NSW Law Reform Commission

WORKING PAPER [3]

ON OCCUPIERS' LIABILITY

[1969]

INTRODUCTION

By letter dated 9th June, 1967, the Honourable K.M. McCaw, M.L.A., Attorney General, made a reference to this Commission in the following terms:

> To review the law relating to the rights and liabilities of occupiers of land and incidental matters.

The enclosed working paper expresses the proposals which the Commission presently has under consideration for recommendation in its report, together with a review of the existing law in this State and other explanatory matter. It is circulated to persons and bodies known to be interested for their consideration. Comment is invited. It is requested that this should be forwarded to the Executive Member, Law Reform Commission, Park House, 187 Macquarie Street, Sydney, 2000, so as to be received by 30th April, 1969.

Recipients of the working paper will appreciate that the members of the Commission are as yet uncommitted to any of these proposals and it would be incorrect to describe them as the views of the Commission. Nor may any implications be drawn as to what may be Government policy in any matters.

It has not been thought appropriate to include proposals at this stage relating to the position of the Crown or public authorities under the legislation proposed in the paper. The proposals in it are nevertheless framed so as to be as far as possible suitable for the purpose should it be ultimately determined that the Crown and such authorities should be bound. Highway authorities, however, have not been treated as within the scope of the reference.

J. K. MANNING, CHAIRMAN

I. THE PRESENT LAW OF OCCUPIERS' DUTIES AND THE LAW OF NEGLIGENCE

1. This paper is concerned with the duties owed by occupiers of land, and certain structures fixed and movable which the law has classed with land for this purpose, to persons entering on the land or structure, or whose property is brought thereon. In the following paragraphs the term "entrant" is used to refer to a person who has so entered irrespective of whether the occupier owes him a duty in the particular circumstances. It is generally used in this sense in the various draft legislative provisions Included in the paper. The paper does not seek to deal with those duties which are owed by occupiers to outsiders, whether on the highway or other private property. The common law has dealt with these latter separately, for example, by resort to the principles of nuisance, to the rule in *Rylands v. Fletcher*, or to independent rules of the law of negligence. Certain peripheral matters are, however, examined because the adequacy of legal protection granted to an entrant upon premises cannot be comprehensively studied without reference to his rights against persons, other than the occupier, concerned with the construction or maintenance of the premises, or carrying out activities upon it. Hence reference will be made to the duties of a vendor, a lessor, and entrants on the premises, whether or not the occupier's servants or agents.

2. The classical formulations of the occupier's duties to various classes of entrants date from a period prior to the first attempt to express in general terms the principles determining the circumstances in which one man owes another a duty of care such that its breach will give rise to an action for damages. An early statement of the rule that an occupier is under no duty to exercise care for trespassers is to be found in the judgment of Chief Justice Gibbs in *Deane v. Clayton* ((1817) 7 Taunt. 489 at 553):

> I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb. Subject to this qualification, I may use my own as I please.

The existence of the duty of care to a customer entering a shop, the typical example of the invitee or business visitor, was recognised in *Parnaby v. Lancaster Canal Co.* ((1839) 11 A. & C. 223), two years after the existence of any general duty of care in English law had been repudiated by Baron Parke in *Langridge v. Levy* ((1837) 2 M. & W. 519). The classical formulation of the duty to an invitee followed in *Indermaur v. Dames* ((1866) L.R. 1 C.P, 274) where Mr. Justice Willes said that the invitee "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory

negligence in the sufferer, must be determined by a jury as matter of fact" (Id, at 288). The position of the licensee, or person in whose presence the occupier has no financial or material interest but whom he permits or even invites to enter, in the lay sense of invitation, was distinguished by the same judge (following the precedent of *Southcote v. Stanley* (1856) 1 H. & N. 247) in *Gautret v. Egerton* ((1867) L.R. 2 C.P. 371). There he said that for recovery "something like fraud must be shown" (*Id.* at 375), the case being treated as analogous to that of a gift of chattels. In those days, Norman S. Marsh has suggested ("The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 *L.Q.R.* 182 at 192), licensees and trespassers were more or less lumped together. Only gradually the rule emerged that the duty to a licensee was to give warning of known but concealed hazards, or "traps". Meanwhile Master of the Rolls Brett had asserted in *Heaven v. Pender* ((1883) 11 Q.B.D. 503) the comprehensive principle that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the property or person of another, a duty arises to use ordinary care and skill to avoid such danger" (Id, at 509).

3. The Master of the Rolls arrived at the general principle quoted in the last paragraph by a process of induction, and among the particular duties from which he generalised were those owed to invitees and licensees. He described the duty of an occupier to invitees as one "of using reasonable care so as to keep his house or warehouse that it may not endanger the person or property of the person invited" (*Id.* at 508) and to the licensee "a duty not to lay a trap for him" (*Id.* at 509). Had this approach been immediately accepted, it might have been anticipated that the individual rules relating to occupiers' duties would have been continuously referred to general principle in the manner which has occurred, for example, in the case of a master's duties to his servants. In that area the case of *Qualcast (Wolverhampton) v. Haynes* ((1959) A.C. 743) made it clear that the duties owed in particular sets of circumstances should not be regarded as the subject of rigid definitions. But in the area of occupiers' liability no similar process has effectively taken place, no doubt because of the early development of the law with regard to duties owed to the different categories of entrant, and the fact that Master of the Rolls Brett's approach was disavowed and not revived until *Donoghue v. Stevenson* ((1932) A.C. 562). Then Lord Atkin formulated the principle of the duty owed to one's neighbour in more elaborate but nevertheless similar terms.

4. Even subsequently to *Donoghue v. Stevenson* there was a continued trend in England to define the occupier's liabilities to invitees and licensees by interpreting the earlier formulations of the duties owed to them rather than to refer to the "neighbour" principle of Lord Atkin. This reached its culminating point in the House of Lords decision in London *Graving Dock Co. Ltd. v. Horton*

((1951) A.C. 737). Here the invitee's knowledge of a danger was treated as a conclusive answer to his claim against the occupier. The view was accepted that Mr. Justice Willes' reference to notice in his formulation of the duty involved that notice was always a discharge of the duty and therefore if the invitee knew of the danger the injury he suffered could not be regarded as caused by a failure of duty of the occupier. Widespread condemnation of this kind of formalistic approach led to the third report of the English Law Reform Committee in 1954 (Cmd. 9305). The central recommendation of this Committee was that the distinction between invitees and licensees should be abolished and that, with regard to lawful but non- contractual visitors, "the occupier of premises should owe a duty ('the common duty of care') to every person coming upon the premises at his invitation or by his permission, express or implied, to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor for the purpose to which the invitation or permission relates" (Paragraph 78). Separate provision was made for contractual entrants (Paragraphs 54-56), but to similar effect in the absence of express contractual provision on the matter (*Ibid.*). The Committee did not recommend any change in the law with regard to an occupier's duty towards trespassers on his premises (Paragraph 80). Its recommendations were substantially adopted by the Occupiers' Liability Act, 1957 (5 & 6 Eliz. 2, c. 31). The matter was also the subject of the First Report of the Law Reform Committee for Scotland presented in 1957 (Cmd. 88), the principal recommendations of which were in the following terms:

> 24(a) A majority of us conclude that the law regarding liability in reparation of occupiers of land or other property to which the categories of invitee, licensee and trespasser apply in Scotland should be simplified by abolishing these categories, and that the standard of care owed should be determined by the whole circum-stances of the particular case. Two of us, however, are of opinion that the categories of invitees and licensees should be abolished, but not the category of trespassers. These two, and three others of us, are of opinion that the category of trespassers should in any event not be abolished if actions of reparation against occupiers of land or other property are left open to trial by jury.

The Committee made similar recommendations in the case of contractual visitors to those of the English Committee (Paragraph 24(c)). The majority recommendations were passed into law by the Occupiers' Liability (Scotland) Act, 1960 (8 & 9 Eliz. 2, c. 30). The pattern of the English legislation was followed in New Zealand in 1962 (1962, No. 31).

5. No similar legislation has yet been enacted in New South Wales or in any other Australian State. In this country the development of the common law has been the product of both English and local influences. A late nineteenth century New South Wales case in the Full Court showed an obvious reluctance to confine the category of invitee to business visitors of the occupier, and extended the duty of reasonable care to all who were on lawful business in the widest sense

of that word, whether it concerned the occupier or not. In *Hanson v. Newcastle Steam Navigation Co.* ((1884) 5 L.R. (N.S.W.) 453) the plaintiff went on board the defendant's vessel to inquire after a parcel to be brought for her mother by a seaman in the defendant's employ and was held to be owed a duty of reasonable care, Sir George Innes concurring with hesitation and saying that the case went further than any he knew. But by 1899 the Court had accepted the distinction between invitees and licensees in the English sense (*Sparkes v. North Coast Steam Navigation Co.* (1899) 20 N.S.W.L.R. 371). Subsequently the High Court of Australia stated the law in terms of the graduated duties established in England for the various categories of entrant in a series of decisions culminating with the comprehensive formulation of Sir Owen Dixon in *Lipman v. Clendinnen* ((1932) 46 C.L.R. 550).

6. Even while accepting the position that different duties were owed to the different categories of entrant, and even during the period before *Donoghue v. Stevenson*, the High Court of Australia continued to concern itself with the relationship of these duties to general principles of the law of negligence. In *Mountney v. Smith* ((1904) 1 C.L.R. 146 at 154) Sir Samuel Griffith, dealing with an invitee, cited both the statement of the law on this matter in *Indermaur v. Dames* and the general negligence principle of *Heaven v. Pender*, and used them both as the foundation of his judgment in that case, obviously regarding them as coming to the same thing for the purpose in hand. And in *South Australian Co. v. Richardson* ((1915) 20 C.L.R. 181) he said again of the duty to the invitee laid down in *Indermaur v. Dames* that "the rule of law which governs such a case is not a special and isolated rule, but a particular application of a general rule governing human beings who have intercourse with one another under such circumstances that one man reposes trust in another, who invites or accepts the trust" (*Id.* at 185). In *Lipman v. Clendinnen* (*Supra*) Sir Owen Dixon elaborated the position:

> The circumstance which annexes to occupation the duty of care, when it exists, is the presence or proximity of others upon or to the premises occupied. It is because the safety of such persons may be endangered that the obligation of care arises... The circumstances in which one man may lawfully come upon premises in the occupation of another are infinitely various and as his lawful presence there must raise some duty of diligence, however slight, for his safety, it might be considered consonant with general principle to measure the standard of care required by determining as matter of fact what amount of care in all the circumstances of each particular case the reasonable man would exercise. But English law has adopted a fixed classification of the capacities or characters in which persons enter upon premises occupied by others, and a special standard of duty has been established in reference to each class (46 C.L.R. at 554-555).

Sir Owen clearly felt bound to recognise that, while the duties of occupiers are ultimately referable to general principles relating to the proximity or presence of others, the manner of their application is fixed by law to a greater extent than perhaps Sir Samuel Griffith's statements suggest. This statement was made

before the impact of *Donoghue v. Stevenson* could be felt, but the more recent statements of Sir Victor Windeyer adopt Sir Owen's view. After referring to the fixed duties in *Commissioner for Railways v. Cardy* ((1960) 104 C.L.R. 274 at 316-317) he said:

> The duty of the occupier is, however, rooted at bottom in his duty to his neighbour in Lord Atkin's sense. For, as Dixon, J., as he then was, said in *Lipman v. Clendinnen* "the circumstance which annexes to occupation the duty of care, when it exists, is the presence or proximity of others upon the premises occupied. It is because the safety of such persons may be endangered that the obligation of care arises". The formulary rules really do no more than state what the law has determined a reasonable man must do to discharge a duty of care arising in particular circumstances.

7. To the extent that the formulary duties represent fixed applications of the principle of *Donoghue v. Stevenson*, it seems to follow that there is no room for additional counts in actions against occupiers, appealing directly to the principle of that case, unless some distinct relationship from that of occupier-entrant coexists with it. When such a distinct relationship exists has been the question at issue in a number of cases in New South Wales. Here the common law system of pleading has forced the issue into prominence and given rise to a difficult history. The problem has been rendered perhaps more acute by English precedents belonging to the decade prior to the passage of the Occupiers' Liability Act which have seemed to some to exhibit a readiness to find an independent relationship on the slightest pretext. Of one group of these precedents a writer has had the temerity to say that "it may be that Denning L.J.'s determination to demonstrate that the long-standing law of occupiers' liability has been altered to his own satisfaction without the aid of the legislature has resulted in the introduction of a new confusion between occupancy and activity duties" (Odgers, "Occupiers' Liability: A Further Comment" (1957) *Cambridge L.J.* 39).

8. In *Commissioner for Railways v. Hooper* ((1954) 89 C.L.R. 486), which involved an invitee, Sir Alan Taylor discussed the matter of the circumstances in which an independent duty would exist. The unusual dangers contemplated by the rule in *Indermaur v. Dames*, he points out, may exist by reason of the condition of the premises or by reason of some activity there carried on. On the other hand, he adds, there may be circumstances unrelated to questions of the safety of the premises in which the obligations of the occupier for both negligent acts of commission and omission fall to be determined in accordance with the general principles of liability for negligence. He instanced the case of an occupier who shoots his companion on a hunting expedition on his property. The result in the New South Wales Full Court decision of *Lewis v. Sydney Flour Pty. Ltd.* ((1955) 56 S.R. 189) is in accordance with this approach. Reliance is, however, there placed rather on the statements in *London Graving Dock Co. Ltd, v. Horton*, and the reasons of the Full Court base the rejection of the independent negligence count on the fact that the allegation related to the state of the premises. The

Court added that it was "not to be taken to hold that in a proper case this (the *Indermaur v. Dames* cause of action) is the only cause of action open to an invitee to whom damage is caused by the negligence of an invitor or his servants, or even a third party performing some function on the invitor's premises" (*Id.* at 196). In *Drive Yourself Lesseys Pty. Ltd. v. Burnside* ((1958) S.R. 390) Sir Leslie Herron considered that where the property of the plaintiff was damaged on the defendant's land by falling rock, a count based on *Donoghue v. Stevenson* was appropriate even though the immediate cause of the harm was a state of the premises. But it should be added that in that case there was a negligent act of the occupier's servant in inviting the driver of the car to place it in a dangerous situation and Sir Leslie Herron doubted in any case whether the *Indermaur v. Dames* duty applied to damage to property in the circumstances of the case. With Sir Leslie's holding may be compared those of Mr. Justice Brereton in *Mortomore v. McPhersons Ltd.* ((1957) 74W.N. 294) (holding a *Donoghue v. Stevenson* count available where the negligence of the defendant's servant in carrying out his ordinary duties of driving a crane on the land resulted in harm to the plaintiff) and in *Delaney v. Muttdon* ((1963) 80 W.N. 1095) (that a *Donoghue v. Stevenson* count might be available where it was alleged that the defendant failed to see that stairs were lit). Yet the first of these two holdings may in turn be contrasted with the view expressed by Mr. Justice Walsh in *Castellan v. Electric Power Transmission Pty. Ltd.* ((1967) 86 W.N. (Pt. 2) 67). There the plaintiff was indirectly injured when a piece fell out of a truck being driven by the defendant's servants on the premises where plaintiff was an invitee, and his Honour stated "that it would not be reasonable to attribute liability in B.H.P. to the plaintiff for negligence in the manner in which it conducted its operations, as distinct from a liability arising out of the state of the premises" (*Id.* at 79). In these circumstances it is not surprising that difference of opinion has persisted in the most recent authority in the Court of Appeal. In *Hislop v. Mooney* ((1968) 1 N.S.W.R. 559) a piece of timber was dropped through a skylight on the plaintiff as he was drinking in the defendant's hotel by a workman on the roof. While Sir Leslie Herron and Mr. Justice Holmes entertained the possibility that the general negligence count might be sustained, perhaps with some amendment to its terms as then framed, Mr. Justice Sugerman rejected it. He said:

> As to the negligence count the matters relied upon were obviously the same as those raised under the second count (liability of occupier) to which I shall later return. The count alleges not vicarious liability for a casual act of negligence but personal negligence of the defendant in the conduct of his business and premises. There is a duty of care as between occupier and invitee, but the measure of it is not defined by or derivable from *Donoghue v. Stevenson*; see *Commissioner for Railways v. McDermott* (1960)1 N.S.W.R. 420 at 424. In a case such as the present the duty must be found, if at all, in the statement of principle by Willes, J. in *Indermaur v. Dames* and resort to *Donoghue v. Stevenson* to establish a wider or different principle is not a correct approach - see *Lewis v. Sydney Flour Pty. Ltd.* (*Id.* at 563).

9. Distinct from the view that the consequences of the category rules may be

escaped in proper cases by direct resort to *Donoghue v. Stevenson*, though not necessarily inconsistent with it in all circumstances, is the view that where there are special features of the relationship between the parties superimposed on the occupier-entrant relationship, apart from such neighbour relationship which is ordinarily involved, an action of negligence may be based on those superimposed features. This is the law, as regards lawful visitors, established by *Commissioner for Railways v. McDermott* ((1967) A.C. 169). The plaintiff licensee was run down by a train at a level crossing as she lay incapacitated by a fall caused by a crossing in bad repair and was held entitled to recover on the basis of such superimposed features of the situation. The Privy Council judgment lays down that occupation of premises is a ground of liability and is not a ground of exemption from liability. There is no exemption from any other duty of care which may arise from other elements in the situation creating an additional relationship between the two persons concerned. Here the defendant was carrying on the inherently dangerous activity of running express trains through a level crossing which was lawfully and necessarily used by the local inhabitants and their guests and persons visiting them on business. These positive operations and the static condition of the crossing interacted and the grave danger was due to the combination of both. In these circumstances there was no room for a separate *Donoghue v. Stevenson* duty. The general principle of proximity or duty to a neighbour was illustrated by the two relations which gave rise to duties of care owing by the defendant to the plaintiff (a) as occupier to licensee and (b) as railway operator to lawful user of the level crossing. There was no other relevant relationship.

