exclusion of liability vary from jurisdiction to jurisdiction. Some jurisdictions expressly

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84 Eg Ontario and Western Australia.  
85 Handford, *Occupiers' Liability Reform in Western Australia and Elsewhere*, 17 W Austr L Rev 182, at 199 (1987). See also Symmons, *How Free Is the Freedom of the Occupier to Restrict or Exclude His Liability in Tort?*, 38 Conv 253, at 267-268 (1974).  
86 Cf *Titchener v British Railways Board* [1983] 3 All ER 770 (HL (Sc)).  
87 Ontario Law Reform Commission's *Report on Occupiers' Liability*, p 23 (1972) citing *Car & General Insurance Co v Seymour and Moloney*, 2 DLR (2d) 369 (1956), *Hambly v Shepley*, [1967] 2 OR 217, and *Eld v Dumas*, 5 DLR (3rd) 561 (1969).  
88 27 DLR (4th) 653 (1986).  
89 *Id.*, at 658-659.

*authorise* the practice, before going on to specify restrictions thereon. Thus, for example, section 4(1) of Manitoba's *Occupiers' Liability Act* provides that:

"[a]n occupier may, by express agreement or by express stipulation or notice,

- (a) extend or increase the [statutory] duty [of care to entrants]; or
- (b) restrict, modify or deny th[at] duty....subject to any prohibition or limitation imposed by this or any other Act of the legislature against or on the restriction, modification or denial of the duty".

4.162 Having prescribed this general entitlement, the legislation goes on to *delimit its scope*. Of particular relevance for present purposes are subsections (2) and (3) of section 4, which provide as follows:

"(2) No restriction, modification or denial of the [statutory] duty [of care], whether by agreement, stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include

- (a) the relationship between the occupier and the person affected by the restriction, modification or denial;
- (b) the injury or damage suffered and the hazard causing it;
- (c) the scope of the purported restriction, modification or denial; and
- (d) the steps taken to bring the restriction, modification or denial to the attention of the person affected thereby.

(3) ....[W]here an occupier restricts, modifies or denies the [statutory] duty [of care], the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed."

4.163 England's approach, as we have seen, is somewhat more complicated. Section 2(1) of the 1957 Act imposes on the occupier the "common duty of care" to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude the duty to any visitor or visitors "by agreement or otherwise". Thus a notice may suffice. Until 1977, the only inhibition on the occupiers' freedom was contained in section 3(1) of the 1957 Act which deals

with contractual provisions purporting to affect strangers to the contract. This is a matter which we discuss in detail below. The Unfair Contract Terms Act 1977 transformed the position. Two commentators observe in its regard that:

"in one deep scoop, [it] undermined the *laissez-faire* thinking which had dominated the law until its coming into force. If the old law attached undue importance and protection to land ownership, the new law may have gone too far the other way."<sup>90</sup>

4.164 The crucial focus in the 1977 Act (as amended by the *Occupiers' Liability Act, 1984*) is on cases of "business liability". This notion envisages liability for breach of obligations or duties arising *either* from what a person does in the course of business *or* "from the occupation of premises used for business purposes of the occupier".<sup>91</sup> Visitors using premises for recreational or educational purposes do not generate a business liability unless granting them access for these purposes "falls within the business purposes of the occupier."<sup>92</sup>

4.165 In circumstances involving "business liability", the occupier may not exclude liability resulting from breach of his common duty of care under the 1957 Act. As regards other types of loss, notably damage to property, a purported exclusion of liability is effective if it is reasonable in view of all the circumstances prevailing when the liability arose.

4.166 A matter that raises somewhat more straightforward policy issues concerns the position of strangers to a contract between the occupier and another party, the terms of which profess to impose, restrict or exclude liability on the part of the occupier relative to those strangers. For the purposes of our discussion we can adopt the definition of a stranger to the contract, contained in section 3(3) of England's 1957 Act, as "a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it...."

4.167 A characteristic feature of occupiers' liability legislation is the inclusion of a provision to the effect that the occupier cannot by contract effectively restrict or exclude the liability that is his under the legislation so far as strangers to the contract are concerned. Section 5(1) of the Ontario Act is a straightforward example:

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90 Dias & Markesinis, *op cit*, p 202.

91 Dias & Markesinis, *op cit*, p202, criticise the vagueness of the latter term:

"Should the Act apply only to premises which are 'mainly used' for business purposes by their occupier, or only 'exclusively' used for such purposes? Where the use of premises for business is only minor or incidental the application of the Act should, arguably, be excluded. What if a doctor uses his sitting-room as an overflow waiting-room? And what if the entire premises are used for private purposes except for one hour every morning? Would the Act apply for that hour, and for the rest of the day would we revert to the old law? Other problems will no doubt arise.... What answer should be given if the facts were similar to those in *White v Blackmore* [1972] 2 QB 651 where a fee was charged for entrance on land, the proceeds going to a charitable purpose?"

