

OCCUPIERS' LIABILITY: THE ENACTMENT OF 'COMMON LAW' PRINCIPLES

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I Introduction

The law of England and Wales¹ relating to the liability of an occupier of land in negligence² to a person who comes on to that land is today largely found in the Occupiers' Liability Acts 1957 and 1984, rather than the common law.

The stories behind the enactment of these two pieces of legislation are related but distinct. The Occupiers' Liability Act 1957 placed the negligence liability of an occupier to a lawful visitor on an equivalent basis to that reached by the common law of negligence following *Donoghue v Stevenson*,³ although encompassing liability for omissions, and with liability essentially based on the reasonable foreseeability of physical harm. A number of more restrictive rules found in the common law of occupiers' liability to lawful entrants, which had been endorsed by the House of Lords, were removed. At that time, the House of Lords was bound by its own previous decisions and the law could only be remodelled by legislation. The 1957 Act was based on a report by the Law Reform Committee.⁴ After the House of Lords gave itself the power to depart from its

¹ The law of occupiers' liability in Scotland and Northern Ireland is found in the Occupier's Liability (Scotland) Act 1960, the Occupiers' Liability Act (NI) 1957 and the Occupiers' Liability (Northern Ireland) Order 1987, SI 1987/1280 (NI 15).

² An occupier may be liable to an entrant on other legal bases, such as trespass to the person or under the Defective Premises Act 1972, s.4, but not in private nuisance (there has to be an interference with land in which the claimant has an interest: *Hunter v Canary Wharf* [1997] AC 655) or under *Rylands v Fletcher* (1868) LR 3 HL 330 (there has to be an escape: *Read v J Lyons & Co Ltd* [1947] AC 156).

³ [1932] AC 562.

⁴ See n 128.

own previous decision where that was in the interests of justice to do so,⁵ the House in *British Railways Board v Herrington*⁶ in effect exercised that power to depart from its decision in *Addie & Sons Ltd v Dumbreck*⁷ that had held that an occupier was not liable to a trespasser in negligence, but only for acts (and only possibly omissions) that intentionally or recklessly endangered the trespasser. The House in *Herrington* sought to set a standard of liability somewhere between the old rule and the negligence standard applicable to lawful visitors, albeit nearer to the latter than the former. There was some dissatisfaction with the detail of the principles articulated, the matter was the subject of a report by the Law Commission⁸ and that in turn led to the enactment of the 1984 Act (in somewhat different terms from those recommended by the Law Commission).

Since their enactment, the two Acts have been the subject of some amendment, in the light of particular developments, but their essential structure has remained. They seem to have worked well, and there is no current pressure for change. However, there are a number of points that remain awkward and have not been resolved. These include the exact relationship between these Acts and the common law; the proper solution to the question as to the extent of any liability that should arise where an entrant to land encounters a hazard that is obvious to him or her and/or to a reasonable person; and the extent to which liability to an entrant other than a lawful visitor can be excluded by the occupier. It is tempting to regard the expansion of occupiers' liability law enshrined in the two Acts as simply a victory in the inexorable onward march of the law of negligence that would in time have been achieved by the judges themselves without the need for legislative intervention.⁹ However, it is submitted that the position is not as simple as that. It must be remembered that what makes the law of occupiers' liability

⁵ *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234.

⁶ [1972] AC 877.

⁷ [1929] AC 358.

⁸ See n 236.