10. The relationship between the rules relating to the duties of occupiers to trespassers and the general principles of the law of negligence has presented especially difficult problems. The old rule that the trespasser was in effect an outlaw (*Supra* para.2) was early modified by the rule that no intentional injury could be done to him beyond what might be involved in the reasonable protection of the premises against trespassers (*Bird v. Holbrook* (1828) 4 Bing. 628; see for a discussion of the early history N.S. Marsh, "The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 *L.Q.R.* 182 at 188). One path of later liberalisation of the law was by way of extension of the concept of intentional harm. In *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* ((1929) A.C. 358) the condition of liability was stated to be some wilful act involving something more than the absence of reasonable care - some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser *(Id.* at 360). Another path of liberalisation rather uncomfortably pursued was what has been described by American writers as the "reclassification of trespassers" (Harper and James, 2 *The Law of Torts* 1467). Tolerance of trespass has sometimes, especially in the case of children, been elevated into licence (subject to the curb imposed by the House of Lords in *Edwards v. Railway Executive*

(1952) A.C. 737), or an allurement of a child by the presentation of something of an appearance calculated to induce trespassory interference has been treated as a substitute for an invitation to interfere (*Glasgow Corporation v. Taylor* (1922) 1 A.C. 44, especially per Lord Sumner at 64). Artificial licence and allurement apart, it might have been supposed in the light of these authorities that the trespasser is not the neighbour of the occupier, that reasonable care for him is no care at all, and that the only duties lie in the different area of intentional or reckless injury. But this position has not been accepted in Australia without qualification and the development of tension between the common law in England and this country is described in the following paragraphs .

11. The existence of exceptional circumstances in which an ordinary duty of reasonable care is owed to trespassers was asserted as long ago as 1933 by Sir Owen Dixon in *Transport Commissioners of N.S.W. v. Barton* ((1933) 49 C.L.R. 114). He says that "with reference to positive acts likely to cause harm to others, I think the occupier's duty depends on knowledge of the presence of the trespasser on his property, and is measured by the care which a reasonable man would take in all the circumstances, including the gravity and likelihood of the probable injury, the character of the intrusion, the nature of the activities causing the danger and the consequences to the occupier of attempting to avoid all injury" (*Id.* at 131). At this stage Sir Owen was content to accept the position that no duty of reasonable care arose between occupier and trespasser regarding the state of the premises as distinct from acts done while the trespasser was known to be present. But in his joint judgment with Mr. Justice Williams in *Thompson v. The Municipality of Bankstown* ((1953) 87 C.L.R. 619) this was qualified where the occupier-trespasser categorisation of the relationship of the parties competed with another, in which circumstances it was laid down that the court must choose between them. In that case, where a boy climbing an electric light pole was injured through the disrepair of the installation, the court selected for application, not the occupier-trespasser categorisation which would have dictated judgment for the defendant, but the law of negligence relating to "the duty of exercising a high standard of care falling upon those controlling an extremely dangerous agency, such as electricity of a lethal voltage". The approach was applied to other circumstances and a different competing category of duty by the High Court in *Rich v. Commissioner for Railways* ((1959) 101 C.L.R. 135) where the occupier-trespasser relationship was considered superseded by the duty owed by the Commissioner for Railways in running his trains to persons upon level crossings. In this case an activity was involved, but the case did not fall within Sir Owen Dixon's original proposition in Transport Commissioners for N.S.W. v. Barton since the duty was not treated as dependent on discovery of the trespasser in time for action to be taken. Thus the decision broke new ground. Finally, in *Commissioner for Railways (N.S.W.) v. Cardy* ((1960) 104 C.L.R. 274) another duty overriding the occupier's immunity from suit by a trespasser was laid down by the High Court. Sir Owen Dixon thus

described the circumstances which give rise to the duty there involved (the case of a child falling through a crust of earth into hot ashes in a railway yard):

> It is to be found in a combination of factors. There are the dangers which attend the use of the premises, the circumstance that the premises are so used or frequented and that in spite of the knowledge which the occupier has or perhaps ought to have of that fact and of the description of persons who use or frequent the premises he exposes them to the danger and takes no precautions to safeguard them (*Id.* at 281-282).

The formulations of Sir Owen Dixon fall short of laying down that the consequences of absence of liability of an occupier to a trespasser may be escaped by resort to the general duty to a neighbour formulated in *Donoghue v. Stevenson*. Indeed this would be inconsistent with his general approach to the functioning of the specific categories of duty in relation to the general law of negligence as laid down in *Lipman v. Clendinnen* (*Supra* paragraph 6). But in this matter other members of the High Court have declared themselves differently, as for example, Mr. Justice Fullagar in *Commissioner for Railways v. Cardy* itself, who firmly adopted the principle that a person who happens to be an occupier can rely on no immunity in relation to one who happens to be a trespasser if the parties are also neighbours in Lord Atkin's sense. The issue between these views would no doubt have been one of the major questions for future consideration had it not been for the intervention of the Privy Council as explained in the following paragraph.

12. In *Commissioner for Railways v. Quinlan* ((1964) A.C. 1054), the case of a trespasser on a level crossing run down by a train, the Privy Council, on appeal from the Supreme Court of New South Wales, reasserted the principle of *Robert Addie & Sons Ltd. v. Dumbreck* and held that it covered the whole field of liability of an occupier to a trespasser. It rejected the notion that appeal could be made to the neighbour principle, or that the consequences of the trespasser rule could be escaped by distinguishing activities from static states, or that the trespasser rule deals only with the position of the occupier as such vis a vis the trespasser as such so as to give rise to the possibility of independent duties. Some wavering on the last point can indeed be detected in the statement that the rule cannot be escaped so long as the occupier-trespasser relationship continues to be "relevant" and by the readiness to defend the decision in *Thompson v. Municipality of Bankstown*. But the reasoning in *Rich's Case* is condemned, as in effect is that in *Cardy's Case*, which is defended on the "allurement" principle, with its blurring of the distinction between licence and trespass, condemnation of which was the starting point and foundation of Sir Owen Dixon's judgment in that case. However, *Cardy's Case* was alternatively defended in *Quinlan's Case* on the basis that there was there reckless behaviour and the point was made that "that formula may embrace an extensive and it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing

things naturally dangerous to them to be accessible in their vicinity" (*Id.* at 1084).

13. The defence of *Cardy's Case* (concerned with static states) as one of recklessness seems at odds with the assertion of the rule in *Addie's Case* in terms of a duty to refrain from wilful or reckless positive acts when the presence of the trespasser is known. Yet the Privy Council in *Commissioner for Railways v. McDermott* ((1967) A.C. 169) continued to state the rule in terms of such positive acts:

> No duty is owing to a trespasser until it becomes known either that he is present or that the presence of a trespasser is extremely likely. The duty, when it arises, is of a very limited character - not to injure him wilfully, and not to behave with reckless disregard for his safety (*Id.* at 190).

In the light of the discussion of this matter in *Quinlan's Case* the reference to likelihood seems to mean a likelihood that the trespasser is present. Meanwhile, however, in *Victorian Railway Commissioners v. Seal* ((1966) V.R. 107) the requirement of a knowledge of the presence of the trespasser was treated as meaning a knowledge of the likelihood of his future presence, and reckless acts as including a reckless omission to remedy a dangerous condition of a turntable created by other trespassers, so that the rule came to be treated as applicable not only to positive acts of misdoing, whenever occurring, but to failure to remedy dangerous static states of the premises. If this view gains general acceptance, we shall have a law of liability for "reckless lack of care" of extensive operation but theoretically unrelated to the general law of negligence.

II. THE PRESENT LAW OF LIABILITY WITHIN THE CATEGORIES

(a) Occupiers

14. When action is brought by a visitor of whatever category on the basis of a breach of the duty appropriate to that category against an alleged occupier, the question of whether the defendant is indeed an occupier may give rise to problems. Even under legislation of either the English or Scottish pattern these problems do not disappear. For example, by s. 1(1) of the English Occupiers' Liability Act "the rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them". The concept of an occupier is thus one of the determinants of the scope of the legislation and, since the statute does not define the term, it is the common law conception which is in question. Hence English decisions since the Act will continue to exert the authority appropriate to their status in New South Wales. The most important recent decisions on the general subject are of this kind. In *Wheat v. E. Lacon & Co. Ltd.* ((1966) A.C. 552) owners were held to be in occupation, at any rate concurrently, of the upper floor of a hotel which was managed by another under a service agreement. The agreement provided for that other's occupancy of the premises but without creating a tenancy and subject to a right in the owner to enter for various purposes. Lord Denning laid down that "wherever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier'". The other judgments are to the like effect. On this test, which is similar to that laid down by the English Court of Appeal in the earlier case of *Hartwell v. Grayson Rollo and Clover Docks Ltd.* ((1947) 1 K.B. 901), occupation may exist without possession in the ordinary legal sense. Hence in the later case of *A.M.F. International Ltd. v. Magnet Bowling Ltd.* ((1968) 2 All E.R. 789) Mr. Justice Mocatta held that the building owner and the builder were both occupiers in relation to a subcontractor. The position that occupation may exist without legal possession seems to have been settled earlier in Australia by the High Court in *Gorman v. Wills* ((1906) 4 C.L.R. 764) and the New South Wales decisions appear consistent with the English development. *Treeve v. Blue Star Line* ((1957) S.R. 264), a decision of the Full Court upheld on appeal to the High Court ((1957) S.R. at 418) provides an example of a degree of control insufficient to satisfy the test (Evidence was that an officer of the defendant supervised the work in course of which the plaintiff was injured but had no control over the part of the vessel where the accident occurred).

(b) Invitees

15. The formulation of the duty to an invitee by Mr. Justice Willes (See *supra* paragraph 2) might have been intended as merely a statement that an occupier owes an invitee a duty of reasonable care, with an added indication of what reasonable care normally connotes in law and a further indication of some matters which would be relevant for a tribunal of fact to consider in the light of this connotation. But, as we have seen (*Supra* paragraph 4), the reference to the relevance of notice was interpreted by the House of Lords in *London Graving Dock Co. Ltd, v. Horton* as meaning that notice always barred a remedy. And generally there has been complaint of formalism whereby the individual words have been treated as if they were a statute rather than part of a common law judgment. In *Roles v. Nathan* ((1963) 2 All E.R. 908) Lord Denning associated himself with the hopes of the draftsman of the Occupiers' Liability Act (England) that "it would replace a principle of the common law with a new principle of the common law: instead of having the judgment of Willes, J. construed as if it were a statute, one is to have a statute which can be construed as if it were a judgment of Willes, J." (*Id.* at 912).

16. Of the rule that notice of the danger always discharges liability it may nevertheless be said that it has had its teeth drawn. Such a precise degree of notice has been insisted upon as a condition of its operation that the rule itself becomes illusory, and notice in the ordinary sense no more than a relevant consideration. In England this approach is exemplified by *Smith v. Austin Lifts Ltd.* ((1959) 1 W.L.R. 100). A similar view was taken in New South Wales in *Edmonds v. Commonwealth* ((1961) S.R. 572) and Sir Leslie Herron recognised the practical consequencethat "the rule in *Indermaur v. Dames* imposed on an occupier simply a duty of reasonable care to protect the invitee against an unusual danger" (*Id.* at 531). This is confirmed by Sir Wilfred Fullagar's judgment in *Commissioner for Railways v. Anderson* ((1961) 105 C.L.R. 42) where his Honour said that if we give knowledge of the full significance of the risk its widest possible meaning, the "rule" is deprived of all significance, and we reach the true position that knowledge is simply one of an indefinite number of relevant evidentiary facts which require examination and analysis (See also *James v. Kogarah Municipal Council* (1961) S.R. 129). Despite *Horton's Case,* the law in this country remains in general that applied by Sir Samuel Griffith in *South Australian Co. v. Richardson* ((1915) 20 C.L.R. 181) where he said that, in the circumstances of that case a finding for the relatives was justified because "there was abundant evidence to warrant a finding that the road was not reasonably safe for the use which the deceased was invited to make of it at that time, and under the circumstances then existing, and a further finding that the condition was nevertheless such as to warrant a reasonable person in thinking that, notwithstanding some apparent danger, the road could be safely used if due care were taken" (*Id.* at 186). If, therefore, knowledge is not an

independent substantive issue in the case, it appears that the doubts expressed in *Edmonds v. The Commonwealth* regarding the majority view in *Buckingham v. Luna Park (N.S.W.) Ltd.* ((1943) 43 S.R. 245), that the plaintiff must prove absence of knowledge in his case, are fully confirmed, more especially since they appear in any case to be contrary to the view of the Full Court in *Savage v. Compagnie des Messageries Maritimes* ((1960) S.R. 450).

17. The question of the effect of knowledge of the invitee is, however, but one of many issues which have been judicially debated arising out of the language in *Indermaur v. Dames*. Even the word "danger" has not been left entirely to speak for itself in the light of general considerations of reasonable care. In *Swinton v. China Mutual Steam Navigation Co. Ltd.* ((1951) 83 C.L.R. 553) the High Court judgment states that the appeal in the end depended upon the view of what was the unusual danger of which the defendants knew or ought to have known. "Is it essential", the judgment proceeds, "that the danger, the subject of such knowledge, should be the actual existence of an escape of gas or is it enough that it should be the contingency or likelihood of an escape of gas occurring or having occurred through a defect in or injury to a drum or drums or through some other mischance?" (*Id.* at 568). Since, however, the Court chose the latter alternative, any restriction on the duty, as compared with one of reasonable care, which could have arisen from a limitation on the meaning of the word "danger" was avoided.

18. Whether, however, the word "unusual" imposes such a restriction is sometimes treated as a matter still awaiting final determination in this State. In *Barr v. Manly Municipal Council* ((1967) 87W.N. (Pt. 2) 136) Mr. Justice Jacobs, while saying that the test of reasonable care for persons entering as of right might come to no more than the invitee duty, yet left the question open (*Id.* at 151) and Mr. Justice Brereton in *Delaney v. Muttdon* ((1963) 80 W.N. 1095), when considering the possible different results of a count directly under *Donoghue v. Stevenson* and that based on the plaintiff's status as an invitee, explicitly makes the point that success under the one count may not be coincident with success under the other because the danger may be properly found not to be "unusual". There, where the plaintiff fell downstairs because of lack of light, his Honour said of the third (*Donoghue v. Stevenson*) count:

> The duty relied on under the third count is to take reasonable care to protect him against reasonable foreseeable injury, so that, in the result in this case and for present purposes there is no significant difference, although, if the matter goes back for a new trial and the jury concludes that the danger was not an "unusual" one there may well be (*Id.* at 1097).

There has been difference of opinion as to whether the term means unusual in relation to the kind of premises or for the kind of entrant, Lord Normand taking the latter view in the House of Lords in *London Graving Dock Co. Ltd. v. Horton* ((1951) A.C. 737) and Sir Isaac Isaacs the former view in the High Court in *South*

Australian Co. v. Richardson ((1915) 20 C.L.R. 181). Another source of possible conflict relates to the proper manner of pleading in New South Wales. In *Jackson v. Vaughan* ((1966)2 N.S.W.R. 147) Mr. Justice Jacobs stated that in his view it was not sufficient in this respect to allege that the defendant failed to protect the plaintiff from an unusual danger but the facts giving rise to the unusual danger should be alleged (*Id.* at 151). It does not seem that the practice appearing from other cases always measures up to this stipulation. Despite such differences of opinion on particular matters, it does, however, appear that "unusual" is in general given a broad and flexible meaning. In *Hislop v. Mooney* ((1968) 1 N.S.W.R. 559) Mr. Justice Sugerman laid down that unusual dangers may arise not- only from structural defects in the premises but also from the use which the occupier permits a third person to make of them, and the immediate cause of damage in such cases may be the acts of third persons who are neither servants nor agents of the occupier (*Id.* at 564). If, indeed, the requirement that the danger be unusual does in fact limit the duty to something more restricted than a duty at large of reasonable care for the invitee's safety, it may be that this is not because of any restrictiveness in the general connotation of the term, but because of a tendency to follow analogous cases of high authority, so that the approach to whether a particular sort of danger is unusual may become stereotyped. In *Hampton Court Ltd. v. Crooks* ((1957) 97 C.L.R. 367) the High Court held that it was not open to the jury in the circumstances of that case to find that the existence of greasy water on the floor of a hotel washroom indicated breach of duty of the occupier. Subsequently the New South Wales Full Supreme Court in *Hurst v. Falconer* ((1962) 79 W.N. 320) held, applying the High Court case, that cherries on the floor of a hotel ante-room were not an unusual danger, and Sir Leslie Herron distinguished the English case of *Turner v. Arding & Hobbs Ltd.* ((1949) 2 All E.R. 911) on the ground that in that case the substance on which the customer slipped was something in which the defendant dealt. In *Hull v. Boland* ((1962) N.S.W.R. 611) the Full Court again applied *Hampton Court Ltd. v. Crooks* where a customer of a beauty salon slipped on a worn doormat, and again in *Whiteman v. Boyd* ((1961) 78 W.N. 724) the Full Court held that a wet floor of a hotel urinal was not an unusual danger. If, however, there is any tendency to reach similar decisions on superficially similar facts in this area, the tendency has not gone to the point of hardening into rules regarding what particular dangers are unusual and what are not. In *Latham v. Davidson* ((1964) 11 Magistrates' Courts Decisions 295) a New Zealand magistrate found for the plaintiff in an action against a hotel keeper in respect of injury from a floor which became slippery from spillage. This was in an action under the New Zealand Occupiers' Liability Act but it does not seem that the different decision is accounted for by this. The floor was designed for dancing and so specially susceptible to slipperiness when wet.

19. Mr. Justice Willes' formulation of the duty of an occupier to an invitee was expressed as if the invitee had to qualify for the right to receive the care laid down by using reasonable care for his own safety (See also *Watson v. Municipal*

Council of Sydney (1926) 26 S.R. 501). So long as contributory negligence generally barred any negligence claim, the question whether his Lordship's words were to be understood as merely a way of stating the ordinary rule about contributory negligence or whether they were indeed intended to impose a condition on the right of the occupier to claim, did not need to be solved. Once, however, contributory negligence came by statute to be a matter for apportionment of damages rather than denial of recovery, selection between the two views had to be made. In Victoria (*Australian Shipping Board v. Walker* (1959) V.R. 152) and Queensland (*Moodie v. Ing* (1966) Qd.R. 229), as elsewhere, it has been determined that the ordinary apportionment rules are applicable to this relationship, though the matter does not appear to have arisen in New South Wales since apportionment in contributory negligence cases was introduced by the Law Reform (Miscellaneous Provisions) Act, 1965. There must, however, continue to be cases where the danger has to be considered as entirely the responsibility of the plaintiff himself and his agents, as where the plaintiff and his agents commence to shunt trucks while the railway servant's attention *is* diverted by the needs of others (As in *Commissioner for Railways (N.S.W.) v. Hooper* (1954) 89 C.L.R. 486 which it is not conceived would be decided any differently since 1965). The New Zealand legislature has evidently considered that the common law position was rendered sufficiently doubtful by Mr. Justice Willes' formulation of the duty to an invitee for specific statutory provision to be desirable in relation to the common duty of care which the legislation substitutes for it. The Occupiers' Liability Act, 1962 (s. 4(8)) provides:

> "Where the occupier fails or neglects to discharge the common duty of care to a visitor, and the visitor suffers damage as the result partly of that fault and partly of his own fault, the provisions of the Contributory Negligence Act 1947 [the apportionment statute] shall apply."