92 *Occupiers' Liability Act 1984*, section 2.

"The duty of an occupier under this Act, or the occupier's liability for breach thereof, shall not be restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises".

4.168 There appear to be no voices today<sup>83</sup> supporting the extension of contractual immunity beyond the confines of privity.

4.169 A more contentious question is whether strangers to the contract should be permitted to avail themselves of an occupier's contractual obligations *in excess* of his statutory duty of care relative to them. The English answer is that they should: section 3(1) of the 1957 Act provides that the occupier's duty of care to strangers to the contract:

"shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty".

4.170 This generosity to strangers to the contract is not generally reflected in the legislation of other jurisdictions, whose law reform agencies have perceived no pressing policies that would warrant such an abrogation of the normal rules of privity of contract.<sup>84</sup>

4.171 A more subtle issue concerns the relationship between the provisions rendering an occupier incapable of excluding or restricting his liability by contract to strangers to the contract and provisions permitting him to exclude or restrict his liability to these strangers by an adequate *non-contractual* notice. A commentator has posed the question thus:

"Suppose that the occupier is by contract with another party bound to permit third persons to enter the premises -for example, when the other party is a contractor and the entrants are the contractor's servants. Though the occupier cannot exclude liability to the servants by means of the contract between himself and the contractor, can the occupier exclude liability to the servants by a notice placed at the entrance to the premises?."<sup>85</sup>

4.172 On one view, to allow the occupier to avoid his contractual liability by means of a notice subverts the policy of protecting strangers (usually employees of the party with whom the occupier contracted). On another view, these strangers cannot complain if they are made aware,<sup>86</sup> through reading the notice, of the diminution or extinction of their rights. An element that is relevant

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83 In contrast to half a century ago: *Fosbrooke-Hobbes v Aitwork Ltd*, *supra*.

84 Cf. the New South Wales Law Reform Commission's *Working Paper on Occupiers' Liability*, para 71 (1969); Handford, *Occupiers' Liability Reform in Western Australia and Elsewhere*, 17 W Austr L Rev 182, at 204 (1987).

85 Handford, *op cit*, at 205.

86 Actually or constructively.

here is whether the occupier is *bound* by the contract to admit the particular stranger. If an occupier contracts with the builder to have an extension to his home built, and either expressly or impliedly undertakes to grant admission to the builder's employees to whom he undertakes to act with due care, is there not something unjust about a rule that would enable the occupier to avoid *all* liability, tortious and contractual, to the employees by the device of a notice?

4.173 This brings us to the question of the duty owed to *contractual entrants*. As we have seen, under present law, in the absence of express terms dealing with the matter, there is an implied term that the occupier will take reasonable care. In England there is a specific provision in the 1957 Act dealing with the question. Section 5 provides as follows:

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

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

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

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

4.174 In other jurisdictions, the tendency is to deal with the occupier's duty to contractual entrants simply as an integrated aspect of the common duty of care.

4.175 After this brief review of the issues arising in respect of the question of modification and extinction of liability, it is necessary to formulate provisional proposals for reform.

4.176 First let us turn to the question of voluntary assumption of risk. The issue here is one with implications ranging wider than the specific area of occupiers' liability. The crucial policy question is whether the defence under section 34(1)(b) should continue to be restricted (at all events in respect of occupiers' liability) to cases involving some "intercourse or communication between the [parties] from which it could reasonably be inferred that the plaintiff had assured the defendan[t] that he waived any right of action he might have in

respect of the negligence of the defendan[t]"<sup>97</sup>.

4.177 In favour of this limitation two arguments may be preferred. First, that the defence of voluntary assumption of risk is rightly concerned with the requirement of proof of *agreement* between the parties whereby the plaintiff waived his right of action. The judicial translation of the notion of agreement into one necessarily involving "some intercourse or communication" may be regarded perhaps as a narrow but nonetheless sensitive interpretation. If the courts were able to find an implied agreement from facts involving no interpersonal communication relevant to that agreement there would be a real risk that foolhardiness would be treated as implied agreement to waive the right of action rather than as contributory negligence. The whole point of the transformation brought about by the *Civil Liability Act, 1961* in relation to foolhardy conduct was to reduce its impact to that of generating a proportionate reduction in damages rather than the complete defeat of the plaintiff's action.<sup>98</sup> Secondly, it may be argued that the defence of voluntary assumption of risk would subvert the establishment of a statutory duty of care in respect of occupation of land unless it is based on genuine, communicated agreement. Let us take the position of persons who enter land having been warned by the occupier of a hidden danger on it. Let us assume further that in the particular circumstances, the warning was not sufficient to discharge the occupier's duty of care to the entrant because it does not enable him to carry out on the land the exercise for which he wished to go onto the land. In such circumstances, a finding that the entrant had impliedly agreed to waive his right to sue by going on the land would have the effect of destroying the occupier's liability in a way that is logically contradictory to the values generating that putative liability in the first place. There is a deep inconsistency in articulating the rule that warnings do not necessarily discharge the duty of care to entrants and then going on to hold that, with respect to at least some of the cases where the warning does *not* discharge the duty, the entrant nonetheless, by deciding to confront the danger, should lose his case.