⁹ As turned out to be the case in Australia by virtue of the decision of the High Court of Australia in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

special is the fact that liability can be imposed for an omission to make premises reasonably safe for an entrant, and not merely for the negligent creation by the occupier of a risk. It is well recognised that the common law has been cautious about the imposition of duties of affirmative action through the tort of negligence.¹⁰ As we shall see, some of the difficulties in the development of the common law in this area were essentially genuine difficulties in determining how far it was appropriate to impose liability for an omission, in a way that made sense alongside other branches of what came to be the tort of negligence.¹¹

This essay will consider the common law of occupier's liability and then the two Acts in turn.¹²

II Occupiers' Liability at Common Law

The common law concerning the liability of an occupier to a visitor was both obscure in its historical origins and complex in the structure of rules that ultimately emerged. In the nineteenth century, there was no organising concept of 'occupiers' liability'. As to the historical origins, cases involving liability for harm caused to entrants to land by careless acts or by structural defects were to be found within the amorphous mass of actions on the case. Some textbook treatments considered the area as part of the law of nuisance, some as part of the law of negligence, others as a separate area.¹³ Cases

¹⁰ See *Stovin v Wise* [1996] AC 923, per Lord Hoffmann at 943-944; cf Willes J in *Gautret v Egerton* (1867) LR 2 CP 371, 375: "No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him."

¹¹ The significance of this aspect was emphasised by FH Bohlen, *Studies in the Law of Torts* (Indeanapolis, The Bobbs-Merrill Co, 1926) Chaps 2, 3 and 6. See also HK Lücke, 'Towards a general theory of negligence and occupiers' liability' (1959-60) 2 Melb ULR 472.

¹² The leading treatment is PM North, *Occupiers' Liability* (London, Butterworths, 1971). This takes the story up to the decision of the Court of Appeal in *Herrington*. For a discussion of the historical origins, see NS Marsh, 'The history and comparative law of invitees, licensees and trespassers' (1953) 69 LQR 182 and 359. A second edition of North's book was published by OUP in 2014.

¹³ See respectively, CG Addison, *Treatise on the Law of Torts* (New York, Cockcroft & Co, 1878) pp 253, 281; WE Gordon and WH Griffith, *Addison on Torts*, 8th edn (London,

tended to be determined by applying or distinguishing precedents on their facts rather than by reference to principles or arguments of policy, although some glimpses of the latter could be seen at least in novel cases.¹⁴

A The mid-nineteenth century cases

A number of propositions emerged during the course of the nineteenth century.¹⁵ First, it was established that it was unlawful for a landowner to set a spring gun without giving notice, the absence of which demonstrated that the purpose was to injure and not to deter.¹⁶ This operated as an exception to the general principle that landowners could make what use of their land they chose provided that did not interfere with the rights of others.¹⁷ The nineteenth century cases tended to raise the question of how far landowners were entitled to go in creating dangers to deter trespassers; the idea that

Stevens and Sons, 1906) pp 717-724; F Pollock, *The Law of Torts*, 4th edn (London, Stevens and Sons, 1886) Ch XII (duties of insuring safety).

¹⁴ See eg *Priestley v Fowler* (1837) 3 M & W 1, a decision which paved the way for the controversial doctrine of common employment. The Court of Exchequer held that a master did not owe a servant a duty to use proper care to ensure that a van in which the latter was carried was in a proper state of repair and not overloaded. Lord Abinger CB stated (at p.5) that 'It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.' To impose liability here 'will be found to carry us to an alarming extent.' See discussion by MA Stein, 'Victorian tort liability for workplace injuries' (2008) *University of Illinois Law Review* 933.

¹⁵ On the development of the law of negligence in the nineteenth century, see DJ Ibbetson, *A historical introduction to the law of obligations* (Oxford, OUP, 1999), pp169-187; and DJ Ibbetson, 'The tort of negligence in the common law in the nineteenth and twentieth centuries' in EJM Schrage, *Negligence: The comparative legal history of the law of torts* (Berlin, Duncker & Humblot, 2001), pp 229-271.

¹⁶ *Bird v Holbrook* (1828) 1 Moo & P 607. CB, aged 17, entered a walled garden, in order to get back a peahen that had strayed, and was seriously injured in the leg by a spring gun of which no notice had been given. H had asked a third party not to mention that the gun was set 'lest the villains should not be detected.' Cf *Ilott v Wilkes* (1820) 3 B & Ald 304 (no action for damages where notice was given that there were spring guns in a wood; volenti defence applied).