20. The extent to which the occupier is involved in liability to an invitee in respect of the negligence of an independent contractor is an obscure matter at common law. Prior to the discovery of *Thomson v. Cremin* ((1953) 2 All E.R. 1185) the generally accepted view was that the occupier was not liable for the negligence of an independent contractor in respect of the structural condition of the premises, though as regards things to be done on the premises (other than structural repairs) to keep them safe he could not by delegating the performance to an independent contractor escape liability, except in those cases where the performance of the duty required some technical knowledge and the occupier would be guilty of negligence if he performed the duty himself without taking and following the advice of an expert (*Salmond on Torts* (10 ed., 1945) 477). The history of the disturbing factor, *Thomson v. Cremin*, is thus explained by Sir Victor Windeyer (in *Voli v. Inglewood Shire Council* ((1963) 110 C.L.R. 74):

> In *Thomson v. Cremin* Viscount Simon, with whom Lord Romer concurred, and Lord Wright expressly approved the decision of Luxmoore, L.J. in *Wilkinson v. Rea Ltd.* ((1941) 1 K.B. 688) that the duty of an invitor to an invitee cannot be escaped by delegating its performance to an independent contractor. Admittedly *Thomson v. Cremin* has had an unusual history. For twelve years it remained unreported except in Lloyd's List Reports; and its place in the law of torts was therefore not appreciated until it was brought to notice by Mr. Heuston in his, the eleventh, edition of *Salmond on Torts* (1953): see *Law Quarterly Review* (1954) vol.70, p.246. Then, within a few years, its apparent effect was largely abrogated in England by the Occupiers' Liability Act, 1957, s.2(4)(b). Meanwhile it had been sought to apply it in another field, the duty of a master to care for the safety of his servants: *Davie v. New Merton Board Mills Ltd.* ((1959) A.C. 604). Whereupon Lord Reid was at pains to explain it, somewhat drastically. He dismissed as dicta the remarks about the responsibility of an invitor for the negligence of a contractor. In New Zealand too it has been explained and distinguished: *Lyons v. Nicholls* ((1958) N.Z.L.R. 409). Nevertheless it stands as a decision of the House of Lords (*Id.* at 97).

In spite of this last comment Sir Leslie Herron in *Hislop v. Mooney* ((1968) 1 N.S.W.R. 559) has accepted the position of the more recent English cases that *Thomson v. Cremin* is not to be taken as establishing general liability of an occupier for an independent contractor's acts. Sir Leslie said that whilst the occupier who lacks technical experience may escape liability by entrusting to an expert contractor work involving technical skill, for example, electrical installations or hydraulic lifts, he may not avoid liability if no technical skill superior to that possessed by the occupier is required to supervise the work. Even this statement seems to involve a somewhat more extensive liability for independent con-20 tractors than that formerly envisaged by Salmond, since the distinction Sir Leslie makes is evidently intended to apply to structural work as well as maintenance, and apparently more extensive too, than the position under the English Occupiers' Liability Act. Under that legislation the occupier is liable only for his personal negligence in entrusting the work to an independent contractor or in supervising it, whereas in the case of non-technical work of an independent contractor, the rule as expressed by Sir Leslie Herron would seem to involve the occupier in liability for his negligence even if the contractor was selected carefully and there was no opportunity for the occupier to intervene in time to prevent the damage resulting from the act of negligence.

(c) Persons Entering Under Contract

21. Persons who enter premises under a contract providing therefor are sometimes thought of as a special class of invitees whose rights may be different from the ordinary kind (The manner in which the matter is expressed by Walker, J. in *Lee v. City of Perth* (1947) 50 W.A.L.R. at 65) or, more often, as a distinct class of entrants. The difference is merely terminological. It is usually common to both views that the rights of the entrant are dependent on the agreement he makes with the occupier and the term may be express or implied. The term to be implied is that in the case where the use of the premises is the primary purpose of the

contract they shall be as safe for the purpose as reasonable care and skill can make them (*Francis v. Cockrell* (1870) L.R. 5 Q.B. 184, 501), but where the use is only ancillary to the purpose of the contract the entrant is owed a duty similar to that owed to an invitee (*Gillmore v. London County Council* (1938) 4 All E.R. 351). The distinction is obviously a source of some difficulty, for while the use of a hotel is in general a typical example of the former class (*Maclenan v. Segar* (1917) 2 K.B. 325) yet in one English Court of Appeal decision it was held that the standard of care owed regarding the condition of a quarter mile drive of a hotel to a paying guest was that laid down in *Gillmore v. London County Council* (*Bell v. Travco Hotels Ltd.* (1953) 1 Q.B. 473). In many local cases where the plaintiff has entered under a contract he has been treated as an ordinary invitee without discussion of the matter or the case has been pleaded on that basis without any attempt to establish a higher duty (See *Culley v. Silhouette Health Studios Pty. Ltd.* (1966) 2 N.S.W.R. 640; *Jackson v. Vaughan* (1966) 2 N.S.W.R. 147). The matter is often no doubt immaterial, as where the only negligence which it might be possible to establish is that of the occupier or his servants. On the other hand the matter has proceeded on the basis of the higher duty laid down by *Francis v. Cockrell* in such local cases as *Green v. Perry* ((1955) 94 C.L.R. 606), the case of a spectator injured by a bullock leaping the fence at a camp drafting exhibition, and *Australian Racing Drivers' Club Ltd. v. Metcalf.* ((1961) 35 A.L.J.R. 405), the case of a spectator at a race injured by a car leaving the track (Similarly in *Smith v. Buckley* (1965) Tas.S.R. 210). It is in any case clear that the mere fact that a contract is made for some purpose while on the premises does not of itself attract a higher standard of duty than that to the ordinary invitee. Sir William Owen pointed out in *Whiteman v. Boyd* ((1961) 78 W.N.724) that it was agreed in that case that the contract to buy a drink at the bar did not impliedly govern the parties' relations in regard to the state of the urinal during an immediately subsequent visit (*Id.* at 724). The principle that the rights of the contractual entrant are different from those of the invitee is thus restricted in its operation, and even in the cases where the principle applies question has been raised whether it is really the contract as such which accounts for the special rights of the entrant, as discussed in the next paragraph.

22. In *Voli v. Inglewood Shire Council* ((1963) 110 C.L.R. 74) the plaintiff was injured by the collapse of a stage in a hall occupied by the defendant council. The hall had been hired to an association, but without the association becoming a tenant, for the purpose of its use by the plaintiff and his fellow members, and perhaps without the plaintiff himself entering into contractual relations with the occupier. Sir Victor Windeyer said that even if the letting of the hall for the meeting did technically create a tenancy that would not be the end of the matter. The hall was kept by the Council for the ordinary purposes of a public hall and let out for use for short periods. This attracted by analogy an ancient principle of the common law concerning things, for example, vehicles or boats, kept for

hire to the public. The measure of that duty (where it was not .prescribed by statutory provisions for the licensing and inspection of theatres and halls) was the same as that laid down by *Francis v. Cockrell*. It was not essential that the beneficiary of the duty should himself be in contractual relations with the occupier, Sir Victor explained:

> It is, however, true that to attract a liability according to the principles of *Francis v. Cockrell* it is generally said that the admission of the public to the premises must be for reward to the defendant occupier. But that, it seems to me, is not because the duty is contractual. Rather it is because in such cases the liability is in effect similar to that in the earliest cases on the law of tort, those concerning the common callings, such as carrier, innkeeper, smith. The liability for negligence in cases of that sort arises from want of care in a public business that the defendant carries on. It matters not whether the plaintiff or someone else was to pay him for his services to the plaintiff (*Id.* at 93).

23. This shift of emphasis from a contractual to a tort basis of the duty here in question may relieve the law of a source of embarrassment. To measure a duty by reference to implication of a term in a contract is frequently artificial, and gives rise to puzzles where the question of contributory negligence is raised. For although this is a matter for apportionment in a tort case, it would not appear to be satisfactory to hold, as a Tasmanian judge did (Crisp, J. in *Smith v. Buckley* (1965) Tas.S.R.210 and *Queens Bridge Motors and Engineering Co. Pty. Ltd. v. Edwards* (1964) Tas.S.R. 93) that the wording of the apportionment legislation is sufficiently wide to apply the principle of apportioning damages, where the plaintiff is himself in a measure to blame, wherever there is a breach of contract by the defendant. Such a large intention is difficult to give to ambiguous words in a statute on ordinary principles of interpretation. It is true, however, that the Master of the Rolls, Lord Evershed, in *Sayers v. Harlow Urban District Council* ((1958) 2 All E.R. 342), in which damages were apportioned between plaintiff and defendant, said that nothing turned on the question whether the foundation of the liability in that case (injury in a penny-in-the-slot lavatory) was tort or contract (*Id.* at 344). Perhaps this is to be explained on a principle that the statute means that the principle of apportionment for contributory negligence shall apply, notwithstanding that an action could be framed in contract or even is framed in contract, provided that an action could also be framed in tort on the facts.

24. It would seem that some earlier Australian decisions may need reappraisal in the light of the doctrine of *Voli v. Inglewood Shire Council*. In that case the earlier High Court case of *Leveridge v. Skuthorpe* ((1919) 26 C.L.R. 135) was referred to as supporting the result in the later. But the reasoning in *Leveridge v. Skuthorpe* is that a person helping the organizer of a hall hired for the evening to make preparations in the afternoon is an invitee . On the arguments made in *Voli's Case* the position of the helper would appear to be indistinguishable from that of the person entering into the contract of hire and of the persons attending during the evening. It would seem, therefore, that the duty would be the higher one

that the premises should be as safe as reasonable care on the part of anyone could make them . The case of *Lee v. City of Perth* ((1947) 50 W.A.L.R. 23), which treats such a helper as a licensee, would appear to be indefensible whether the appropriate principle is that of *Leveridge v. Skuthorpe* or *Voli v. Inglewood Shire Council*.

(d) Persons Entering As of Right

25. The commonest class of entrants with a right to enter premises in the reported cases is the member of the public entering public reserves or recreation grounds maintained by a local government body or by some other public institution. The weight of English authority treats these entrants as licensees with the consequence that the duty of the occupier is one only of warning of known dangers. In Australia this position has not been accepted by the High Court of Australia from the time of *Aiken v. The Municipality of Kingborough* ((1939) 62 C.L.R. 179) and *Burrum Corporation v. Richardson* ((1939) 62 C.L.R. 214). These cases do not, however, make clear the precise character of the duty owed nor whether the standard of duty is single for all kinds of facilities or varies from category to category. It is in consequence only recently that clarification has been achieved in New South Wales over part of the field when the Court of Appeal had an opportunity to consider one aspect of the matter in *Barr v. Manly Municipal Council* ((1967) 87W.N. (Pt. 2) 136).

26. In that case the plaintiff's declaration alleged that the plaintiff was on the council's recreation reserve as of common right when he suffered injury from a danger which was not apparent and not to be avoided by the exercise of reasonable care on the plaintiff's part and that the defendant council failed to take reasonable care to prevent injury to the plaintiff. To this count there was a demurrer and the issue which was thereby intended to be raised and was argued was whether it was essential in the case of suit by a person entering as of right, as in the case of an invitee, that it should be shown that the defendant knew or ought to have known of the danger. To anyone unfamiliar with the practice in actions by invitees of pleading the words of Mr. Justice Willes in *Indermaur v. Dames* it might appear extraordinary that it should be possible to raise this issue in this way, for one might expect that these considerations would be taken to be sufficiently implied by the reference to lack of reasonable care. It is testimony to the firmness with which this form of expression of the duty to an invitee has become fixed in the law of New South Wales that to the majority of the Court this seemed an appropriate way of raising the issue which counsel wished to argue. The learned President, however, one of the majority, was not prepared in the absence of a decision by the High Court to say that the duty was higher than that to an invitee because he could not see why it should be so. Sir Gordon added (*Id.* at 137):

> It may well be that a higher duty exists in a case where the "premises" are artificially constructed premises such as a public jetty or a wharf or swimming pool, but where the property occupied, and into which members of the public may enter as of right, is (for example) a reserve or park different considerations seem applicable. In this country a park or reserve may consist of "rugged mountain ranges" and not the "ordered woods and gardens" of an English park. I am unable to accept that less than constructive knowledge of a non-apparent danger should be capable of attracting liability on the part of the occupying authority in the case of a reserve or park.

In distinguishing the position of artificial constructions Sir Gordon Wallace was leaving open the possibility that certain words of Sir Owen Dixon in *Aiken v. Kingborough Corporation*, spoken in a case involving a wharf, could be interpreted as counsel for the plaintiff in the instant case contended - that is, as laying down a duty which extended to care in respect of dangers of which the defendant had no actual or constructive knowledge. At the same time Sir Gordon considered that "An alternative permissible view of his Honour's judgment is I think that, where a public authority is charged with the care control and management of premises, it is liable for injuries to persons entering as of right resulting from dangers of the relevant type, even without knowledge of their existence, if they ought to have known of them because, if the duty were performed properly, either such dangers would not exist or their existence should be known to the authority" (*Id.* at 138). It was this view which was accepted by Mr. Justice Walsh, the other member of the majority in *Barr's Case*, and, as Mr. Justice Walsh points out, it seems also to have been accepted by Sir Leslie Herron in *Vale v. Whiddon* ((1949) 50 S.R. 90). On this view there is no duty whether in relation to natural conditions or artificial constructions to guard against dangers of which the occupier neither knew or ought to have known. But in view of Mr. Justice Jacobs' dissent in *Barr's Case* on a pleading issue and the learned President's preference for leaving the position of artificial constructions open till the matter distinctly arises, the law relating to these is not settled in New South Wales. It may indeed be questioned whether, when the issue does arise, the imposition of such a draconic measure of duty could be expected, going beyond even the duty in *Francis v. Cockrell*, but Sir Owen Dixon's views appear to have been interpreted in this sense by Sir John Latham in *Burrum Corporation v. Richardson* (See the reference in *Barr's Case* 87 W.N. (Pt. 2) at 143).

27. During recent years other Australian cases inside and outside New South Wales have taken the view that an entrant as of right upon a recreation ground is at least in the position of an invitee. This position was recently taken in Western Australia in *Pemberton National Park Board v. Jackson* ((1966) W.A.R. 61 - appeal to the High Court dismissed. See Note 39 A.L.J.R. 254) applying the New South Wales case of *James v. Kogarah Municipal Council* ((1961) S.R. 129). In *Abbott v. Commonwealth of Australia* ((1965) A.L.R. 1121) Mr. Justice Bridge held that the position of the entrant was similar to that of an invitee though not identical with it, following in this respect the language of Sir Leslie Herron in *Vale v. Whiddon* (50 S.R. 90 at 105-112). As early as 1935 Mr. Justice Halse Rogers had anticipated

the later trend of authority in New South Wales by holding in *Mills v. Sydney Municipal Council* ((1935) 12 L.G.R, 96) that a person walking on the footpaths of a park was entitled to the rights of an invitee but some of the views expressed in *Pettiet v. Municipal Council of Sydney* ((1936) 36 S.R. 125) are not consistent with later Australian authority in their adherence to the English view that an entrant on a public park is generally a licensee.

28. Outside the field of entrants upon recreational facilities authority relating to persons entering as of right is sparse. This is particularly the case concerning persons entering not merely as of right, but under pressure of duty, as for example, police and firemen. Professor Fleming points out that this group's position is subject to distinct considerations because the premises entered are private, not public (*Fleming on Torts* (3 ed. 1965) 419-20). He notes that English authority treats such persons as invitees, American authority treats them as licensees. He suggests (At 420, footnote 19) that the probable reason for the American view is that these are considered job hazards included in their employers' compensation scheme. However, it is clear that in England and in this country the employer and the occupier of property are frequently put in the position of concurrent tortfeasors and this reason would therefore not seem cogent. A more popular explanation among American text writers seems to lie in a consideration to which Professor Fleming refers, namely that "they often enter at unforeseeable times, upon unusual parts of the premises and in circumstances of emergency" (*Id.* at 419-20). This connects with the view espoused by American text-writers that the test of whether an entrant is an invitee or a licensee relates to the consideration whether or not he is entitled to expect that the premises would have been prepared for him (See *Prosser on Torts* (3 ed. 1964) 400 and 407). At the same time, the American writer Prosser argues that although a man who climbs in through a basement window cannot expect any assurance that he will not find a bulldog in the cellar, nevertheless this is something that should go to the issue of negligent conduct and not to the nature of the duty (*Id.* at 407). In view of this consideration and the fact that the duty to an invitee corresponds closely if not in all respects with the ordinary duty of reasonable care, there seems little reason to suppose that Australian courts would prefer American to English authority in this matter if the issue arose for determination.