4.178 As against these arguments, some other considerations have to be weighed. As to the first it may be replied that it is doubtful whether it was wise of the courts to have demanded proof of "some intercourse or communication" between the parties from which waiver might be inferred: even contract law, with its stringent rules of offer and acceptance, would not seem to go so far in practice.<sup>99</sup> It is one thing to be chary about invoking the *volenti* principle against a plaintiff who, with his eyes open, willingly exposed himself to a known danger by what might be called a private decision, with the defendant ignorant of the fact that the plaintiff had subjected himself to the danger. To imply an agreement in such a case clearly could not in any sense be rooted in a

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97 *O'Hanlon v ESB*, [1989] IR, at 92.

98 See McMahon & Binchy, *op cit*, ch 20. In this context it is worth noting that the principle of negligent failure to mitigate damage is deemed by section 34(2)(6) of the Act to amount to contributory negligence in respect of the amount by which such damage exceeds the damage that would otherwise have occurred: McMahon & Binchy, *op cit*, pp357-358.

99 Cf. *The Salinita*, [1985] P248, *aff'd*, *sub nom Clarke v Dunraven* [1897] AC 59.

factual base of interpersonal agreement. But *some* contexts of exposure to danger may be considered to lend themselves more easily to a legal characterisation of implied agreement in the absence of any communication between the parties. Occupiers' liability may well be regarded as one such context. The entrant's act of crossing the threshold is not of the same social quality as crossing the street. To go onto someone's property is an act that immediately raises questions which, in a sense, call for answer by the entrant in terms of the relationship that he is thus establishing with the occupier. He is seeking to use the other's property by a free act of his own.

4.179 It is a matter of common knowledge that real property can have its dangers, some patent, some hidden, some inevitable, some caused by human error or neglect. If a person chooses to enter onto another's property, without conferring any benefit on the occupier<sup>100</sup> and in the face of (for example) a patent danger, could it not be said, credibly, that he has assumed the risk, even to the extent of ascribing an implied agreement not to sue? If the rhetoric of "proximity of relationship" can generate a legal relationship out of a factual relationship, why should there be a fundamental objection to the legal ascription of an agreement based on a clearly known relationship between the parties, where the entrant has acted in such a manner as to indicate a willingness to undertake the risk in circumstances where that willingness is quite inconsistent with the *justice* of his subsequently suing the occupier for injuries?<sup>101</sup>

4.180 The theme of justice arguably underlines the *volenti* doctrine at common law. It surely explains, more credibly than a purported examination of the plaintiff's psychological state, the development of the courts' approach to the application of the doctrine in relation to employment<sup>102</sup> and rescue<sup>103</sup> cases.

4.181 As to the second rationale put forward in defence of the present approach, it may be argued that it elevates what is a sound point in relation to some specific contexts into an unacceptable general principle. There *are* some relationships in which the capacity of the *volenti* defence to subvert the policy or principles underlying the defendant's duty of care makes it just to abrogate the

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100 *A fortiori* in a case where the occupier has not consented to his presence on the property.

101 *Cf Donaldson v Irish Motor Racing Club and Thompson*, Supreme Court, 1 February 1957, extracted in McMahon & Binchy, *Casebook on the Irish Law of Torts*, pp220-28 (1st ed, 1983), where Kingsmill Moore J observed (at p224) that:

"it corresponds to common sense and reality to suppose that the spectators appreciate and take the risk of certain accidents inherent in the nature of the game or sport. If it were pointed out to the ordinary spectator at a point to point or a motor race that a horse or car might get out of control and run into him, causing him serious injuries, he would probably reply 'I know that, but the chances are so small that I am willing to risk it'; and if a spectator on the touch line at a hockey match or round the green at a golf championship were reminded that it was by no means an improbability that he could be hit by a ball he would say 'Yes but the chances of any serious injury resulting are so remote that I am prepared to disregard them'. Where the liability of the promoter rests on contract (as where the spectator pays) effect can be given to these considerations by implying a term to accept such risks; and, where it lies in tort, the same result can be arrived at by applying the doctrine of *volenti non fit injuria*'.

102 *Cf Bowater v Rowley Regis Corporation* [1944] KB 476, *Merrington v Ironbridge Metal Works Ltd* [1952] 2 All ER 1101, McMahon & Binchy, *op cit*, 336-338, *Rafferty v Parsons (CA) of Ireland Ltd*, [1987] ILRM 98 (Sup Ct, 1986).