¹⁷ See Dallas J in *Deane v Clayton* (1817) 7 Taunt 489, 522: '[W]ithin the limit of my own property adjoining a common....I may dig a ditch, however, wide; and man or beast sustaining harm, having no right to be there, no action will lie.' Citing *Blithe v Topham*, Cro Ja 158); cf Park J at 513, noting that in *Blithe v Topham* 'it was not found that the pit was dug for the purpose of killing mares.'

they might be required to take any affirmative steps to protect trespassers was rejected.¹⁸

Secondly, a very different view was taken where a landowner allowed a person to enter their land for some purpose of benefit to the landowner. In *Parnaby v Lancaster Canal Co*¹⁹ the Court of Exchequer Chamber held that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, here by removing or giving warning of a sunken barge. Tindal CJ stated²⁰ that this liability was based

upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury.

No cases were cited to support the latter proposition. The underlying ideas were not articulated. (In modern terms they might be that the benefit to the landowner in itself created a special relationship with the entrant that justified imposition of a duty of care to take affirmative steps to protect him or her or that the positive invitation in the circumstances entitled the entrant reasonably to assume that care had been taken by the landowner.²¹) There was an obvious analogy with the law of contract but no suggestion that the liability of either canal company or shopkeeper was so based.

¹⁸ *Hounsell v Smyth* (1860) 7 CB (NS) 732 (plaintiff fell into excavations on waste land between two public highways; no liability). (No case raised the question whether a landowner who took over land with a spring gun already in place might come under a duty to remove it or to give notice; presumably the answer would have been yes.) There could, however, be liability in public nuisance where an excavation adjoining the highway rendered use of the highway dangerous; the defendant was not allowed to argue that a plaintiff who fell into the excavation was technically a trespasser: *Barnes v Ward* (1850) 9 CB 392; cf *Hardcastle v South Yorkshire Railway Co* (1859) 4 H & N 67.
¹⁹ (1839) 11 A & E 223. Applied by the House of Lords in *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93 to a public body.

²⁰ At 243.

²¹ See *Stovin v Wise*, n10. As to the second justification, see Pigot CB in *Sullivan v Waters* (1864) 14 ICLR 460 at 467, where he stated that claims by an entrant 'who is induced by the owner to come to his premises for the purposes of business carried on by the owner there' were different from those by a person who has a 'mere licence'. cf Cockburn CJ in *Corby v Hill*, below n 31.

Subsequent decisions imposed a similar general duty of affirmative action on shopkeepers and the like as regards customers;²² on railway companies as regards passengers;²³ and on the proprietor of a market who received tolls.²⁴ In 1864 Cockburn CJ said that it was

now settled law that any one inviting the public to a given place for purposes of business is bound to take reasonable care that the place in question can be entered with safety.²⁵

However, liability would not be imposed where the entrant encountered an obvious risk, although whether by reference to a limitation on the duty or the establishment of a defence of contributory negligence or *volenti non fit injuria* was not necessarily made clear.²⁶

Thirdly, a middle way emerged in the case of a person who entered land with the permission of but no benefit to the landowner. It was held in *Southcote v Stanley*²⁷ that a claim by an ordinary visitor to premises that he was injured when a piece of glass fell from a door and that the occupier had been careless in that regard disclosed no cause of action. Pollock CB²⁸ held that as a master would not be liable to a servant in such

²² *Chapman v Rothwell* (1858) 11 Bl & Bl 168 (deceased visiting brewery office on business fell through open trap door in passage).

²³ *Grote v Chester and Holyhead Railway Co* (1848) 2 Ex 250 (defendant liable for injury to passenger of a different railway company caused by a defective brake); *Martin v Great Northern Railway Co* (1855) 16 CB 179. A railway company owed a duty of care to a passenger in tort; it was not necessary to establish a contractual relationship: *Marshall v York, Newcastle and Berwick Railway Co* (1851) 11 CB 655 (claim for loss of baggage by servant whose ticket was paid for by his master).