29. A special set of considerations applies to the case of persons entering as of right on roads occupied by a highway authority, which in New South Wales is most likely to be either the Main Roads Board or a local Government body according to circumstances. On this subject there is abundant authority, both at High Court and State level, that the English common law rule denying liability for the state of the highway, whatever negligence there may have been, applies. The position is otherwise where there has been a positive act of negligence leading to the harm or failure to repair an "artificial structure", that is, a structure not

"part" of the highway in the sense of being constructed for highway purposes (See *Municipal Council of Sydney v. Burke* (1895) A.C. 433; *Gorringe v. Transport Commission* (1950) 80 C.L.R. 357; *Buckle v. Bayswater Road Board* (1936) 57 C.L.R. 259; *Kirk v. Culcairn Shire Council* (1964) 64 S.R. 281; *Bretherton v. Shire of Hornsby* (1963) S.R. 334; *Florence v. Marrickville Municipal Council* (1960) S.R. 562; *Grafton C.C. v. Riley Dodds* (1956) S.R. 52). Where the road is rendered dangerous by misfeasance, even though this gives rise to a static condition, the Full Court has been prepared to resort directly to *Donoghue v. Stevenson* in finding a duty and has not attempted to categorise the plaintiff (*Spackman v. Wellington Shire Council* (1955) 72 W.N. 410). The rules are productive of borderline cases where results may vary apparently arbitrarily with small differences in circumstances. In *Vale v. Whiddon* ((1949) 50 S.R. 90) the plaintiff was injured on the highway controlled by the defendant through a decayed tree falling. If the tree had been considered in the highway area presumably this must have been treated as nonfeasance, but the defendants were in occupation both of the highway and surrounding country and could be considered as in breach of duty in the latter capacity to occupants of the highway either in nuisance or on the basis of *Donoghue v. Stevenson*.

30. In some special circumstances the fact that a person is an entrant as of right is permitted to be overshadowed by other aspects of the situation. It is not customary to base an action on the duty of an inn-keeper for the safety of his guests (although in *Delaney v. Muttdon* (1963) 80 W.N. 1095 Mr. Justice Brereton envisaged the possibility of this approach (*Id.* at 1097)), the coexistent entry under contract or invitor-invitee relationship being treated as founding the duty. The fact that a carrier is a common carrier has not generally been allowed to obtrude into or influence the duty owed to passengers as distinct from the duty for safety of goods (*Readhead v. Midland Railway* (1869) L.R. 4 Q.B.379).

(e) Licensees

31. It seems possible to detect in the decisions in Australia over the years a trend towards restricting the category of licensee, or gratuitously permitted entrant, to those for whose visits no shadow of material interest in the occupier can be found. It is true that in *Lipman v. Clendinnen* ((1932) 46 C.L.R. 550) a visitor to a tenant was held to be a mere licensee on the common entrances of the premises which remained in possession of the lessor. But in this matter there was no reasonable escape from the decision of the House of Lords in *Fairman v. Perpetual Investment Society* ((1923) A.C. 74) which the House of Lords itself was later to feel bound to follow in *Jacobs v. London County Council* ((1950) A.C. 361). The reasoning of Fairman's Case is difficult to reconcile with that in *Stowell v. Railway Executive* ((1949) 2 K.B. 519) holding visitors to railway stations to welcome incoming or speed departing passengers to be invitees. The lessor would seem to have the same kind of interest in the tenant's visitors as does

the railway company in the customer's visitors - in either case care for the customer's or tenant's visitors is part of a service to one who is paying the occupier for service. In New South Wales *Stowell's Case* was, to some extent, long anticipated by *Trice v. Clarence and Richmond Rivers S.N. Co.* ((1884) 5 N.S.W.L.R. 137), which held the plaintiff an invitee rather than a licensee because when he visited the defendant's ship to see off a friend he carried some parcels for the friend. And although in *Sparkes v. North Coast Steam Navigation Co.* ((1899) 20 N.S.W.L.R. 371) a visitor to see off a passenger was held a licensee by contrast to *Trices' Case* and to the case of *Hanson v. Newcastle Steam Navigation Co.* (mentioned *supra* paragraph 5) yet even here the Court held the defendant liable to the licensee for his negligent act of commission in pulling away the gangway. Thus it bypassed the rule that an occupier is only liable to warn a licensee of a known danger in precisely the same manner as the Privy Council was to do half a century later in *McDermott v. Commissioner for Railways* (*Supra* paragraph 9), and applied ordinary principles of negligence to the case. Somewhat in opposition to the general trend in New South Wales, however, is *Finnie v. Carroll* ((1927) 27 S.R. 495) where the Full Court applied the rule, that mere warning of a state of premises is sufficient to exclude liability, to the situation where the plaintiff had notice of the drunken state of the defendant occupier of an automobile when he entered it and allowed himself to be driven. Of this Sir Owen Dixon, while reaching no different practical result, said in *Insurance Commissioner v. Joyce* ((1948) 77 C.L.R. 39) that the assimilation by the Full Court of the condition of the driver to the state of the premises was not very satisfactory. This comment would seem to be underlined by the reasoning in *McDermott's Case*, which would also seem to call in question the correctness of the approach of the Full Court in *Keato v. Commissioner for Railways* ((1956) S.R. 270) holding that an approaching locomotive was not a concealed trap for a licensee user of a level crossing. This seems an appropriate case for an "activity duty" on ordinary principles of negligence and indeed. *Keato' s Case* was doubted in the course of the Full Court judgments in *Commissioner for Railways v. Quinlan* ((1960) S.R. 629). Nevertheless cases will remain where no shadow of material interest of the occupier in the visit of the plaintiff can be detected, or the authorities are too strong to the effect that the plaintiff is a licensee to be escaped, and where also the source of danger is too clearly a state of the premises for any independent duty of ordinary reasonable care to be detected. In such cases the rule that the occupier is liable only to warn the licensee of a known danger will continue to be of importance, and despite a marked tendency in the English decisions to interpret "known" and "danger" so widely that the duty is brought close to one of ordinary reasonable care, Professor Fleming nevertheless argues that the distinction between the duties to licensee and invitee remains strong enough to put a premium on the occupier in his relations with licensees, refraining from searching for defects in premises so that the danger becomes known (*Fleming on Torts* (3 ed. 1965) 429).

No doubt cases may be found when such a premium exists. But precisely when failure to look will protect against action by a licensee is not clear. In several English cases involving dangerous conditions created by third parties, failure to search for them did not protect the occupier when he knew of the danger in the sense of the likelihood of such activity bythe third parties (*Coates v. Rawtenstall Corporation* (1937) 3 All E.R. 602; *Ellis v. Fulham Borough Council* (1938) 1 K.B. 212; *Pearson v. Lambeth Borough Council* (1950) 2 K.B. 353). The existence of the rule determining the duty to a licensee, which is obviously felt to be out of touch with the general law, is a source of obscurity through the process of erosion to which it is subjected while the law flows in new channels around it.

(f) Trespassers

32. It has been necessary to discuss the duties of the occupier to trespassers in some detail when developing the relation of this topic to the general law of negligence and we therefore content ourselves here with referring the reader to paragraphs 10 to 13 *supra*.

(g) Duties to Protect Property

33. It has occasionally been argued that the rules relating to persons in the various categories we have discussed should not be applied to property brought upon the land, except where the property is that of a person suing as an entrant on the land who has also suffered personal injuries (See *Tinsley v. Dudley* (1951) 2 K.B. 18 per Lord Evershed, M.R.). But in this country, the practice is well established of treating property upon land as being there through a trespass, or by licence or invitation, and the owner or possessor thereby acquires rights against the occupier of a similar kind to those which he would have obtained if he had entered personally (which he may or may not have actually done along with his property) and had been injured. It will be recalled that a leading case on the duties to trespassers is *Transport Commissioners of N.S.W. v. Barton* ((1933) 49 C.L.R. 114) where the damage was done to a mare, and the ordinary principles relating to trespassers were applied, though the owner of the horses did not personally enter the property (Similarly in *Commissioner for Railways v. Ward* (1965) 82 W.N. (Pt. 2) 443). In *Barton's Case* the presence of the horses did involve the owner in the tort of cattle trespass, but it presumably would have made no difference if the straying animal had been outside the description of cattle and hence had not involved the owner in a trespass. Consideration of this latter kind of example indicates that the category rules are here applied to chattels by an analogy or extension. In *Drive Yourself Lessey's Pty. Ltd. v. Burnside* ((1958) S.R. 390) the defendant occupier was held liable in respect of damage to a car brought on to the premises with his permission by a person other than the owner. The majority of the court approached the matter on the basis that

whether the defendant was regarded as an invitor or a licensor, the invitation or licence extended to the plaintiff as owner of the car and gave rise to a corresponding duty in respect of it. Sir Leslie Herron preferred to approach the matter on the basis of a *Donoghue v. Stevenson* duty, and doubted the validity of the alternative approach.

34. It may be that the rules should be applied to property only in the case of damage and not to theft. It may be, for example, that a person whose property is on premises with the licence of the occupier cannot complain if the occupier fails to warn of a danger on the property of which the occupier is aware if the danger is that the property is frequented by thieves even though a thief steals the plaintiff's property. In *Tinsley v. Dudley* ((1951) 2 K.B. 18) the defendant was held not to owe a duty of care in respect of property of a customer stolen from the yard of defendant's inn which was not a common inn. And in *Edwards v. West Herts Group Hospital Management Committee* ((1957) 1 W.L.R. 415) the same result was reached on the authority of the earlier case of *Deyong v. Shenburn* ((1946) K.B. 227), although the plaintiff in these cases was a servant as well as an invitee of the occupier. The two last cases are adversely criticised by A.L. Goodhart (73 L.Q.R. 313) but principally on the ground that, if the occupier-invitee relationship is insufficient to raise such a duty, the employer-employee relationship should do so in circumstances like those of Edwards' Case, where it was difficult to see how the plaintiff could have performed his obligations to the hospital without bringing his clothes to the hostel room from which they were stolen.

(h) "Structures"

35. The practice is well established of treating movable property, on which people may enter, as "premises" for the purposes of the rules we have been discussing. The commonest example is provided by ships, but *Dolbel v. Dolbel* ((1962) 80 W.N. 1056) is a recent example of their application to motor vehicles (See also *Finnie v. Carroll* discussed *Supra* paragraph 31). In *Dolbel's Case* a defective door flew open and precipitated the plaintiff on to the road when the car, "occupied" and driven by the defendant, struck a pothole at speed. The Full Court considered whether there was a breach of duty to the plaintiff in respect of the condition of the vehicle either on the basis that he was an invitee or on the basis that he was a licensee and came to the conclusion that on the facts neither duty could be held to be broken. The court thought otherwise as to the manner of driving, but, in accordance with long standing authority, treated this as a matter not depending on the rules relating to occupiers but on ordinary principles of negligence. Mr. Justice Sugerman pointed out that the existence of the two kinds of liability may occasionally lead to the two heads becoming confused - cases in which a known defect still leaves the vehicle safe to be driven provided a special degree of care is taken

and the question is whether that degree of care has been taken. It is cogently argued that the distinction was not properly appreciated by the Courts in *Twine v. Bean's Express* ((1946) 1 All E.R. 202 and 62 T.L.R. 458) and *Conway v. George Wimpey & Co. Ltd.* ((1951) 2 K.B. 266). (See, for example, the criticisms in J.G. Fleming, *Law of Torts* (3 ed. 1965) 442.)

(i) Duties of Others Than Occupiers

36. In the United States it seems that the balance of authority extends to certain other persons such immunity from suit on ordinary principles of negligence as the occupier possesses by virtue of the restrictions on the duties he owes. A leading American text states that the occupier's immunities probably inure to members of his family and also to those acting in his behalf on the premises either as employees or as independent contractors (Harper and James, 2 *Law of Torts* 1, 433). A similar position is taken by the American Restatement (ï¿½ 383-385). This is sometimes expressed by saying that certain persons may shelter under the occupier's umbrella. But in England recent cases, no doubt influenced by the desire to confine the unpopular "category" duties as narrowly as authority will permit, seriously call into question whether the occupier's umbrella is ample enough to protect anyone except himself. In *A.C. Billings & Sons Ltd. v. Riden* ((1958) A.C. 240) the House of Lords refused to restrict the duty to the plaintiff of the defendants, contractors employed by the occupier, to that which would have been imposed on the occupier to the plaintiff, a licensee, if the occupier himself had been sued. Lord Reid said:

> The only reasonable justification I know for the rights of a licensee being limited as they are is that a licensee generally gives no consideration for the rights which the occupier has given him and must not be allowed to look a gift horse in the mouth. That cannot apply to the appellants, who gave no concession to the respondent (*Id.* at 249).

In *Davis v. St. Mary's Demolition and Excavation Co. Ltd.* ((1954) 1 W.L.R. 592) the defendant contractors to the occupier were held to owe an ordinary duty of reasonable care even to child trespassers whose presence they might have anticipated. This was followed in *Creed v. McGeoch & Sons Ltd.* ((1955) 1 W.L.R. 1005). As Professor Fleming, who prefers the American view, points out (*Law of Torts* (3 ed. 1965) 439), there may be an escape for the contractor if he can show that he has sufficient control of the premises for the purposes of his work to be himself considered an occupier. Although Professor Fleming's assertion that this was the holding in *Perry v. Thomas Wrigley Ltd.* ((1955) 1 W.L.R. 1164) does not seem to be borne out, nevertheless the possibility of convincing the court that a contractor was an occupier seems to be increased by cases decided since Professor Fleming's last edition (See *Supra* paragraph 14).

(j) Lessors

37. The lessor will normally not be an occupier, except of the retained common staircases etc., although recent authority referred to in the previous paragraph may make it desirable to investigate what degree of control may in a particular case arise out of, for example, a right to enter and repair in the lease, before reaching a final conclusion. As a lessor out of occupation he may owe duties of care whether under the lease, or at common law in the case of furnished premises, or by statute. But these duties, unless the tenant contracted as agent, have been confined in their scope to the tenant himself. At common law otherwise the severe rule of *Cavalier v. Pope* ((1906) A.C. 428) applies that no duty of care exists, either in relation to conditions at the beginning of the lease or which are allowed to develop during the lease (*Silk v. Reid* (1897) 18 N.S.W.L.R. 29). More recent authority has, however, distinguished the position of repairs made, even gratuitously, during the lease in a careless fashion (*A.C. Billings & Sons Ltd. v. Riden* (1958) A.C. 240 overruling *Ball v. London County Council* (1949) 2 Q. B. 159) and the High Court of Australia, as we have seen (*Supra* paragraph 22), has made a special case of premises let for short periods for entry of the public (*Voli v. Inglewood Shire Council* (1963) 110 C.L.R. 74). In this last case the duty that the premises shall be and continue to be as safe as reasonable care and skill can make them extends not only to the person who made the contract of hire, and whether that contract involves transfer of possession or not, but also to other persons whose use of the premises is within the purview of the hiring.

(k) Vendors and Builders

38. The position of a vendor has traditionally been similar to that of the lessor in its absence of liability for the grossest carelessness or failure to warn of known dangers whether to the purchaser, in the absence of any covenant, or to third parties using the premises, even if there is a contractual obligation to the purchaser (*Bottomley v. Bannister* (1932) 1 K.B. 458; *Otto v. Bolton and Norris* (1936) 2 K.B. 46). But while the immunity of the ordinary seller or the speculative builder who builds and sells may continue, English authority now holds the contract builder responsible for lack of care in construction to those who may use the premises (*Sharpe v. E.T. Sweeting & Son Ltd.* (1963) 1 W.L.R. 665). And here again *Voli v. Inglewood Shire Council* ((1963) 110 C.L.R. 74 - *Cf. Florida Hotels Pty. Ltd. v. Mayo* (1965) 39 A.L.J.R. 50) is relevant in another of its aspects, holding that an architect who designs a structure owes a duty of care to others who may subsequently use it. Any immunity which continues in the builder-seller would in this case relate to real property in the ordinary sense and not to structures (See, for example, *Daley v. Gipsy Caravan Co.* (1966) 2 N.S.W.R. 22).

(l) Modification of Duties by Agreement

39. In *South Australian Co. v. Richardson* ((1915) 20 C.L.R. 181) Sir Isaac Isaacs pointed out that where a visitor has an abolute right to go on premises independently of invitation, his rights cannot be measured by the terms of the invitation (*Id.* at 193). But in the ordinary case of an invitation the entrant may take the risk of injury on himself by exceeding the terms of the invitation through the manner in which he conducts himself. In *Archer v. Hall* ((1967) 1 N.S.W.R. 107) Mr. Justice Sugerman applied this principle and the High Court upheld the decision on grounds stated to be substantially those in his Honour's judgment. He said:

> The plaintiff's invitation was limited to working on the roof trusses at the rear of the second storey and to taking himself and his equipment to and from his place of work. For these latter purposes a stairway to the first floor and a ladder to the second were provided. In deciding to depart from these means and to throw a rod over the front of the building [which tangled in street wires and transmitted an electrical shock] the plaintiff went beyond the scope of the invitation. He took upon himself the risk of this operation. (*Id.* at 115).

The principle here seems distinct from that by which a person's rights may become those appropriate to a trespasser when he goes outside the area of the invitation, and to relate rather to what duties are to be implied in the nature of the arrangement between the parties. Apart from such implications, cases may arise in which parties have expressly varied the ordinary duties, even though it is not a case of an entrant under contract, and the freedom with which this has been permitted has excited some adverse comment. In *Ashdown v. Samuel Williams & Sons Ltd.* ((1957) 1 Q.B. 409) the English Court of Appeal held that an occupier could effectively exclude his liability to a licensee making use of his premises by displaying an adequate notice disclaiming liability. It is suggested that this would be equally applicable to the case of an invitee (See Professor Payne's discussion in (1958) 21 *Modern L.R.* at 364). The decision was criticised on the ground of unfairness by ProfessorGower in (1956) M*odern L.R.* at 532-7 but has been defended on the ground that it is consistent with principle that a conditional licence (using this term in its broad "property" sense) should be capable of being granted (See Odgers, "Occupiers' Liability: A Further Comment" (1957) *Cambridge L.J.* 39 at 44) though it is claimed on the authority of *Cosgrove v. Horsfall* ((1946) 62 T.L.R. 140) that the exclusion of liability cannot enure in favour of third parties to an agreement, even the occupier's own servants or agents, unless he acts as an agent in making the contract of exclusion or displaying the notice. The rules seem to have the curious result that vis-a-vis an invitee a notice merely warning of danger might be ineffective whereas a notice which could be construed as indicating an intention to exclude liability for the danger would always be effective.