103 See Binchy, *The Good Samaritan at the Crossroads: A Canadian Signpost*, 25 NILQ 147 (1974).

application of that defence: employers' liability<sup>104</sup> or (arguably) the relationship between car drivers and their passengers,<sup>105</sup> for example.

4.182 To compound the difficulties it is worth bearing in mind that the *volenti* issue can easily be recast in terms of an analysis of the parameters of the defendant's duty of care, the discharge of that duty and of causation characterisation. If we take the case law dealing with injuries caused to spectators at sporting events, we encounter a melange of characterisation which can be difficult to unravel. In *Callaghan v Killarney Race Co Ltd*<sup>106</sup>, the Supreme Court unanimously held that the trial judge had been correct in withdrawing the case from the jury where a spectator at a race-track standing close to a hurdle had been injured by a horse that jumped to the side of the hurdle. Maguire CJ stated that:

"[t]he risk of what happened occurring is inherent in racing and particularly in the type of race which was taking place. That it would happen in precisely the way it did may ... be unforeseeable, but that a horse might jump off the course was a possibility of which all intelligent spectators are aware.<sup>107</sup> The plaintiff must be held to have accepted this risk, and accordingly there is no evidence of any breach of duty on the part of the defendants which would render them liable".<sup>108</sup>

4.183 This analysis conflates the issues of duty and voluntary assumption of risk - a process not of great importance when voluntary assumption of risk encompassed a plaintiff's *uncommunicated* freely chosen exposure to danger resulting from the defendant's negligence but of crucial significance when the efficacy of the defence of voluntary assumption of risk was made to depend on *communicated* agreement not to sue. After that change, the plaintiff's action stands or falls on the basis of the court's disposition of the duty issue. It was a matter of no moment in *Callaghan* whether the rejection of the plaintiff's case was in terms of the absence (or lack of breach) of the defendants' duty or of the plaintiff's voluntary acceptance of the risk. Today the distinction is vital because the characterisation of the issue as one properly dealt with exclusively in terms of voluntary assumption of risk (rather than interchangeably with the concept of duty) will mean that a plaintiff will win his case if there was

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104 Cf *Bexiga v Havir Manufacturing Corp*, 80 NJ 402, 290 a 2d 281 (1972), *Wheeler v New Merton Board Mills* [1833] 2 KB 699, *ICI Ltd v Shatwell*, [1995] AC 656, *Salmond & Heuston on the Law of Torts*, p258 (20th ed, by RFV Heuston & RA Buckley, 1992). In *Siragusa v Swedish Hospital*, 80 Wn 2nd 310, 373 P 2d 767 (1962), it was observed that, if the employer has the positive duty to furnish a reasonably safe place of work,

"it is not just or fair to permit an employer except liability for a failure to perform this duty simply because the employee was aware of the danger when he reasonably elected to expose himself to it while in the course of employment. To do so is to affirm and deny, in the same breath, the employer's duty of care.

105 As England has done *Road Traffic Act 1988*, section 149(2).

106 [1958] IR 366 (Sup Ct, 1956).

107 There is here an interesting anticipation of the distinction drawn by the House of Lords in *Hughes v Lord Advocate*, [1964] AC 837; the contrast is, of course, that, whereas the elasticity in the notion of reasonable foresight, blessed by the House of Lords in *Hughes*, was seen as capable of acting in aid of the interests of plaintiffs in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering (The Wagon Mound No 1)* [1961] AC 388 (PC), Maguire CJ used the same elasticity in favour of the defendants in *Callaghan*.

108 [1958] IR, at 372.

no communication between the parties.

4.184 Returning to the judgments in *Callaghan*, it is useful to contrast Kingsmill Moore J's approach with that of the Chief Justice. The crucial part of his judgement is in the following terms:

"There is no evidence that the owners of race-courses are accustomed to protect spectators by a double fence or by a fence which a horse cannot negotiate, nor, having regard to the rarity of a horse running wild among the spectators, could it be regarded as folly to fail to take such precautions. The spectators at Killarney have a right to view the race from any part of the interior margin of the course and, if there is an obligation to fence one part there is an obligation to fence every part. No evidence was adduced to show that a horse was more likely to leap the fence at one part than another.

In judging what a reasonable and prudent man would think necessary more than one element has to be considered. The rarity of the occurrence must be balanced against the gravity of the injury which is likely to ensue if the occurrence comes about, and some consideration must be paid to the practicability of the precautions suggested. If there was an obligation to double fence the whole perimeter, or to surround it with an unbreakable fence, the expense might well put an end to many of the smaller race-courses, or involve a higher price for admission. Having regard to the unlikelihood of the occurrence and the difficulty and expense of taking adequate steps to make such an occurrence impossible, and the practice prevailing at other similar race-courses, I do not consider that a jury could properly find that the defendant Company were guilty of a lack of reasonable care.