²⁴ *Lax and Bainbridge v Mayor of Darlington* (1878) 5 Ex D 28.

²⁵ *Hodgman v West Midland Railway Co* (1864) 5 B & S 173, 191.

²⁶ See *Wilkinson v Fairrie* (1862) 1 H & C 633 (workman on business at sugar refiners warehouse was directed down a dark passage and fell down an unlit staircase; nonsuit by Bramwell B on the basis that 'if he could see his way, the accident was the result of his own negligence, if he could not see his way, he ought not to have proceeded without a light' upheld on appeal); *Toomey v London, Brighton and South Coast Railway Co* (1857) 3 CB (NS) 145 (illiterate passenger looking for urinals opened wrong door and fell down some steps).

²⁷ (1856) 1 H & N 247.

²⁸ With whom Alderson B agreed.

circumstances,²⁹ a visitor could not be in a better position. Bramwell B³⁰ stated that there might be liability for an act of commission, as where a person asked another to walk in his garden in which he had placed spring guns or man-traps, and the latter was not warned and was thereby injured. However, no 'act of commission' was alleged here.

That there might be liability for negligently creating a risk of harm was subsequently confirmed in *Corby v Hill*,³¹ where the defendant, a builder, was held liable for carelessly leaving slates on a private road, which was unlit. The builder knew the road was liable to be used. The plaintiff's horse was injured when his servant drove his horse and carriage into the slates at night. The plaintiff's servant was using the road 'by leave and licence.'³² The builder claimed as a defence that he had had the owner's permission to place the slates on the road. However, court indicated that the owners of the soil of the road would equally have been liable had they placed or expressly authorised the obstruction.³³ Cases concerning trespassers were held not to be applicable.³⁴ *Southcote v Stanley*³⁵ was distinguished on two different bases. The first³⁶ was that it was founded on the principle

that one who chooses to become a guest cannot complain of the insufficiency of the accommodation afforded him.³⁷

²⁹ *Priestley v Fowler* (1837) 3 M & W 1; 'the mere relation of master and servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself': Pollock CB at 249-250.

³⁰ At 250-251. The report at 25 LJ Ex 339, 340 has Bramwell B saying 'leading another into danger would be an act of commission'.

³¹ (1858) 4 CB (NS) 556. Applied in *Pickard v Smith* (1861) 10 CB (NS) 470 (occupier of refreshment rooms and cellar at station liable where passenger fell through an open trap door on the platform over the cellar; no contributory negligence). See also *Gallagher v Humphrey* (1862) 6 LT (NS) 634 (liability imposed for 'superadded negligence' in the operation of a crane which caused a load of sugar to fall on a passing licensee).

³² Cockburn CJ at 563. Willes J at 566 referred to persons using the road by 'leave'.

³³ Cockburn CJ at 563-564; Byles J at 568 (on the basis of joint and several liability).

³⁴ Cockburn CJ at 564; Williams J at 565.

³⁵ Above.

³⁶ All four judges attached weight to this point.

³⁷ Williams J at 565-566.

Here, by contrast, there was an 'act of commission'³⁸ and 'the defendant had no right to set a trap for the plaintiff.'³⁹ The case was regarded as 'obvious'.⁴⁰ The second distinction was this:⁴¹

The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto....Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held it out as a way along which they might safely go.

This suggests that the entrant might have been regarded what came to be known as an 'invitee'.⁴² However, whether the plaintiff had been using the road for the purposes of the owner's business was not raised as an issue.⁴³ This passage in Cockburn CB's judgement led to case law in the United States that supported the position that liability was normally based on 'invitation' rather than on the fact that entry was 'on business'.⁴⁴ However, that position did not reflect English law.⁴⁵

³⁸ Cockburn CJ in argument at 562.

³⁹ Willes J at 567. An inelegant phrase in that there is no suggestion that the defendant intended to harm the plaintiff or was reckless.