III. COMMENTS ON THE LAW

(a) Dissatisfaction with the Categories of Duty

40. The attempts, which we have been reviewing, to establish what degree of care is appropriate on the part of an occupier for various categories of entrants represent the legal philosophy of a bygone age. This philosophy was most neatly expressed by Mr. Justice O.W. Holmes. One of the applications he made of his famous aphorism that the life of the law is experience was to argue that the proposition that a man must exercise reasonable care should always be giving way as the law developed to rules that he should exercise this or that precaution in this or that situation. Ironically, the disproof of this proposition (put forward in his *The Common Law* (1881)) seemed to emerge from Mr. Justice Holmes' own experience, for in a whole series of cases after his retirement from the Supreme Court of the United States his colleagues found it necessary in the interests of justice to depart from rules which he had laid down about what was reasonable care in particular types of cases. The account of the law relating to occupiers which we have given demonstrates, we believe, that the same thing would have happened to the rules relating to the care which occupiers must take for particular categories of entrants had they not become too firmly fixed in the law at too early a stage. The complexities we have observed both in the definitions of the rules themselves and in the accounts of their relation to the law of negligence seem to be due not only to the marginal cases which must always arise in applying any rules, but also to the effects of temptation in the interests of justice to find means of escaping from one or other of the rules in cases where in the absence of such pressure the rule might naturally be applied. Convincing evidence of the wide-spread character of dissatisfaction with the distinction between invitees and licensees is to be found in the passage of the English, Scottish and New Zealand Occupiers' Liability Acts abolishing it and establishing a common duty of care and in the recommendations which led to them (*Supra* paragraph 4). Nor have these attacks been lacking in Australia. In *Mortomore v. McPhersons Ltd.*((1957) 74 W.N. 294) Mr. Justice Brereton said that "there has commonly been an approach to the problem which involves attaching a label to the plaintiff, namely 'invitee' 'employee' or 'licensee' and determining the defendant's duty accordingly without much reference, if any, to any of the multifarious detail in the relationship varying immensely from one case to the next". So, too Professor Fleming: "The emphasis on categories and labels involves a high degree of formalism which experience has proved to be a fertile source of unrealistic distinctions, capricious results and all too many appeals on what should be questions of fact but are distorted into questions of law" (*Fleming on Torts* (3 ed. 1965) 404). In Scotland the condemnation has extended to the rules relating to trespassers and is reflected in the provisions of the Scottish Occupiers'

Liability Act, 1960 applying the test of reasonable care to the duties of occupiers to trespassers. Behind this was the dissatisfaction felt in Scotland at the imposition upon that country of the English category rules by the House of Lords decision in a case relating to trespassers, *Robert Addie & Sons Ltd. v. Dumbreck* (*Supra* paragraph 10). Speaking of the results of this case a Scottish writer says:

> Not merely was this a subversion of the common law of Scotland but it gave rise to many narrow and difficult arguments on categorisation, particularly as between invitee and licensee. The insistence on labels, categories and rigidly distinct compartmentation obscured fundamental principles and produced results exhibiting the worst characteristics of purely mechanical jurisprudence.
>
> The categories, in later cases, showed a great tendency to shade into one another and similar facts were sometimes differently categorised as between Scotland and England at different times. There was also a noticeable tendency to treat judicial formulations of a duty of care as canonical and to accord them the deference, and the casuistic interpretation, usually reserved for statutes (D.M. Walker, 2 *Law of Delict in Scotland* (1966) 588).

41. Support for abolition of the categories, even for the lesser step of abolishing the distinction between invitee and licensee as taken in England and New Zealand, has not been unanimous. Lord Justice Diplock (then Mr. Diplock, Q.C.) dissented from the recommendation of the English Law Reform Committee in this respect ((1953) Cmd. 9305 at 43-44) though suggesting some minor modifications of the existing law. In 1958 members of the New Zealand Law Revision Committee were generally in agreement with Mr. Diplock' s views but following an article "Occupiers Liability: Urgent Need for Legislation" ((1959) *N.Z. Law Journal* 113) and judicial criticisms of the law in *Hope Gibbons Ltd. v. Percival* ((1959) N.Z.L.R. at 658, 677), opinion changed. Professor Douglas Payne, of the law school of the University of Western Australia, was also impressed by Mr. Diplock's doubts. He said:

> It is fashionable nowadays to deprecate "mechanical jurisprudence", of which the common law categories of visitor have often been cited as an example, and to favour an enlargement of judicial discretion by the formulation of broad standards to do "Justice" in the particular case. This tendency is often to be welcomed, particularly where the rigid categories of the law law owe their existence merely to the accidents of legal history or have given rise to a wealth of subtleties and refinements disproportionate to any practical gain in legal certainty. But the critics of mechanical jurisprudence appear sometimes to forget that a legal system has the practical function of resolving and preventing disputes and to place a pathetic trust in the infallibility of judicial discretion. Justice is not an absolute, given to all of us, or even to all judges, to see alike.
>
> The reports of recent years contain many cases in which appeal courts have reviewed the question whether the defendant took reasonable care in the circumstances of the case, sometimes with a remarkable lack of unanimity of opinion. The interpretation of the common duty of care now imposed on occupiers is bound to add to the number of these appeals (Douglas Payne, "The Occupiers' Liability Act" (1958) 21 *Modern L.R.* 359, 373-4).

According, however, to the testimony of Lord Denning, Professor Payne's predictions have not been borne out. In 1963 in *Roles v. Nathan* ((1963) 2 All E.R. 908) Lord Denning said that this was the first time the Court of Appeal had had to consider the Act of 1957. The Act, he pointed out, had been in force six years and hardly any case had come before the courts in which its interpretation had had to be considered. He expressed the opinion that the Act had been very beneficial (*Id.* at 912). Addressing the Eleventh Legal Convention of the Law Council of Australia A.L. Goodhart expressed the view that the English Act had worked extremely well, allowing technical considerations to be eliminated and each case to be considered on its merits ((1959) 33 A.L.J. 137). The New Zealand experience has been similar. Dr. J.L. Robson, the New Zealand Secretary for Justice, in correspondence with us, advises that the paucity of reported cases presumably indicates that few difficulties have been encountered when applying the Act in practice. Indeed the only reported New Zealand decision which has come to Dr. Robson's attention is *Latham v. Davidson* (To which we have referred *supra* paragraph 18). Even in Scotland, with the more extensive operation of the Act of 1960 in that country to bring trespassers within the protection of the common duty of care, no spate of litigation appears to have resulted. Recent texts refer to only one case since the Act dealing with a trespasser, in which the trespasser was held to have no remedy as the occupier had built a fence adequate against all but those who might deliberately decide to overcome the barrier (*McGlone v. British Railways Board* (1964) Scottish Law Times (Notes) 85 cited in D.M. Walker, 2 *Law of Delict in Scotland* (1966) 598-9 and in the House of Lords (1966) S.L.T. 2 cited Gloag and Henderson, *Introduction to the Law of Scotland* (1968) 448-449).

(b) The Formulary Rules as Controlling Juries

42. In interpreting the English experience for New South Wales mention should be made of the different legal environment in which reform would operate in this State owing to the general use of the jury in this type of case and the existence of a New South Wales Government policy in favour of its continuance. A feature of formulary rules laying down what can be required in a given situation is that they restrict the role of the jury - the limitations on liability in these rules may have the effect of preventing the matter from going to the jury at all for lack of evidence of the conditions the rules impose for liability, or may have the effect of calling for narrower issues to be submitted to the jury than would be the case in ordinary actions of negligence. Mistrust of the consequences of permitting a jury to consider at large the reasonableness of the defendant's conduct in this area of liability has been evident in the cases from the outset and must have contributed to the formulary approach. In *Toomey v. London and Brighton Railway* ((1857) 3 C.B. (N.S.) 146) the plaintiff was an illiterate passenger on the defendant's railway who, mistaking a door marked "Lamp Room" for an adjoining door marked "For Gentlemen", fell down a staircase and was injured. Holding that there was no evidence for the jury, the

Judge said: "Every person who has any experience in Courts of Justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result" (*Id.* at 150). In New South Wales the Railway Commissioner is a prominent defendant in cases of this kind and there seems to be some impression that the readiness of juries to give favours to members of the general public at the expense of railway authorities persists. It was in *Commissioner for Railways (N.S.W.) v. Anderson* that Sir Wilfred Fullagar, in his dissenting holding that there was no case on the facts for the jury which had awarded damages to the plaintiff invitee against the defendant Commissioner, complained that "the word 'negligence' has tended of recent years to lose all meaning" and added, quoting Sir Frederick Pollock, that "we still have to take notice that there are such things as inevitable accidents which are nobody's fault" ((1961) 105 C.L.R, 42, 58). Sir Wilfred is here referring to a tendency which the American writer Ehrenzweig provocatively terms the development of "negligence without fault", and a leading American torts text frankly recognises that in American conditions, where juries are also general, the effect of substituting a general liability in negligence for the formulary rules would be to establish something approaching strict liability of occupiers to entrants. Fleming James writes:

> It may be argued with some reason that, however careful a defendant has been, in nearly every case the ingenuity of counsel after the event can suggest some further or alternative precaution that might have avoided injury, and since juries are ever ready to find a defendant negligent this would in practice burden occupiers of land with an infinite series of precautions, or in effect make them insurers against injury caused by the dangerous conditions of their land. Something approaching this obtains broadly in the accident field. The question here is whether or not the use of land ought to be exempted from the treatment accorded to enterprise generally
>
> The bulk of these accidents involve industrial or business property and the slight risk of the small landowner is readily and reasonably insurable (Harper and James, 2 *Law of Torts*, 1437).

It is clear that Sir Wilfred Fullagar would not have reconciled himself to submitting to these consequences of the tendency to which he refers, but it also seems clear from his various judgments that he would have been at one with the American in wishing to see the general negligence rules operative in this field, relying on the ordinary powers of control of judges over juries to avoid the consequences thereof which Fleming James foresees. A recent example of the exercise of such powers in a case in the New South Wales Court of Appeal involving an occupier was *Jackson v. Vaughan* ((1966) 2 N.S.W.R. 147) where the Court ordered a new trial on the ground that the verdict was against the weight of the evidence and the trial judge was in error in leaving to the jury the question whether the danger to the plaintiff invitee was an unusual one. Mr. Justice Asprey described the result of the trial as due to "the benevolence of a jury exercised at the expense of the pockets of other people" (Id. at 156). In the view of Mr. Justice Jacobs, however, reliance on the general methods of judicial control over juries such as holdings of 40 lack of evidence or that a verdict is against the weight of the evidence offers

insufficient protection against the vagaries of juries in this area of liability. In *Barr v. Manly Municipal Council* ((1967) 87 W.N. (Pt. 2) 136) he calls attention to the distinction between the system in England and New South Wales in the present respect, quoting a New Zealand judge who suggested five years before New Zealand adopted the English statutory rule of a general duty of reasonable care to lawful entrants that "it would almost be tantamount to surrendering the whole field of law on this topic to the untrammelled decisions of juries" (*Id.* at 152). Mr. Justice Jacobs' inference is that so long as the jury survives, some further formulation of the duties owed by occupiers is necessary (*Ibid.*).

(c) The Strict Liability Solution

43. It is against the background of these problems that the question arises whether the common duty of care, as established by legislation in England and New Zealand, and over a broader area in Scotland, would offer a solution to the difficulties felt with the formulary rules and at the same time offer sufficient means of control over tribunals of fact to prevent the imposition of liability in cases where the jury entertained no real belief that negligence had been proved. 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.

(d) The "Common Duty of Care" Solution

44. The English Occupiers' Liability Act, 1957 (5 & 6 Eliz. 2, c. 31), to the background of which we have already referred (*Supra* paragraph 4), provides by the first two subsections of s. 2:

> 2. -(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, [the term "visitors" is elaborated in the Act in such a way as to exclude trespassers] except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

The New Zealand Occupiers' Liability Act (No. 31 of 1962) is in terms virtually identical with those of the English Act in the present respects (s. 4 subs. (1) and (2)). The provisions of the Occupiers' Liability (Scotland) Act, 1960 (8 & 9 Eliz, 2, c. 30) cover the occupier's liability to all visitors, lawful or not, and in the present respect state the liability as follows in s. 2(1):

> The 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 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.

45. A feature of all three Acts referred to in the last paragraph is that under their provisions the existence of a duty of care owed by a defendant in an action to the plaintiff is left to be established by simple proof of the occupier- visitor relationship. 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 (See, for example, Lord Wright's judgment in *Bourhill v. Young* (1943) A.C. 92, 111 discussed at length in *Nova Mink Ltd. v. Trans Canada Airlines* (1951) 2 D.L.R. 241) 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* ((1932) A.C. 562) 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. In *Bourhill v. Young* ((1943) A.C. 92) the House of Lords, applying *Donoghue v. Stevenson*, held that although the parties were in the relationship of motorist and pedestrian on the highway no duty was owed because the plaintiff was beyond the range of danger created by the defendant's acts. But the majority of the House of Lords refused to approach the occupier-invitee situation in the same way. In *Glasgow Corporation v. Muir* ((1943) A.C. 448) the House of Lords agreed that no

danger could be anticipated to invitees from the defendant occupier's act in permitting some visitors to carry an urn containing some four gallons of tea from one part of the premises to another. Thus the plaintiff over whom the visitors spilled the tea was held to have no cause of action and the reason given by Lord Macmillan, applying *Bourhill v. Young*, was that because the defendant was entitled to assume that the activity which she permitted would be carefully carried out and an event of the kind which happened was not to be anticipated "there was no duty incumbent on her to take precautions against the occurrence of such an event" (*Id.* at 458). All the other law lords, however, held that there was a duty of care but because harm could not be anticipated to the plaintiff it was not broken, and in reaching this conclusion each applied *Bourhill v. Young* in principle or in terms, Lord Wright describing the issue in it as a "kindred problem" (*Id.* at 460). Probably the explanation of the approach of the law lords other than Lord Macmillan was that the rule that the existence of the occupier-invitee relation itself immediately raised a duty of care of a precise formulation had become so firmly fixed that to leave to the judge as a duty question the additional matter of whether the plaintiff was endangered by the particular act or activity or condition, on which the defendant was engaged or which he permitted, was improper. But it is a large step, when a statute replaces the restricted duties with duties of reasonable care at large, to make the 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* 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.

46. 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 juryman 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.

47. The history and present state of the law as we have outlined it appears to us to

show that many of the difficulties, especially those which we have outlined in the section on the present law of occupiers' duties and the law of negligence (*Supra* paragraphs 1-13), arise from the conflict between older and newer approaches to negligence. It is therefore a great step forward to substitute a duty of reasonable care for the defined duties as the United Kingdom and New Zealand Acts do. But the persistence for so many years of the categories and the measure of support the old rules receive from critics of the legislation is also indicative of the sensitive relations which are involved. The old danger that a jury with no property interests would behave unfairly to the property owner has no doubt diminished with the broadening of home ownership, just as the danger that the judge may serve in his exercise of his functions the interests of the property owner - a factor frequently alleged to have been responsible for the restricted duties on occupiers - has diminished with the growth of equality of opportunity to achieve office in our society. At the same time the pressure to find a remedy for the injured against someone, in a society dominated by notions of social welfare, however it may operate in fields like motor and industrial accidents where liability insurance is compulsory, can be productive of individual injustice where the insurance situation is the different one we have described above (*Supra* paragraph 43). We are not therefore disposed to recommend that the common duty of care be imposed *ipso facto* on occupiers either in relation to lawful visitors or in relation to visitors generally.

(e) A Fresh Start on Modern Common Law Principles

48. In view of the considerations to which we have referred we tentatively propose that legislation should be introduced which in its main provision should in effect (a) require 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, (b) provide that where such a duty is determined to exist it shall be an ordinary duty of reasonable care.

(f) Application of This Approach to Trespassers

49. In our tentative opinion such an approach, applied to all visitors and not restricted in the manner of the English and New Zealand Acts to lawful visitors, would offer on balance the best means of dealing with duties to trespassers, the most difficult of the many questions in this area from the point of view of the state of the authorities (See paragraphs 10 to 13 *supra*) as well as the technical and social problems involved. As to the state of the authorities, uncertainty is the necessary consequence of the fact that the Privy Council in Commissioner for *Railways v. Quinlan* (*Supra* paragraph 12) condemned the reasoning in a number of decisions of the High Court of Australia, but was at pains to find reasons for defending the results on principles which the Privy Council regarded as established. This was something which could hardly be done, it is suggested

with respect, without distorting the principles themselves and causing confusion about their application in future cases. The Victorian decision in *Victorian Railway Commissioners v. Seal* (*Supra* paragraph 13) - that "recklessness" included failing to remedy for the safety of subsequent foreseeable trespassers a defect in a lock on a turntable caused by trespassers - would have seemed inconceivable as an application of *Robert Addie & Sons v. Dumbreck* (*Supra* paragraph 10) which *Quinlan's Case* maintains is still the fountain of the law, but at least derives some encouragement from the statement in *Quinlan's Case* that recklessness is an expanding conception. The correctness of the Victorian decision must nevertheless still be regarded as in doubt in jurisdictions not bound by it, especially in view of the formulation of the duty to trespassers in terms appropriate to describe a duty to refrain from positive acts in the later Privy Council decision of *Commissioner for Railways v. McDermott* (*Supra* paragraph 13). In New South Wales the further question arises whether the Victorian Court's view of what will satisfy the requirement that there should be knowledge of the extreme likelihood of the presence of a trespasser can consist with the view of the New South Wales Full Court in Commissioner for *Railways v. Ward* ((1965) 82

> W.N. (Pt. 2) 443). There *Quinlan's Case* was applied to deny a remedy when the defendant had actually been warned by the plaintiff that his cattle might be on the line only a few hours before. The ground was that some trains had passed in the intervening period without mishap. The uncertain state of the authorities in itself, in our tentative opinion, gives sufficient ground for clarifying legislative intervention.

50. In determining what form such legislative intervention should take, we consider that attention should be paid to the technical considerations to which Sir Owen Dixon referred in *Transport Commissioners for N.S.W. v. Barton* (*Supra* paragraph 11). In criticising the resort to the concept of recklessness to determine whether an occupier has broken a duty to a trespasser, Sir Owen Dixon said:

> A disregard of the interests of a trespasser whom *ex hypothesi* the occupier knows is in proximity to danger [his Honour was accepting that *Robert Addie & Sons Ltd. v. Dumbreck* required this knowledge] must often appear to merit the description "reckless". But all attempts have failed in the past to fix upon a standard, an external standard at any rate, which requires less than due care in the circumstances and more than an abstention from intentional harm. I think that in relation to the persons and property of trespassers it will not be found possible to formulate an ascertainable standard of such a character (49 C.L.R. 114 at 131).