It must be remembered that there was no obligation on the plaintiff to post himself so near the rails, and if he chose to do so it seems to me that the defendant Company can rely on the further limitation of liability which Scrutton LJ and Greer LJ laid down in *Hall v Brooklands Auto Racing Club*<sup>109</sup> and which was approved by the English Court of Appeal in *Murray and Another v Harringay Arena Ltd*<sup>110</sup> namely that a person paying for his licence to see a cricket match or a race or other sport takes upon himself the risk of unlikely and improbable accidents provided that there has not been on the part of the occupier a failure to take the usual precautions. A person placed near to the playing ground takes the risk of being hit by a cricket ball or a hockey ball, or, as in *Murray's Case*<sup>111</sup> by an ice hockey puck. Lord Justice Greer in *Hall's Case*<sup>112</sup> says that 'a man taking a ticket to see the Derby would know

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109 [1933] 1 KB 205.  
110 [1951] 2 KB 529.  
111 [1951] 2 KB 529.  
112 [1933] 1 KB 205, at 224.

quite well that there would be no provision to prevent a horse which got out of hand from getting amongst the spectators, and would quite understand that he was himself bearing the risk of any such possible but improbable accident happening to himself'; and, in *Coleman v Kelly and Others*<sup>113</sup> Maguire CJ said: - 'It was not the duty of the defendants to provide against improbable or unlikely happenings such as the dashing of a horse through the railings in amongst spectators.'

Accordingly, I consider that this appeal must be dismissed."<sup>114</sup>

4.185 As may be seen, this analysis bases exemption from liability on a series of grounds: *customary practice*,<sup>115</sup> the *standard of care*<sup>116</sup> in the light of the likelihood of accident, gravity of threatened injury, social utility of defendant's activity and cost of prevention, and *voluntary assumption of risk*.

4.186 In contrast with Kingsmill Moore J's approach, O'Daly J's rejection of the plaintiffs' duty of care was based exclusively on the lack of foreseeability of the accident.

4.187 The case is instructive in showing just how integrated in judicial thinking are the views of duty and voluntary assumption of risk.

4.188 *Our provisional recommendation is to provide that an occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his.*

4.189 Let us now turn to the narrower question of the circumstances, if any, in which an occupier should be permitted to modify or exclude liability in respect of the duty (or duties) prescribed by the proposed legislation.

4.190 One option would be to permit the occupier to exclude liability to the full extent allowed by section 34(1)(b), as it has been judicially interpreted. This allows for waiver by contract or *otherwise*, provided there has been "some intercourse or communication" from which such waiver may properly be inferred. Clearly a contract fulfilling the requirements of the law of contract would be *capable* of exempting the occupier from liability, but one suspects that the courts would not be over sympathetic to a broad interpretation of exemption clauses in this context, especially where they profess to exclude liability for causing death or personal injury. *Communications* in which waiver may properly be discerned raise related uncertainties. If the particular communication does not expressly amount to a waiver, in what circumstances should be courts be disposed to infer a waiver? Again one suspects that courts will be very reluctant to draw that inference. The goal of respecting freely made agreements has no doubt an

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113 85 ILTR 48, at 51.  
114 [1958] IR, at 375-376.  
115 Cf McMahon & Binchy, *op cit*, pp319 - 321.  
116 Cf *id*, ch 7, especially at pp110-119.

important social value but one may question whether it should be given a completely free rein where its effect would be to subvert another important social value - of protecting entrants, at all events those with a legitimate, approved purpose in relation to the property they visit, from injury caused by the neglect of the occupier.

4.191 The crucial question that we must decide is whether it is sufficient to leave this matter to the courts or whether it would be better for the legislation to deal with it expressly. *Our preference, and accordingly our provisional recommendation is that the legislation should contain a provision modelled on section 4(1) of Manitoba's Occupiers' Liability Act, which we have already quoted. This provision would be on the following lines:*

- "(1) An occupier may, by express agreement or by express stipulation or notice,*
- (a) extend or increase the statutory duty of care to entrants; or*
  - (b) restrict, modify or deny that duty .... subject to any prohibition or limitation imposed by this or any other Act of the legislature against or on the restriction, modification or denial of the duty'.*
- (2) No restriction, modification or denial of the statutory duty of care, whether by agreement, stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include*
- (a) the relationship between the occupier and the person affected by the restriction, modification or denial;*
  - (b) the injury or damage suffered and the hazard causing it;*
  - (c) the scope of the purported restriction, modification or denial; and*
  - (d) the steps taken to bring the restriction, modification or denial to the attention of the person affected thereby.*
- (3) Where an occupier restricts, modifies or denies the duty of care, the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed."*

4.192 This leads us to the question whether the legislation should go further and expressly abrogate the entitlement of an occupier - or, perhaps, only an occupier of business premises - to exempt himself from liability for personal injury or death. Our present view is that this would not be desirable. Apart from the potential for anomalies as to what constitute business premises -not a very great problem, we suspect - the difficulty with such a legislative approach is that it could work unjustly in some cases as well as placing too heavy a burden on occupiers.