It seems to us that the present uncertainties in relation to the outcome of *Quinlan's Case* may well amount to confirmation of Sir Owen's view that it is not possible for the law to lay down a standard of conduct due from an occupier to a trespasser intermediate between abstention from intentional harm and the exercise of reasonable care. Since recent history demonstrates that the confining of the duty of an occupier to a trespasser to intentional harm is unacceptable alike to the

judiciary and the general community, we are disposed to think that the proper course is to provide for an ordinary duty of reasonable care to be imposed inappropriate circumstances. The question then becomes whether an attempt should be made to define these circumstances or to leave them largely to judicial development, but a judicial development untrammelled by rules relating to trespassers surviving from an earlier period and distorted in an unsuccessful attempt to make them meet the present needs of the community, it is the latter course, as we have already indicated, which we are presently inclined to prefer. 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.

51. In resorting to this course we are rejecting the view to which the Privy Council gave some credence in *Quinlan's Case* that the problems may be in a measure met by what we have called, following an American writer, the "reclassification of trespassers" (*Supra* paragraph 10). Thus *Cardy's Case* in its result is defended by the Privy Council on the ground that the child might be considered to have been allured by the occupier through the attractions created in the railway yard and thus not a trespasser in the fullest sense but a kind of constructive licensee. To this approach we are inclined to think sufficient answer is that which Sir Owen Dixon gave in *Cardy's Case* itself:

> ...the application of the rule [denying liability to trespassers in the absence of recklessness] is modified to the point of exclusion by inferring a licence from circumstances notwithstanding the unreality of the supposition that there was any actually consenting mind or will. The process of inference is then transmuted to a different and wider conception, that expressed by Lord Goddard, conduct on the part of the occupier of such a kind that he cannot be heard to say that he did not give a licence. At that point, by precluding the denial of a licence, the law has surely reached the use of fiction, and if now we boldly look at the facts which give rise to the imposition in this matter of the liability it will be but to complete the course of development by a process for which the history of the law furnishes many precedents...for want of some rationalization of the kind great confusion, not to say dissatisfaction, as to the state of the law exists. Is there any reason why in Australia the step should not be taken? ((1960) 104 C.L.R. 274 at 285).

To this last question which Sir Owen posed, the Privy Council in *Quinlan's Case* gave the answer that it was precluded by the binding force of authority. But this is no reason why the confusion and dissatisfaction to which Sir Owen refers should not be removed by legislatively empowering the judges to attribute the duties of reasonable care to trespassers to the actual facts giving rise to such duties in the manner which Sir Owen considered desirable. This, we conceive, is what our general proposal amounts to in its application to the relations between occupier and trespasser.

52. In applying our proposals to the case of trespassers we recognise that we are taking issue with the view of the English Law Reform Committee, expressed in

its report of 1953 and implemented in the English Act of 1957 in that the Act did not apply the provision for a common duty of care to the relationship between occupiers and trespassers (See *Supra* paragraph 4). The Committee's reasons for its views were stated as follows:

> 80. So far as adult trespassers are concerned, we think the law is satisfactory and we do not recommend any change. It has been suggested that the decision in *Edwards v. Railway Executive* (1952) A.C. 137 may bear harshly upon child trespassers in cases in which (on this view) common humanity demands that they should not be left without a remedy. The difficulty here is to evolve an exception in favour of child trespassers which would in practice give them any substantial degree of protection without imposing too heavy a burden upon occupiers of land used for perfectly legitimate purposes. Uses involving no danger to any rational adult may be fraught with peril to children. Adults can be warned off or kept out. Children ignore warning notices even if they can read them, creep through or climb over fences, and having done so, heedlessly involve themselves in any dangers, however obvious, the premises may afford. The majority of us are therefore satisfied that, as in the case of adult trespassers, no change should be made in the existing law. We should perhaps add that this view does not imply any disapproval of the decision in *Lynch v. Nurdin* ((1841) 1 Q.B.30).

It does not seem necessary to accept the Committee's apparent view that no precautions which could be reasonably required of occupiers would be effective to save the general body of children from themselves in any type of case. And the Committee's readiness to leave the matter of tempering the severity of the rules to the principle in *Lynch v. Nurdin* - an "allurement" case - raises the issue between the Privy Council and Sir Owen Dixon on which we have commented in the previous paragraph. Finally, the difficulty to which the Committee refers of framing exceptions to the general rules regarding trespassers is not one which we consider the legislature need face. The High Court of Australia was already engaged upon the task of framing duties for appropriate circumstances when *Quinlan's Case* arrested the process (See *Supra* paragraphs 11-12) and we are disposed to believe that the legislative function need in this context go no further than to authorise its resumption.

53. In venturing to disagree with the English Committee we naturally derive some encouragement from the First Report of the Law Reform Committee for Scotland recommending that the rights of trespassers should depend on the general principles of negligence equally with the rights of lawful visitors, which recommendation was adopted in the Occupiers' Liability (Scotland) Act, 1960 (See *supra* paragraph 4). It is true that, as pointed out in the Scottish Committee's report ((1957) Cmd. 88 paragraph 5), in Scotland the "trespasser" is generally not a wrongdoer in the sense that he may be sued for damages, unless he causes damage. Hence there was less inducement in Scotland than in England to establish special rules for the relation of occupiers and trespassers and, before the House of Lords transported the English common law rules to Scotland in *Addie's Case*, the Committee points out that one of the only reasons - if not the only reason - why, in the normal case, a trespasser was in Scotland

beyond the scope of any duty owed to him by the proprietor, was that the latter usually had no reason to suppose that people were invading his property behind his back. We do not consider that because the Scottish Committee's recommendation was made against the background of a different state of the law it is therefore without significance for our purposes. Rather we view that different state of the law as calling attention to a point made by an American writer in supporting the liberal approach to actions by trespassers in many jurisdictions in the United States. Professor Fleming James says:

> Another reason advanced for the immunities of land occupiers is that the trespasser is a wrongdoer. Sometimes this is put in the form of contributory negligence, and a trespass under the circumstances of a given case may amount to contributory negligence, as where a man walks along a single-track railroad trestle. Where this is the case, his contributory negligence would be a factor to consider under the ordinary rules of negligence quite aside from the trespass. But the trespass is often given an effect over and above that accorded to contributory negligence. Moreover trespassing is not always or even usually negligent. The wrong it entails is the invasion of a property interest, not the subjection of oneself to unreasonable risk of harm. All in all, this aspect of trespass could not account for the traditional rule. If his wrong puts the trespasser beyond the pale of a duty of ordinary care, this is because he is treated as something of an outlaw who is not entitled to the benefit of rules requiring humane consideration for people generally. Perhaps landed gentry did once so regard the poacher in England. A trace of this attitude may still linger in the more emotional aspects of the notion that the useful exploitation of land should not be interfered with. But such an attitude finds little modern acceptance in our law. It seems especially inappropriate here in view of the relatively innocent character of many trespasses (Harper and James, 2 *The Law of Torts* (1956) 1438-39).

The "relatively innocent" character of many trespasses is for us emphasised by the fact that in Scotland, in the absence of damage, trespass is usually not a delict at all. And in speaking of the relatively innocent character of many trespasses, Professor James is speaking in general terms. It may additionally be pointed out that because of the rule making an innocent mistake no defence, however reasonable the error, a trespasser may sometimes be entirely innocent. This somewhat draconic rule has been applied in the context of the occupier's liability to deprive the plaintiff of a remedy. In *Conway v. George Wimpey & Co. Ltd.* ((1951) 2 K.B. 266; *Cf, Walder v. The Borough of Hammersmith* (1944) 1 All E.R. 490, 492) counsel attempted to distinguish *Twine v. Bean's Express Ltd.* (62 T.L.R. 458) where the plaintiff, given a lift by the defendant's driver contrary to the driver's instructions, had failed to recover when injured in an accident caused by the negligence of the driver, as in the instant case. Lord Justice Asquith said in refusing to distinguish *Twine's Case*:

> ...there was one distinction which might be material to the present phase of the argument, viz. that in *Twine's Case* the plaintiff was informed by the driver himself that he (the plaintiff) had no right to travel on the car, whereas in the present case the plaintiff was not told that, although in fact he had no such right. The plaintiff in *Twine's Case* (*supra*) was not only a trespasser de facto, but he never imagined he was anything else. I am not sure that Mr. Shawcross's argument did not at

times assume that he could not, in fact, be a trespasser unless he knew he was one. Of course, that assumption is unfounded in law (*Id.* at 273).

Some limitation on the rule making reasonable mistake no defence to an action for trespass is imposed by the recent decision that a person may reasonably infer that he is permitted to enter the grounds of a house and go to the front door and this implied licence is only rebutted by notice to the contrary (*Robson v. Hallett* (1967) 3 W.L.R.

28). However, entry into a house was distinguished on the authority of *Great Central Railway v. Bates* ((1921) 3 K.B. 578) and no reference was made to *Conway's Case*. The limitation therefore seems only minor and the possibility that a trespasser may be an entirely innocent person remains.

(g) Drafting Requirements for Legislation Permitting a Fresh Start

54. We envisage that the terms of a statute requiring the judge in a case to determine whether a duty of care existed in the circumstances, as proposed in paragraph 48 and supported by the considerations referred to in the subsequent paragraphs, would need to be general but, for the reasons we have given, flexible, avoiding the consequence that the duty question would have to be automatically determined in the affirmative whenever an occupier-entrant relationship arises. In our tentative opinion the statutory test consistent with the modern common law approach might be whether the entrant in all the existing circumstances was reasonably entitled to expect that the defendant 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. We are inclined to reject the alternative which might be immediately suggested by *Bourhill v. Young* (discussed *Supra* paragraph 45) of making the test for the judge whether the defendant occupier would as a reasonable man consider that the plaintiff would be endangered if he did not so regulate or modify his conduct. We are disposed to think that the second formulation of the test concentrates too much attention on the matter of foreseeability of harm. This was appropriately the dominant consideration for the court in the circumstances of *Bourhill v. Young* but other considerations as well seem appropriately prominent in occupiers' cases. Particularly in relation to trespassers, there may be cases where it would be proper to hold that a reasonable man would consider himself entitled to subject the entrant to whatever risk there was in order to carry on an activity free from interruption. The difficult and important questions of this sort should in our opinion be for the judge in order to ensure a degree of consistency in the handling of such questions from case to case.

55. As well as permitting judicial consideration of a proper range of factors in determining whether an occupier owes a duty to a trespasser, we conceive that the test we have suggested would permit a similar examination of the kinds of

factors which have been claimed to represent what measure of justification there is for distinguishing the position of invitees from that of licensees. In a well-known article published in both the *Minnesota Law Review* ("Business Visitors and Invitees", (1942) 26 *Minnesota L.R.* 573) and the *Canadian Bar Review* ((1943) 20 *Canadian Bar R.* 446) Dean William L. Prosser of the University of California argued that later English cases, as distinct from some of the earliest, as well as a number of American decisions, had gone wrong in switching the emphasis from the fact of invitation to the business nature of the visit in determining whether a person was an invitee. The law began. Dean Prosser suggests - and in some places has persisted in the proper course - by drawing a sound distinction between on the one hand cases where there is an encouragement to enter under circumstances which carry an implied assurance of care taken to make the place safe for the purpose and on the other hand cases where, although entry is permitted, a reasonable man in the position of the entrant would not understand himself to be in receipt of such an assurance. We believe that this distinction would be thrust into prominence by the manner in which we have suggested that the general test of duty be framed, though not in such a sharp form as Prosser presents it. We consider there might be varying degrees of reasonable expectation in relation to different aspects of the premises or activities thereon and the formulation we have suggested would enable attention to be concentrated on the relevant aspects in the particular circumstances.

56. We have suggested in paragraph 48 (*Supra*) that where the judge holds that a duty exists it shall be an ordinary duty of reasonable care. It will be seen from paragraph 44 (*Supra*) that in the English Act the duty is elaborated as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there" (So also runs the New Zealand Act). It is not practicable to follow this precisely in view of its framing for the needs of lawful visitors only but we should wish to incorporate one of the objectives of the provision, which is to reverse the effect of the decision in *London Graving Dock Co. Ltd. v. Horton* (Discussed *supra* paragraphs 4 and 15) so that under the statute notice to an entrant of a danger is insufficient if this would not offer the entrant proper protection. We believe that this is a desirable step, on grounds including one which emerges from the cases themselves, that the courts in practice avoid the effect of the requirement by either interpreting the requirement of knowledge so strictly that the rule in the case becomes illusory or by holding further that because the requirement is illusory because of the strictness with which the requirement of knowledge can be interpreted, therefore the rule in the case is not binding and need not be applied (See *supra* paragraph 16). But apart from the rule's ineffectiveness, it seems undesirable, for it has been pointed out that we simply cannot go about life without constantly running into dangers which others have unreasonably put

up to us, even if we are aware of their existence (Harper and James, 2 *Law of Torts* (1956) 1497). Hence information of danger is sometimes insufficient protection even for those who act with all proper care and may be less than could reasonably be expected. The Scottish provision (Quoted paragraph 44 *supra*) is closer to our needs than the English since it, too, aims to avoid the effect of *Horton's Case* and moreover is de-signed to apply to trespassers as well as lawful visitors. We would propose a modified form of it to the effect that where a duty (that is, a duty of the kind referred to in paragraph 54 *supra*) exists, it shall be a duty to exercise such care as in all the circumstances of the case can be reasonably expected of the occupier in respect of the protection of the entrant from the damage which he suffered. The main modification of the Scottish provision involved in this formulation is that our suggestion seeks to avoid any hint of an implication that wherever the occupier comes under any duty at all it is a duty to use his best efforts to do whatever is 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.

(h) Scope of Application of Proposed Provisions

57. It will be necessary to include in any legislation which may adopt the provisions proposed in the preceding paragraph, some definition of the scope within which they are to operate. This is necessary in the first place to make it as clear as possible whether the provisions are intended to apply to duties in regard to the state of the premises only and, if not, how far they are also intended to apply to acts of the occupier himself, or his servants or agents, or persons he has permitted to be on the property, or even trespassers whom he has not controlled, or outsiders who are creating hazards for those on the property by something done outside it. The distinction between static states and activities on the premises has been forced into prominence by the effort to confine the exclusive application of the unsatisfactory occupiers 1 rules presently existing as narrowly as possible. We have seen that it has been suggested that the result is confusion (*Supra* paragraph 7). It seems that the various Occupiers' Liability Acts from which we may seek guidance have been of varying effectiveness in eliminating confusion by the provision they make on the present matter. Under the English legislation the hazards to which the provisions of the Act apply are "dangers due to the state of the premises or to things done or omitted to be done on them" (Section 1(1) quoted in full in paragraph 14 *supra*). The description of the dangers is the same in the New Zealand Act but the Act provides that it is to regulate the duties which an occupier of premises owes in respect of such dangers in his capacity of occupier. The New Zealand Secretary of Justice

advises us that it was believed in New Zealand that this was the intention of the English Act but the altered wording was inserted because of doubts whether the words of the English Act were appropriate to give effect to the intention (Section 3(1)). The relevant Scottish provision reads:

> 1(1) The provisions of the next following section of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land (in this Act referred to as an "occupier of premises") is required by reason of such occupation or control, to show towards persons 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 them and for which he is in law responsible.

In commenting on the English Act, Professor Douglas Payne has expressed doubts about the scope of the words relating to things done or omitted to be done on the premises in their bearing on harm caused by current operations ("The Occupiers' Liability Act" (1958) 21 *Modern L.R.* 359, 368) and Odgers has stated that despite the reference to things done or omitted to be done on the premises the Act relates only to "occupancy duties" and not "activity duties" ("Occupiers' Liability: A Further Comment" (1957) *Cambridge L.J.*) - something made explicit in the Scottish as well as the New Zealand Act. Writing much more recently (In his *Introduction to the Law of Torts* (1967) at p.81) Professor Fleming claims of the English Act that "prevailing juristic opinion has it that this does not cover an occupier's positive acts of commission".

58. In framing our proposals to deal with this matter we are guided by the consideration that the prominence of the distinction between static states and activities is due to the vexed history of this branch of the law rather than any significance in the distinction for the purpose of doing justice. It seems that the matter might be of small importance in any case once the duty resting on an occupier in respect of matters formerly the subject of the "category" rules becomes one of reasonable care, for the practical result is likely to be the same whether the duty in a marginal case is derived from the proposed Act or from some independent common law principle. But in any case so long as the present procedure in New South Wales remains, any uncertainty about the source of the defendant's obligations may be reflected in disputes concerning proper counts in the declaration. In these circumstances we think we should give effect to our view of the singleness of the substantial sources of the obligation to take care whether in respect of the condition of the premises or the acts of others where the use of the premises will be affected, and frame the legislation to cover both. Frequently the distinction between a state of the premises and an activity depends only on the point of time when the intervention by the occupier or a third party in the situation took place and, as has been said, "the relative point in time when the occupier's activity took place is only one among varying circumstances, and is entitled to great weight in some circumstances and little in others" (Harper and James, 2 *Law of Torts* 1462). 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 would in the latter respect be seeking to follow the line of distinction suggested by Sir Alan Taylor in *Commissioner for Railways v. Hooper* ((1954) 89 C.L.R. 8) which we have already described (*Supra* paragraph 8). 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 oh whether the telephone from which he could have warned the caller was on his land or a public telephone in the street. In this respect we would think it desirable to depart from all three Occupiers' Liability Acts at present in force.

59. The English Act (By s.1(1) quoted *supra* paragraph 14), the New Zealand Act (By s.3(1) which is in similar terms to s.1(1) of the English Act) and the Scottish Act (By s.1(1) quoted *supra* paragraph 57) all enact in the sections determining the scope of operation of the main provisions of the legislation that those provisions are to apply in place of the rules of the common law. Although this may be strictly unnecessary as the provisions of an Act would normally have this effect, emphasis on this aspect seems nevertheless desirable. We would propose to provide that the provisions of the legislation as to the existence and character of the duties of an occupier should apply "in any proceedings, notwithstanding any rule of the common law applying to the relationship of occupiers and entrants and having a different effect".

60. Our objective of permitting reconsideration by the judges of the circumstances when a duty arises will require modification in the proposed New South Wales legislation of the English legislation which confirms the existing common law tests of the relationships between occupiers and entrants which it assumes will give rise to a duty (apparently *ipso facto*) of some kind at common law. The English provision is:

> 1(2). The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purposes of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same [subject to special provision regarding certain persons with rights of access] as the persons who would at common law be treated as an occupier and as his invitees and licensees.

Apart from the proviso referred to within the squared brackets, the New Zealand provision is virtually identical (s.3(2)). The Scottish provision reads (s.1(2)): "Nothing in those provisions [the main operative provisions of the Act] 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 care as aforesaid towards persons entering thereon is incumbent." The drafting of our own different present proposals in respect of the subject matter of these provisions is contained in paragraphs 54 and 59 (*Supra*). The only matter which we would propose to incorporate from the overseas provisions just quoted is the adoption of the common law conception of an "occupier". This would preserve the benefits of the consideration of the matter in Australian cases and in the English cases both before and since the English Act (These are discussed in paragraph 14 *supra*). We are disposed to consider that the breadth of the conception of "occupier" as developed in these cases is especially appropriate to the legislation we propose since the existence of an occupier-entrant relationship will not automatically give rise to a duty. The court will therefore be in a position to protect the occupier against harshness by considering whether the degree of control which he had over the premises was such as to impose on him a responsibility to take care in respect of the harm that was suffered. We Would therefore propose to include provision that in the proposed Act the term occupier in relation to premises should have its common law meaning.

61. All three overseas Occupiers' Liability Acts which we have mentioned contain provision for extending the operation of their main operative provisions beyond premises in the ordinary sense to apply also to "structures" and beyond injury to the person of entrants to the case of damage to property, including the property of persons not themselves entrants on the land (s.1(3) of the English Occupiers' Liability Act, 1957; s.3(3) of the New Zealand Occupiers' Liability Act, 1962; s.1(3) of the Occupiers' Liability (Scotland Act, 1960). These provisions follow identical lines and, since the Scottish Act is not confined to relationships of the occupier with lawful visitors, it is most closely adapted to our purposes. It reads:

> Those provisions shall apply, in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon, -
>
> (a) in relation to a person occupying or having control of any fixed or moveable structure. Including any vessel, vehicle or aircraft, and to persons entering thereon; and
>
> (b) in relation to an occupier of premises or a person occupying or having control of any such structure and to property thereon, including the property of persons who have not themselves entered on the premises or structure.

Some criticism has been levelled in Scotland at these provisions of the Act, complaint being based on the consideration that the scope of the legislation in the present respects is wider than the area to which under the Scottish common law the principles of occupiers' liability formerly applied. It is claimed that, for

example, the special principles of occupiers' liability were apparently applied under Scottish common law to personal injury only (D.M. Walker, 2 *Law of Delict in Scotland* (1966) 589). What seems to us, however, to be of overriding importance is to ensure that the provisions of the Act shall be as wide as the application of the common law principles - otherwise pockets of application of the much criticised category rules will be left. In the present matter it seems that the Scottish Act may be more appropriate in New South Wales than in Scotland, and perhaps not surprisingly since, apart from the absence of the restriction to lawful visitors, the Scottish Act follows the English provision designed to deal with an English common law position which has influenced the common law position in New South Wales. We have seen that authority in this State and of the High Court of Australia applies the existing occupiers' liability both to the case of property damage (according to some New South Wales authority even when the owner is not an entrant - see on the whole matter paragraph 33 *supra* and especially *Drive Yourself Lessey's Pty. Ltd. v. Burnside* therein referred to) and to the case of structures which are not premises in the ordinary sense (See paragraph 35 *supra*). There may be justification for the criticism which has been made of some aspects of the common law rules on these matters and their application (See Prosser's strictures on the treatment of motor vehicles as premises in his *Law of Torts* (3 ed. 1964) 392) and for judicial reservations about them which have been expressed (See Sir Leslie Herron's views in the case last quoted). But by including these matters in the scope of the proposed legislation we are disposing of any unfairness involved in applying specially limited duties of care in such circumstances, by throwing these matters open to judicial reconsideration of the circumstances when an ordinary duty of care can be required, along with reconsideration of the rules about occupier-entrant relationships within their ordinary uncontested field of application.

62. We are not disposed as at present advised to provide in the proposed legislation any interpretation of the word "damage" in the section of the proposed legislation dealing with the existence and character of the duty as it would apply to property by reason of the provision suggested in the preceding paragraph. It appears from the authorities referred to in paragraph 34 (*Supra*) that the special occupiers' liability rules do not apply to the case of failing to guard against loss by theft and that generally there is no liability. Criticism of this position is rather to be considered as dissatisfaction with the present rules rather than doubts about what the present law is. The criticisms in any case are directed against the purported application of the general principles of negligence to withhold a remedy and the proposed legislation would not be designed to deal with matters which at present are unaffected by the special occupiers' rules. Apart from the question of loss of property through theft, the extent of the expression "damage" in relation to property may also come into issue when the plaintiff seeks to recover financial loss. In discussing this question under the English Act in *A.M.F. International Ltd. v. Magnet Bowling Ltd.*

((1968) 2 All E.R. 789) Mr. Justice Mocatta asked (At p.807) whether if a visitor brought on to premises a car used for hiring out and it was damaged by a falling wall the visitor could recover the loss of his hiring fees. He answered this question in the affirmative, but we would respectfully suggest that this is not a question which in any case should have arisen in the present context, being properly a question of the measure of the damage to the car. We consider that any questions of the recoverability of the financial results of physical damage to property should be disposed of on ordinary principles of measure of damage and remoteness of damage, and we think it so clear that this would be regarded as the proper course by the judges that no clarificatory provision is required. Where financial harm is not accompanied by personal injury or damage to physical property, Mr. Justice

> Mocatta says that "financial loss is apparently irrecoverable, except in the rare cases to which the principle in *Hedley Byrne & Co. v. Heller & Partners Ltd*. applies". Whether or not this is an apt description of the application of the Hedley Byrne Case since the decision of the High Court of Australia in *Mutual Life and Citizens Assurance Co. Ltd, v. Evatt*, at any rate his Lordship's proposition means that the common law occupiers' liability rules do not deal with such a situation. Accepting this, we do not consider it necessary to substitute a form of expression which would cover financial harm for the expression "damage".

(i) Elaboration of What is Reasonable Care

63. The English and New Zealand Acts, by contrast to the Scottish Act which contains nothing of the sort, have provisions by way of elaboration and exemplification of what amounts to reasonable care by occupiers for entrants or is relevant to reasonable care in particular aspects or circumstances. In the English Act it is laid down:

> 2.(3) The circumstances relevant for the present purpose include the degree of care, and 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.
>
> 2.(4) In 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.

The New Zealand legislation differs in that, although it includes the general provisions of subsection (3) above, it omits the examples given in that subsection in the English Act. Professor Douglas Payne had criticised the first example in the English subsection on the ground that the matter it contained went without saying, since it is well established as a matter of the general law that a duty to take reasonable care requires one to take account of the fact that children are less careful than adults ("The Occupiers' Liability Act" 21 *Modern L.R.* 359). It seems to us, however, that, if this is the explanation of the New Zealand Act's failure to refer to this matter, the argument might be pressed further. The New Zealand provision (s. 4(3)) that "the circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor" is surely equally clear under the general law. On the other hand s.2(3)(b) of the English legislation, which is omitted from the New Zealand legislation, would seem to have the desirable purpose of ensuring that the upsetting of the existing rules regarding occupiers' liability does not disturb the principle of cases like *Christmas v. General Cleaning Contractors* ((1952) 1 K.B. 141) placing the major responsibility for avoiding ordinary hazards of an occupation upon the employer rather than the occupier of the premises where the work is to be done. Of s.2(3) of the English Act, therefore, we would propose to incorporate only the substance of s.2(3)(b) in some such form as the following:

> The circumstances referred to in [the paragraphs specifying that whether care is required to be taken and the amount of care to be taken depends on what is reasonable in all the circumstances] shall include those relevant to the consideration that 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.

We do not propose to incorporate the general provisions of subsection (4) of the quoted English section which seems entirely repetitive of the section defining the common duty of care, is equally so in its New Zealand version (s.4(4)), and would be equally so in our own proposed legislation. Of the examples given, the first is clearly designed to ensure that the authority of *London Graving Dock Co. Ltd. v. Horton* is thoroughly disposed of, but we conceive that we have attended to this matter already and it would not be desirable to multiply words on the matter (See *supra* paragraph 56) even if the adoption of the phraseology of the English provision did not possibly convey an implication that the visitor is always entitled to expect the premises to be prepared for him. Even in the case of a lawful visitor this would not always seem to be reasonable, and since the scope of our legislation is not so confined it would be quite inappropriate. The reference to liability for independent contractors in the other paragraph of s. 2(4), however, raises more difficult considerations and is discussed in the next paragraph.

(j) Liability for Independent Contractors

64. The provisions of s. 2(4)(b) of the English Act quoted in the preceding paragraph of their own force make (or by spelling out implications of the subsection defining the common duty of care, call attention to) considerable inroads on the common law with regard to the liability of occupiers for the acts of independent contractors. We put the matter in these alternative ways because it has been argued that, although as we have seen the Scottish Act does not contain this provision, the effect is nevertheless the same as that of the English Act since it would be inconsistent with the requirement that the duty shall be one of reasonable care to impose in any circumstances a duty of insurance of entrants against the negligence of an independent contractor when the occupier did not fail in selection or supervision (D.M. Walker, 2 *Law of Delict in Scotland* (1966) 601). In any event, the effect in England is to remove any suggestion which might continue to be based on *Thomson v. Cremin* that an occupier is generally liable to an invitee for the negligence of an independent contractor (See the discussion in paragraph 20 *supra*) even where there is no negligence in selection or supervision. The English Act also alters the law laid down by *Francis v. Cockrell* that there is general liability to contractual entrants for the negligence of independent contractors where the use of the premises is the main purpose of the contract (Discussed *supra* paragraph 21). It thereby disposes of the difficulty of distinguishing such cases from those where a lesser duty has been owed because the use of the premises is only ancillary to the use of the contract, since now there will be no difference in the duties owed. Further, it may prevent the recognition in England of the duty recognized by the High Court of Australia in *Voli v. Inalewood Shire Council* - namely, a duty stricter than ordinary reasonable care in relation to premises the subject of short term hirings (Discussed *supra* paragraphs *23* and 24). Since in Australia the controversy surrounding *Thomson v. Cremin* is still alive (*Supra* paragraph 20) it will be desirable to clarify this matter and it seems incumbent on us to choose between the lesser duty of the English Act and the severer one laid down by the High Court in respect of the circumstances with which *Voli's Case* dealt. In our tentative opinion it would be appropriate to follow generally the English solution in relation to the ordinary occupier-visitor relationships (including persons entering private premises under a contract with no express provision on the present matter) so that no liability is imposed on the occupier for the negligence of the independent contractor except where his own negligence was also involved, but to save the principle relating to the provision of premises for the use of the public as developed in *Voli's Case*. In the former situation since a private occupier will often be involved the limited duty of insurance may operate harshly whereas in the latter case an entrepreneurial defendant may be expected to be involved. We would seek to frame the legislative provision in this respect in such a way as not to conclude the point left open in *Voli's Case* in relation to premises made available to the public without consideration

passing. 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 damage 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.

65. Apart from saving the principle in *Voli v. Inglewood Shire Council* we have in some other respects departed from the precedent of the English legislation in the draft provision set out in the last paragraph. The object is in the first place to avoid certain implications of the English legislation suggested by Mr. Justice Mocatta in *A.M.F. International Ltd. v. Magnet Bowling Ltd.* ((1968) 2 All E.R. 789). His Lordship said:

> Counsel for A.M.F. submitted, first, that, unless someone who was sued under the Act as an occupier could bring himself within s.2(4)(b), it was of no avail to him to establish that he had employed a qualified independent contractor and that the latter had been negligent. In particular in support of this argument he relied on the words of s.2(4)(b) "the occupier is not to be treated without more as answerable for the danger" etc. It seems to me there is great weight in this argument, at least in cases to which the opening words of s.2(4)(b) apply, namely, "where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair" and I accept it (*Id.* at 801-802).

If this interpretation means there might be non-delegable duties even under the Act it seems to us that it would be unfortunate if it came to be accepted. We have therefore used different language to make it clear so far as possible that there are no non-delegable duties involved except in the area which we have deliberately excluded from the operation of the Act. We have also avoided the use of the language of another part of the paragraph which has suggested to some the existence of non-delegable duties. The paragraph speaks of circumstances in which the occupier has "acted reasonably in entrusting the work to an independent contractor". Though there may obviously be circumstances where it would be unreasonable not to employ an independent contractor (See *Bloomstein v. Railway Executive* (1952) 2 All E.R. 418 and the discussion in *Wells v. Cooper* (1958) 2 Q.B. 265) there seems no reason why it should ever be unreasonable in the interests of the safety of the person or property of others to employ a competent independent contractor. We have sought, therefore, to avoid language which could be interpreted as raising any question about this.

(k) Persons Entering As of Right

66. The exclusion of the case of short term hirings etc. of premises to the public leads on to the question whether a further exception should be made in respect of cases where plaintiffs enter as of right. Apart from the case where

the person enters as of right in pursuance of a duty, for example, a policeman, the premises on which people enter as of right are likely to be public premises, that is the right is likely to be that of the public generally, and to this extent the same considerations apply - that is, the possibilities of injury from a defect are greatly multiplied - as in the cases with which the *Voli Case* deals. On the other hand, the considerations which appealed to Sir Gordon Wallace against imposing a strict duty in the case of natural reserves seem conclusive (See the passage quoted in paragraph 26 *supra*). The question remains whether in the case of artificial constructions some limited strict liability should be imposed, as conceivably suggested by some High Court authority. In view of the fact that artificial constructions may themselves be of very differing characters varying from a few sticks damming the earth into steps on a bush path to elaborate buildings, we are inclined to take the view that the se should not be excluded from the general provisions of the proposed legislation, with the result that the ordinary principles of negligence would apply. This would seem to be equally appropriate in the case of persons entering as of right on private premises where the circumstances are likely to differ widely and require individual consideration (See paragraph 28 *supra*).

67. We do not regard consideration of the rule absolving highway authorities from liability in respect of the state of the highway in the absence of misfeasance (See paragraph 29 *supra*) as within our present terms of reference. This is clearly a matter involving special policy considerations in view of the implications for the finances of public and local authorities. In England the matter is not dealt with by the Occupiers' Liability Act, but by separate legislation, the Highways (Miscellaneous Provisions) Act, 1961. This Act by s.1(1) abrogates the rule of law exempting highway authorities from liability for non-repair of highways. We propose to make it clear that nothing in the legislation we suggest affects the rule.

68. Distinct from the situation affecting public highways is the position of an entrant on private property either under a right comprised in a public right of way or under a right in the nature of a servitude such as a right of way or other easement or a profit. The position of such entrants under the English legislation is apparently a matter of speculation. For the purposes of the main operative section of the Act it is provided that "persons who enter premises for any purpose in the exercise of aright conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not" (Section 2(b); New Zealand Act s.4(9)). Whether persons in the categories considered come within this concept, or whether their position is to be distinguished from that of, for example, police and fireman, whom the subsection would clearly cover, on the ground that their rights have their origin in an act of a private person as distinct from the general law, is not made clear. Professor Harry Street suggests that those exercising a public right of way

would be unaffected by the Act since the surface of the area of a public right of way is not to be thought of as controlled by the occupier of the subsoil, but he suggests that the immunity of the occupier with respect to private rights of way has been altered by the section we have quoted (*Law of Torts* (3 ed. 1963) 189). Both arguments seem tenuous. In our own proposed legislation the position of such entrants would appear to be *prima facie* covered by the general provisions we have suggested, unlike the English legislation where the necessity of s.2(6) arose from the limitation of the Act's general provisions to invitees and licensees. We do not, however, wish to attach new incidents to rights in the nature of servitudes nor to public rights of way, insofar as they have not been treated as within the ordinary sphere of occupiers' liabilities. To deal both with the position of the highway authority and the occupier whose property is subject to one of these *jura in re aliena* we propose provision along the following lines:

> Nothing 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 new incidents to the rights given by easements or profits or public rights of way.

69. Special classes of persons entering as of right include the person staying at a common inn and (in the extended sense permitted both by the common law and the overseas Acts) persons whose goods are carried by a common carrier whether they themselves are carried or not (See *supra* paragraph 30). The English and New Zealand Acts contain very limited provisions, by way of exception to their rules regarding contractual entrants, saving obligations created by any "contract for hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or under or by virtue of any contract of bailment" (English s.5(3), New Zealand s.9). More apposite to our present purpose is s.2(3) of the Scottish Act which we propose in substance to adopt, having regard not only to the two cases we have mentioned, but the position of other classes of entrants, such as employees vis-a-vis employers in regard to the work premises such as factories. The Scottish provision runs:

> Nothing in the foregoing subsection [the main operative sub-section of the Act] shall relieve an occupier of premises of any duty to show in any particular case any higher standard of care 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.

We should propose to include a provision saving (a) the provisions of any Act in force immediately before the commencement of the proposed legislation and (b) any rule of law imposing special standards of care on particular classes of persons.

(l) Persons Entering Under Contract

70. All three overseas Acts which we have mentioned modify their principal provision

for the existence of the common duty of care by a saving. In the Scottish Act it reads (s.2(1)) "except in so far as he [the occupier] is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person [the entrant]". In the English and New Zealand Acts the wording of the saving is similar (apart from the limitation to lawful visitors) except that the restriction, modification or exclusion, where the occupier is free to make it, may be by agreement *or otherwise* (Italics supplied - English Act s.2(1); New Zealand Act s.4(1)). The Scottish Act rests content with this provision for the contractual entrant, who for the rest is left to be entitled to the common duty of care like all other entrants on the property. The English (s.5) and New Zealand (s.7) Acts on the other hand make further specific provision for the contractual entrant along lines similar to one another but not identical. In the English Act the provision reads:

> s.5(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 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 of 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 virtue of any contract of bailment.
>
> (4) This section does not apply to contracts entered into before the commencement of the Act.