4.193 *As regards the position of "strangers to the contract" we are in accord with other law reform agencies in being of the view that the duty of the occupier under the legislation should not be capable of being restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit that person to enter or use the premises. We so provisionally recommend. We are not at present convinced of the merit of extending protection to these strangers as far as was done by section 3(1) of England's legislation of 1957, and we provisionally recommend that such a position should not be adopted here.*

4.194 As to the more subtle question of the relationship between the proposed incapacity of the occupier to exclude or restrict by contract his liability to strangers to the contract and his power to achieve the same goal by notice, we found some difficulty in determining the best course to recommend. One solution which has much attraction would be to include in the legislation a provision to the effect that, where the occupier is by contract bound to permit certain strangers to the contract to enter the premises, *no* notice purporting to exclude the occupier's statutory duty to them should be effective. *We ultimately came to the conclusion, however, and we so provisionally recommend, that the better course would be to leave this question to be determined in accordance with the general provision that we have already provisionally proposed regarding the reasonableness of such notices.* It may well be that in *most* cases the court will conclude that a notice relative to such strangers is unreasonable; but it would seem wrong for the legislation to insist, in effect, that such a conclusion be reached in *every* instance.

**(5) To what Extent should an Occupier be Liable for the Conduct of an Independent Contractor?**

4.195 We now must consider how the legislation should deal with the matter of the occupier's liability in cases where an entrant to whom the occupier owes a duty of care is injured by the negligent act or omission of an independent contractor. Three possibilities suggest themselves. The *first* would be for the legislation *not* to deal specifically with the subject, leaving it to be determined by application of general negligence principles. The *second* would be for the legislation to articulate in clear and specific terms the type of conduct required of the occupier to discharge his duty of care with respect to the selection and supervision of the independent contractor. The *third* would be for the legislation to impose a *non-delegable* duty on the occupier, thus making him, in effect,

vicariously liable for the independent contractor's default. We do not favour the first of these options. The common law precedents on this matter are somewhat conflicting,<sup>117</sup> and there would be a danger that some of this confusion might flow over into judicial analysis subsequent to the enactment of the legislation.

4.196 The real debate is between the second and the third options. What is at stake here is the question of the appropriate scope of vicarious liability in relation to occupancy duties. It must be admitted that there is not a very coherent pattern in the application of vicarious liability throughout the law of torts.<sup>118</sup> The question whether vicarious liability of occupiers should extend to the negligence of independent contractors is one on which we would greatly welcome views. So far as we have a preference at present, *it lies against thus extending liability, and we so recommend*. We consider that the imposition of a non-delegable duty on an *employer* in respect of premises provided for his employees<sup>119</sup> does not necessarily call for a similar rule in respect of occupiers relative to entrants. The employment relationship is a far closer one, to which wide-ranging and fairly stringent obligations attach.<sup>120</sup>

4.197 *On the basis of our provisional recommendation, it seems therefore to us that the second option is the one that should be followed.* This approach finds widespread support among the law reform agencies that have addressed the issue. As we have seen, section 2(4) of the English legislation of 1957 provides that, in determining whether the occupier has discharged the common law duty of care to a visitor, regard is to be had to all the circumstances, so that (for example):

"where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

4.198 This provision has come in for some criticism by commentators for its vagueness.<sup>121</sup> *Dias & Markesinis* enquire:

"Is work not involving 'work of construction, maintenance or repair' excluded from it? What comes under these words?"<sup>122</sup>

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117 Cf *Haseldine v CA Dew & Son*, [1941] 2KB 343 (CA), *Thomson v Cremin* 71 Ll L Rep 1, [1953] 2 All ER 115 (HL, 1941), *Woodward v Mayor of Hastings*, [1945] KB 174, *Vial v Housing Commission of New South Wales* [1976] 1 NSWLR 388, *Hillman v McIntosh*, [1958] SCR 384.

118 See *McMahon & Binchy*, *op cit*.

119 *Connolly v Dundalk Urban District Council* [1990] 2 IR 1 (High Ct, O'Hanlon J).

120 It is worth noting that many employers are under statutory duties (often involving strict liability) in relation to their employees' safety: see *McMahon & Binchy*, *op cit*.

121 See *Dias & Markesinis*, *Tort Law*, 205 (2nd ed, 1989).

122 *Id*.