The New Zealand Act, beside limiting the scope of the provision to occupancy duties, contains additional provision (In s. 7(4)) that in determining whether in any such case the occupier has discharged the common duty of care, so far as it is applicable, the existence and nature of the contract shall be included in the circumstances to which regard is to be had. Moreover it omits the words in the English Act ascribing the duty to a term to be implied in the contract. In our tentative opinion the approach of the English Act is not satisfactory in that it confirms the common law doctrine whereby the duty of an occupier to a contractual entrant is determined by artificially implying a term in the contract covering the matter. This gives rise, for example, to unsettled problems regarding the application of the doctrine of contributory negligence to such cases (See paragraph 23 *supra*) and has formerly given rise to a difficult line of distinction between cases of the *Francis v. Cockrell* type and the *Gillmore v. London County Council* type (*Supra* paragraph 21), though the English Act removes the latter difficulty by implying the same duty with the same standard of care in every case. We would tentatively propose to follow the Scottish approach. We would, however, propose to depart from the wording of the Scottish Act by adding the words or otherwise to the statement of the saving clause in case the word

agreement might not be wide enough to include all the cases where a person might at present impose conditions on a licence to enter property (See *supra* paragraph 39). We further propose to include a provision to prevent actions in tort being converted into actions in contract through artificial implications of terms not in fact in the minds of the parties. In the light of these considerations provision along 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 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 matter and intended to agree on the provision.

(m) Effect of Contract on Occupier's Liability to Third Party

71. Both the English and New Zealand Acts (though not the Scottish) contain extensive provision determining the position of third parties to a contract (English s.3, New Zealand s.5). They differ from one another virtually only in what appear to be matters of drafting. The English version is:

3(1). Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be excluded or restricted by that contract, but (subject to any provision of the contract to the contrary) 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.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers 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 and persons acting under his direction and control.

(3) In this section "stranger to the contract" means 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, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as those entered into or created after its commencement, but, in so far as it enlarges the duty owed by an

> occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement.

The object of this provision is in the first place to overcome the effect of the decision in *Fosbrooke Hobbes v. Airwork Ltd.* ((1937) 1 All E.R. 108, esp. at 112) that, should a person having a contract with the occupier whereby third parties are to use the premises limit the rights of those parties to something less than they would be under the general law, that limitation is effective to bind the third parties in regard to their rights against the occupier. This result is, however, achieved by the first part of the first subsection. Some part of the remainder is devoted to ensuring that the common duty of care will extend to visitors to tenants upon parts of the premises retained in the occupation of the landlord and to persons entering the demised premises on behalf of the landlord. For the rest the section makes it clear that if some higher duty is imposed by the contract third parties contemplated by it will in general obtain the benefit of it. We do not as at present advised think it desirable to abrogate the rules relating to privity of contract to achieve this latter result. We would propose only to adopt provisions corresponding to the earlier parts of the section, to the effect that a tort duty, under the provisions of the proposed legislation, to third parties to a contract or tenancy will not be excluded or restricted by any provision of the contract or tenancy to which they were not privy.

(n) Liability of Landlords

72. All three overseas Occupiers' Liability Acts contain provisions designed to impose on landlords who have an obligation to enter and repair premises the same liabilities to entrants for disrepair, or in respect of goods brought on the premises as would exist if the landlord was an occupier of the premises (English Act s.4, Scottish Act s.3, New Zealand Act s.8). The object of these provisions is to extend the range of persons in whose favour the obligations exist beyond those to whom they are owed under the lease or other source of the obligation (See *supra* paragraph 37). In New South Wales there is no need for such extension in cases to which the principle of *Voli v. Inglewood Shire Council* (*Supra* paragraph 22) applies. To make recommendations for other cases would not strictly be within our terms of reference and the fairness of any considerable extension in the obligations of landlords could only be determined by investigations of the situation of such persons in New South Wales which have not been called for under the present reference. However, the chief object of the overseas provisions is only to prevent the multiplicity of actions which arise when an entrant sues the occupier for damage suffered through disrepair of the premises and the occupier in turn sues his landlord for the damages he has had to pay as damage to him arising from the landlord's breach of covenant. In general, the only effect of the introduction of the overseas provisions would be to substitute direct action by the entrant against the landlord for this roundabout process. Only in the case of personal injury to the wife of the occupier would the

section apparently extend the quantum of the landlord's obligation, since at present the wife is unable to sue her husband in these circumstances and therefore the husband cannot show damages in this respect in an action for breach of covenant against the landlord. We therefore think it appropriate to call attention to the terms of the English legislation:

> 4.(1) 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 shall owe 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).
>
> (2) Where premises are occupied under a sub-tenancy, the foregoing subsection shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated asput by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.
>
> (3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.
>
> (4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.
>
> (5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way or of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949.
>
> (6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.
>
> (7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.
>
> (8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

(o) Defence of Assumption of Risk

73. All three overseas Acts contain provision to preserve the defence of assumption

of risk against any implication to the contrary in the establishment of the common duty of care in the Act (English Act, s.2(5); Scottish Act, s.2(3); New Zealand Act, s.4(7)). The Scottish provision, which is similar to the English, and, in referring to the mode of determination, contains matter omitted from the New Zealand Act, reads:

> Nothing in the foregoing provisions of this Act [which are the main operative provisions] shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.

There seems no doubt as the law stands in New South Wales at the present time the doctrine of assumption of risk is applicable to the relationships of occupiers and entrants (See the reference to the matter in paragraph 39 *supra*). If, as is often considered to be the case, this is a matter going to the existence of a duty (See Mr. Justice Blackburn's article "'Volenti Non Fit Injuria' and the Duty of Care" 24 *A.L.J.* 351) 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 (*Supra* paragraph 54). If it is not a matter of duty, but is to be considered 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.

(p) Contributory Negligence

74. We have observed (*Supra* paragraph 19) that Mr. Justice Willes' formulation of the occupier's duty of care to an invitee was expressed as if the invitee had to qualify for the right to receive the care laid down by using reasonable care for his own safety (See the passage quoted in paragraph 2 *supra* and the discussion of this aspect in paragraph 19 *supra*). We have also seen, however, that there is some authority that any impression to this effect which might be gained from Mr. Justice Willes' language is wrong and that the provisions of the contributory negligence legislation for apportionment apply to the case where both occupier and invitee have been negligent (*Supra* paragraph 19). Writing before the decisions we have cited on the subject were handed down. Professor Douglas Payne expressed surprise that the position of this matter under the English Occupiers' Liability Act had not been clarified (The Occupiers' Liability Act (1958) 21 *Modern L.R.* 359, 366-7). Whether or not as a result of this comment, the New Zealand Act does contain a provision making it clear that the apportionment provisions apply (Quoted *supra* paragraph 19). If a similar provision were included in our proposed legislation it would read somewhat as follows:

> Where the occupier breaks a duty of care to an entrant, and the entrant suffers damage as a result partly of that fault and partly of his own fault, the provisions of Part III of the Law Reform (Miscellaneous Provisions) Act, 1965 shall apply.

The need for such a provision may, however, be considered slight since it would seem to exist only if (a) the duty to an entrant did not arise at common law unless he was using reasonable care for his own safety (which is wrong in relation at least to invitees according to what authority there is) and (b) it were supposed that the proposed legislation did not intend to alter this rule (whereas the object of the proposed legislation will clearly appear to be to abrogate the special rules relating to occupiers and entrants. Although the English Act contains no reference to the matter, as Professor Payne points out, yet in the case of *McDowell v. F.M.C. (Meat)* ((1968) 5 Knights' Industrial Reports 456 noted in November 1968 *Legal Monthly Digest* paragraph 3943) it appears that the English Court of Appeal recently apportioned the damage in the case of a plaintiff guilty of contributory negligence bringing an action against an occupier under the Act. It appears that at common law the plaintiff in this case would have been considered an invitee. Since we have avoided reference to the assumption of risk defence lest its singling out for preservation should carry implications that other defences and modifications of liability were not intended to be preserved, avoidance of reference to the present matter also might be preferable.

(q) Summary - The State of the Law

75 (i) Because of the early development of the law relating to the duties of an occupier of land to various classes of entrants, they have become subject in English law to rigid definitions imposing strict limits on their scope. Although usually regarded as manifestations of general principles of negligence, they have not been subjected to the continual process of reassessment in the light of general principle which has taken place in other fields. Dissatisfaction with this situation has led to legislation to bring the matter in varying degrees into closer relationship with the general law of negligence in England, Scotland and New Zealand.

(ii) The development of the common law in New South Wales has followed the general pattern just described. The failure of the occupier's duties accurately to reflect the general principles of negligence has resulted here as elsewhere in attempts by plaintiffs to appeal directly to those principles. Under the present New South Wales system of pleading this reflects itself in controversies as to when a count so doing may be included as well as, or instead of, a count alleging a breach of an occupier's ordinary duty. The differences between the content of the occupiers' duties and those of duties of care deriving from other relationships have also led to attempts to find other relationships superimposed on the occupier-entrant relationship wherever possible. In New South Wales these attempts, too, are reflected in pleading difficulties.

(iii) Although the judgments of the Privy Council have upheld the legitimacy of finding duties of care imposed on occupiers in favour of lawful entrants by by-passing the occupier-entrant relationships with their associated limited duties in favour of superimposed relationships where there are sufficiently independent

features of the situation to render this plausible, nevertheless the refusal of the Privy Council to permit any similar procedure where trespassers are involved has thrown the Australian authorities into confusion and unsettled the law in New South Wales as in other Australian states. Liability to a trespasser now generally has to be determined by reference to the vague criterion of whether the occupier showed recklessness for his safety.

(iv) By contrast to its unsatisfactory treatment of trespassers, in one matter the common law has worked in trouble-free fashion, namely in its delineation of the concept of an occupier as a person having a degree of control over property not necessarily amounting to possession for the purposes of the law of property. In this matter Australian decisions appear to have anticipated the English view, which itself is preserved under the legislation to which we have referred. Evidently this concept has proved a satisfactory point of attachment for the main duties connected with the management of property.

(v) The common law duty of an occupier to an invitee appears to have caused dissatisfaction to the extent that elements in its early formulation, justifiably or unjustifiably, have been interpreted to involve departures from what might be considered an ordinary duty of reasonable care, and to the extent to which uncertainty still persists as to whether elements in the formulation involve such a departure. An example of an element involving such a departure is the rule that the knowledge of an invitee of a danger debars his action in respect of it, though this rule, once adopted as involved in the interpretation of the duty, was itself whittled down by interpretation so as to become virtually illusory. An example of an element in the duty with a continuing periphery of uncertainty is the requirement that the danger must be unusual, and questions may also still be raised about the interpretation of the statement that the duty is owed to an invitee who is exercising reasonable care for his own safety. A further source of uncertainty exists in the state of the authorities concerning an occupier's liability to an invitee in respect of the negligence of an independent contractor.

(vi) The occupier's duty to persons entering premises under contract where no express term covers the matter varies according to whether the use of the premises is the main purpose of the contract, in which case the duty is to see that the premises are as safe as reasonable care and skill can make them, or is ancillary to it, in which case the duty corresponds to that to an invitee. The application of the distinction in practice is a source of difficulty. Australian authority applies the higher measure of duty, in favour of persons entering under a hiring of premises which are made available for public hiring, even if the entrant himself is not in contractual privity with the occupier. This decision must raise questions about whether the rules regarding persons entering under contract really belong to the law of contract or the law of tort.

(vii) In Australia persons entering premises as of right have been accorded a higher status against the occupier than in England, where entrants, for example, upon public parks, have been treated as licensees, in New South Wales such persons have been put in a position similar to that of invitees and the question has been reserved whether in some circumstances such entrants may be owed a higher measure of duty.

(viii) In New South Wales courts have evidenced reluctance to restrict the duty owed to a licensee, or visitor gratuitously permitted on property, to a duty to warn only of concealed traps known to the occupier. Courts have avoided the rule, once they accepted it, by finding shadows of material interest to the occupier in the

visitor's presence where possible, or by bypassing the rule whenever a relationship independent of that between occupier and licensee could be detected. Nevertheless the continuance of the rule in circumstances where it is obviously felt to be out of touch with the general law is a source of difficulty.

(ix) In New South Wales the courts have accepted the proposition, contested by some but assumed to be the law by the framers of the English Occupiers' Liability Act, that the occupiers' liability rules apply to the case of damage to property brought on land as well as to injury to the person of entrants. The practice is also well established in this State of treating movable property on which people may enter as premises for the purpose of application of the occupiers' liability rules.

(x) The immunity of occupiers, to the extent that this arises from limitations on their duties to entrants as compared with ordinary duties of care, is not matched by immunities of others than the occupier who may do work on the property, under English authority applicable in New South Wales. This is so, by contrast to American law, even where the person is employed by the occupier to do the work. This holding seems evidence of a desire to restrict the operation of rules not thought appropriate to modern conditions, within their narrowest limits.

(xi) With some exceptions, the lesser of premises at common law owes no duty of care either with regard to conditions of the premises at the time of letting or which are allowed to develop during it. Vendors and speculative builders, as distinct from builders under contract, enjoy a similar immunity.

(xii) At common law, except vis-a-vis persons entering as of right, an occupier may vary his obligations, by contract with entrants, or by imposing conditions regarding his obligations by appropriate means on their licence to enter.

(r) Summary - Proposals

76 (i) There has been widespread dissatisfaction with the results produced by the formalistic occupiers' liability rules, though this has not been universal, some arguing that definite rules are more likely to assist the objective of certainty in the law and prevent litigation. However, predictions that the departure from them in the Occupiers' Liability Act in England would lead to increased litigation have not been justified, the reverse having in fact happened. The experience in Scotland and New Zealand has apparently been the same. Another argument in favour of the present rules which can be advanced is that the present rules restrict the functions of the jury, and that to throw the broad question of reasonable care open as a question of fact as the English Act does would give too much discretion to that body - a problem which does not arise in England where the judge is the tribunal of fact.

(ii) Some writers frankly recognise that to leave the question of reasonable care to the jury at large would go some distance in practical effect towards making the occupier an insurer of entrants' safety and they welcome this result. We do not, however, consider an absolute liability desirable at present especially since there are many private occupiers who do not have their liability insured.

(iii) Nor, in view of the considerations referred to in (i) above, do we consider it desirable in New South Wales conditions to institute a general duty to exercise reasonable care for all lawful entrants, as is the practical effect of the English

and New Zealand legislation, or for all entrants lawful or otherwise, as is the practical effect of the Scottish legislation.

(iv) We tentatively propose that legislation should be introduced which *firstly* lays down and places emphasis upon the duty of the judge to determine whether there is a duty to exercise care in the individual case on modern principles of negligence and *secondly* lays down that, where such a duty is determined to exist, it shall be a duty of reasonable care.

(v) We would propose to apply this approach to the occupier's relations with trespassers as well as lawful visitors, since we regard the present uncertainties as confirmation of Sir Owen Dixon's view that no half-way house can be found between liability only for intentional harm and liability in appropriate circumstances for failure to exercise reasonable care. Such a half-way house is what the present law regarding liability for recklessness appears to attempt.

(vi) We believe that the approach we have suggested is a solution preferable to that whereby courts have on occasions mitigated the harshness of the law towards trespassers by fictionally treating trespassers as licensees.

(vii) We consider that in considering the position of trespassers, weight must be given to the fact that many trespasses are comparatively innocent and trespass may even occur through reasonable mistake.

(viii) We are inclined to propose as the legislative test to be applied by the judge for the determination of the existence of the duty in each case: was the entrant in all the existing circumstances 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?

(ix) We are disposed to believe that in addition to permitting judicial consideration of a proper range of factors in determining whether an occupier owed a duty to a trespasser the above formulation would permit consideration of the kind of question which has been claimed to lie behind what measure of justification there is for drawing some distinction between at any rate some invitees and some licensees, namely the question: would a reasonable man in the position of the entrant consider that he was invited or encouraged to enter under circumstances carrying an implied assurance of care taken to make the premises safe?

(x) Where a duty exists we propose that the test of its discharge shall be whether the occupier has exercised such care as in all the circumstances of the case could be reasonably expected of him in respect of the protection of the entrant from the damage complained of. By this formulation we would hope, *inter alia*, both to escape the common law rule that full knowledge of the danger on the part of the plaintiff is always a good defence and to escape from a certain suggestion in the overseas occupiers' liability legislation that reasonable care involves doing all in one's power to make the entrant safe.

(xi) We propose to make the scope of the proposed legislation wide enough to cover both damage caused by the state of the premises and acts or omissions of the occupier, or of others for which he may be responsible, where occupancy is the source of the defendant's obligation and its breach such as to cause damage in the use of the premises.

(xii) We propose to preserve the common law meaning of the expression "occupier".

(xiii) We propose to adopt the type of provision in the overseas occupiers' liability legislation extending the principles adopted by the proposed legislation to apply (a) to damage to property brought on premises (b) to entry on fixed or movable structures under a person's control.

(xiv) We propose to adopt one of the provisions of the English legislation elaborating what is relevant to reasonable care in a particular set of circumstances, namely the provision that in a proper case an occupier may expect that a person in the exercise of his calling will appreciate and guard against any special risks ordinarily incidental to it, so far as the occupier leaves him free to do so.

(xv) We propose to clarify the liability of an occupier for an independent contractor by recommending provision firstly that nothing in the proposed legislation shall affect the duties at common law of persons making premises available for public use for short periods at a time but *secondly* (and without prejudice, *inter alia*, to the above) that where damage 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.

(xvi) We do not propose to make any provision excluding persons entering as of right on premises from the provisions of the proposed legislation, except to exclude from its operation altogether the position of highway authorities, and to provide that nothing in the proposed legislation should attach new incidents to easements or profits or public rights of way over private property.

(xvii) We propose to recommend general provision that the Act is to have effect subject to (a) the provisions of any Act in force immediately before the commencement of the proposed legislation (b) any rule of law defining special standards of care for special classes of persons.

(xviii) We propose to recommend that an occupier may extend, restrict, modify or exclude by agreement or otherwise the duties imposed by the Act in so far as he is entitled by law to do so. We propose, however, that the liabilities in tort imposed by the proposed legislation should not be extended, restricted, modified, excluded or confirmed by the 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 matter and intended to agree on the provision.

(xix) We propose to recommend that a tort liability under the provisions of the proposed legislation to third parties to a contract or tenancy will not be excluded by any provision of the contract or tenancy to which they were not privy.

(xx) We do not propose to make any recommendation regarding landlords or vendors of property.

(xxi) We do not propose to make any recommendation regarding the defence of assumption of risk or the application of the rules relating to contributory negligence because we consider that it will be clear enough that this defence and these rules will apply in relation to cases arising under the proposed legislation in the same way as to ordinary actions for negligence.