4.199 In *Ferguson v Welsh*,<sup>123</sup> Lord Keith considered that the provision required "a broad and purposive interpretation", so that the term "construction" should be held to include demolition; and in *AMF International v Magnet Bowling Ltd*,<sup>124</sup> Mocatta J said of a builder's failure to take adequate precautions against flooding which caused damage to a visitor's property that "it would be altogether too technical to hold this not within the true construction of the words 'a danger due to the faulty execution of any work of construction, maintenance or repair'.

4.200 In our view, it would be preferable to avoid such uncertainties by adopting a clearer draft which dispenses with unnecessary elaboration. Section 6(1) of Ontario's *Occupiers' Liability Act* seems to us to constitute a good example and we provisionally recommend the inclusion in the legislation of a provision drafted on these lines. Section 6(1) provides as follows:

"(1) Where damage to any person or his property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken".<sup>125</sup>

#### (6) Occupiers' Liability for Attacks by Dogs

4.201 We now must examine the present interrelationship between occupiers' liability and civil liability for injuries resulting from attacks by dogs. Under section 21 of the *Control of Dogs Act 1986*, the general rule is that owners of dogs are strictly liable for injuries caused where their dog has either *attacked* a person or *injured* livestock.<sup>126</sup> They are also capable of being sued under the *scienter* rule<sup>127</sup> and under general principles of liability,<sup>128</sup> such as negligence and nuisance. The principle of strict liability prescribed by section 21 is subject to an important qualification contained in subsection(3): in cases where a dog attacks a *trespasser*, liability is to be determined *only* in accordance with *negligence* principles.

4.202 The subsection clearly seeks to avoid the possibility that a

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123 [1987] 1 WLR 1553, at 1580.

124 [1968] 1 WLR 1028, at 1043.

125 For the reason already mentioned, we do not favour the inclusion of section 6(2). Section 6(3) provides that nothing in the section affects any duty of the occupier that is non-delegable at common law or affects any provision in any other Act providing that an occupier is liable for the negligence of an independent contractor. This is in line with our tentative preference as to how the law should operate in this context.

126 See McMahon & Binchy, *op cit*.

127 See *id*.

128 See *id*.

trespasser would obtain damages for an attack by a dog on the basis of *strict* liability. It would be very hard to justify imposing strict liability in such circumstances.

4.203 *If our provisional proposals are acceptable with their restriction on liability relative to trespassers, then it would appear to follow that section 21(3) should be amended to bring the duty which it prescribes into line with the restricted liability envisaged in the Report, i.e. a duty not to be guilty of gross negligence.*

#### (7) **Preservation of Higher Obligations**

4.204 Occupiers' liability legislation throughout the common law world invariably includes a provision preserving occupiers' higher obligations. Section 9 of Ontario's Act is a good example, since it is fuller than some others:

- "(1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on the occupier by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of,
- (a) innkeepers, subject to the *Innkeepers Act*;
  - (b) common carriers;
  - (c) bailees.
- (2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from an employer and employee relationship where it exists."

4.205 We have already mentioned the provisions of our *Hotel Proprietors Act, 1963*. Traditionally the law has imposed distinctively onerous burdens on innkeepers and carriers, out of concern for the need to the dependent and potentially vulnerable position of those who avail themselves of their services. The law of bailment, deriving from Roman Law principles, involves certain liabilities in excess of due care. The reason why carriers are mentioned in the context of occupiers' liability is that the broad definition of "premises" includes reference to vehicles.

4.206 The employer-employee relationship is capable of generating liability with respect to premises in circumstances where occupier's liability principles would not do so. An employer owes a duty to take reasonable care

to provide his employee with safe premises.<sup>129</sup> An employee who is injured can always invoke this unencumbered duty rather than the more restricted duty laid down in *Indermaur v Dames*. Another important factor worth noting here is that the employer owes a *non-delegable* duty of care in this context to his employee. In *Connolly v Dundalk Urban District Council*,<sup>130</sup> O'Hanlon J considered it:

"well-established ... that an employer owes a duty to his employee to provide a safe place of work, and cannot escape liability for breach of such duty by employing an independent contractor - no matter how expert - to perform the duty for him".

4.207 This non-delegable duty on the part of the employer has no exact parallel in occupiers' liability. Vicarious liability does not generally extend to the acts of an independent contractor. Of course an occupier can be *personally* liable in respect of the selection of an independent contractor or in respect of inspecting his work; but that is a different matter.

4.208 Like other law reform agencies throughout the common law world, we see no reason why the statutory prescription of occupiers' liability should affect any of these higher duties. *Accordingly, we provisionally recommend the inclusion of a provision preserving these higher duties, drafted on the lines of section 9 of Ontario's Occupiers' Liability Act.*

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129 This duty relates not only to the employer's own premises but also to premises that the employee attends in the course of his duties. This can result in troublesome issues of sensitive social policy for the court: see *Mulcare v Southern Health Board* [1988] ILRM 689 (High Ct, Murphy J, (1987), analyzed by Byrne & Binchy, *Annual Review of Irish Law 1988*, 422-424 (1989).

130 [1990] 2 IR 1. See Byrne & Binchy, *Annual Review of Irish Law 1990*, 505-507 (1991).

## CHAPTER 5: SUMMARY OF RECOMMENDATIONS

1. Legislation should provide for two classes of entrant on lands or premises namely, visitors and trespassers. (Para. 4.126)
2. Premises should be defined as meaning lands and structures, or either of them, and includes
  - (a) water,
  - (b) ships and vessels,
  - (c) trailers and portable structures designed or used for residence, business or shelter,
  - (d) trains, railway cars, vehicles and aircraft, except while in operation. (Para. 4.128)
3. The term "occupier" should be defined as a person exercising such control over the premises that it is proper to impose on him a duty of care relative to persons entering thereon. Without prejudice to the generality of that definition, an occupier may, in the circumstances of any particular case, be:
  - (i) a person who is in physical possession of premises; or
  - (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises.

For the purpose of the legislation, there may be more than one occupier

of the same premises. (Para. 4.132)

4. The term "visitor" should be defined as:
  - (i) an entrant as of right, or
  - (ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract, or
  - (iii) any other person whose presence on premises is lawful, or
  - (iv) a person whose presence on premises becomes unlawful after his entry on those premises and who is taking reasonable steps to leave those premises.

Any other entrant should be classified as a trespasser. (Para. 4.119)

5. There should be a common duty of care to all visitors. (Para. 4.140)
6. There should be a provision to the effect that the circumstances relevant in determining whether the occupier has discharged his duty of care include the degree of care that would ordinarily be looked for in such a visitor, so that (for example) in proper cases an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so. The legislation should also provide that, where damage is caused to an entrant, other than a trespasser, by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable that entrant to be reasonably safe. (Para. 4.140)
7. The duty of an occupier towards a trespasser should be a duty not to injure him intentionally or to act with gross negligence towards him. (Paras. 4.74 and 4.121)
8. An exception for child trespassers, on the lines of the Alberta legislation, should be made as follows:

- (1) Where an occupier knows or has reason to know
  - (a) that a child trespasser is on his premises, and
  - (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,

the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child

will be reasonably safe from that danger.

- (2) In determining whether the duty of care under subsection (1) has been discharged consideration shall be given to
    - (a) the age of the child,
    - (b) the ability of the child to appreciate the danger and
    - (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of danger to the child.
  - (3) For the purposes of (1), the occupier has reason to know that a child trespasser is on his premises if he has knowledge of facts from which a reasonable person would infer that a child is present or that a child's presence is so foreseeable that the occupier should conduct himself on the assumption that a child is present.
  - (4) For the purposes of this legislation, a child should mean a person under 15. (Para. 4.119)
9. The legislation should contain a provision modelled on section 4(1) of Manitoba's Occupiers' Liability Act, on the following lines:
- "(1) An occupier may, by express agreement or by express stipulation or notice,
- (a) extend or increase the statutory duty of care to entrants; or
  - (b) restrict, modify or deny that duty .... subject to any prohibition or limitation imposed by this or any other Act of the legislature against or on the restriction, modification or denial of the duty.
- (2) No restriction, modification or denial of the statutory duty of care, whether by agreement, stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include
- (a) the relationship between the occupier and the person affected by the restriction, modification or denial;
  - (b) the injury or damage suffered and the hazard causing it;
  - (c) the scope of the purported restriction, modification or denial; and

- (d) the steps taken to bring the restriction, modification or denial to the attention of the person affected thereby.
  - (3) Where an occupier restricts, modifies or denies the duty of care, the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed." (Para. 4.189)
10. As regards the position of "strangers to the contract" the duty of the occupier under the legislation should not be capable of being restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit that person to enter or use the premises. We so provisionally recommend. Protection of these strangers should not be extended as it was by section 3(1) of England's legislation of 1957. (Para 4.193)
11. As to the question of the relationship between the proposed incapacity of the occupier to exclude or restrict by contract his liability to strangers to the contract and his power to achieve the same goal by notice, his question should be determined in accordance with the general provisions provisionally proposed regarding the reasonableness of such notices. (Para. 4.194)
12. The legislation should include a provision on the following lines:
- "Where damage to any person or his property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken". (Para. 4.195)
13. The legislation should include a provision, preserving the occupiers' higher obligations, drafted on the following lines:
- "(1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on the occupier by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of

- (a) hotel proprietors;
- (b) common carriers;
- (c) bailees.

(2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from an employer and employee relationship where it exists." (Para. 4.204)

- 14. An occupier should not be under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his. (Para. 4.146)
- 15. In the light of the preceding provisional recommendations, we consider it unnecessary to make a special recommendation in respect of entry to view national monuments. (Para. 4.124)

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