⁴⁰ Willes J at 567; Byles J at 568. Cf *Hounsell v Smyth* (above) where Williams J held that there was no duty to fence an excavation on waste land between two highways even if the plaintiff were there with tacit permission. The other judge who gave judgment in that case, Keating J, dealt with the case on the basis that the claimant was a trespasser.

⁴¹ Per Cockburn CJ at 563-564.

⁴² As was the interpretation placed on *Corby* by Pigot CB in *Sullivan v Waters*, below n 49. *Corby* was subsequently treated as an authority on liability to licensees.

⁴³ Cf *Parnaby*, n 19 above, and *Indermaur v Dames*, n 50 below. The road led from the turnpike-road to Hanwell Lunatic Asylum and the adjoining residence of the superintendent, Dr Saunders. It seemed that the plaintiff's servant was going to the latter.

⁴⁴ W Prosser, 'Business visitors and invitees' (1941-42) 26 Minn L Rev 573. The factor that entry was 'on business' would only be crucial as regards entry to private premises.

⁴⁵ GW Paton, 'Invitees' (1942-43) 27 Min L Rev 75.

As with invitees, there was no liability to licensees in respect of obvious risks. In *Bolch v Smith*,⁴⁶ it was held that no duty arose where the defendant had inadequately fenced off a shaft connecting a steam engine and a mill that lay across a path in a dockyard that the plaintiff was permitted to use. The plaintiff injured himself when he slipped and fell against the shaft. *Corby v Hill* was distinguished on the ground that, in the present case, the defect was apparent and there was nothing which could be called a 'trap'.⁴⁷

Fourthly, cases where the plaintiff entered land by virtue of a contract with the occupier were regarded as raising a separate principle. For example, a person who provided a temporary stand for people to pay to watch the Cheltenham races was held to be subject to an implied term that the stand was reasonably fit and proper for the purpose, except that there would be no liability for unknown defects not reasonably discoverable.⁴⁸

B *Indermaur v Dames*

The first attempts at a more systematic analysis came with *Sullivan v Waters*⁴⁹ and *Indermaur v Dames*.⁵⁰ In *Sullivan v Waters* the question was whether the owner of a distillery owed to a 'mere licensee' permitted to sleep in the loft of a distillery a duty to fence and light an aperture in the loft floor. Pigot CB for the court reviewed the cases, noted that there seemed to be distinction between cases where the entrant was 'expressly invited' or a business customer and cases of a 'mere' visitor, guest or

⁴⁶ (1862) 7 H & N 736.

⁴⁷ Wilde B at 746.

⁴⁸ *Francis v Cockrell* (1870) LR 5 QB 501, per Kelly CB at 503, 508, Martin B at 511 and Keating J at 512-513. Montague Smith J at 513 and Cleasby B at 514 found that there had been an implied undertaking that due care had been taken. The latter was applied in *John v Bacon* (1870) LR 5 CP 437 (in respect of the duty owed by a steamer company to a passenger). See also *Dunster v Hollis* [1918] 2 KB 795 (landlord under an implied contractual obligation to take reasonable care to keep common staircase reasonably safe). There was a substantial body of cases considering when the different approaches should apply.

⁴⁹ (1864) 14 ICLR 460.

⁵⁰ (1866) LR 1 CP 274, Court of Exchequer, aff'd (1867) 2 CP 311, Court of Exchequer Chamber.

licensee, but could discern no clear general rule or test.⁵¹ On the facts, the claim failed as there was no obligation to guard a mere licensee against an existing, apparent source of danger.

This paved the way for the leading decision in *Indermaur v Dames*. Here, the defendant sugar-refiner, Dames, owned premises with several floors. A partially unfenced hole or shoot was left in each floor to enable sugar to be raised and lowered from the different storeys. Indermaur was a gas-fitter whose employer, Duckham, had fitted a gas regulator in the refinery. Under the contract, the defendants' gas burners were to be inspected by Duckham. One evening, Indermaur entered the premises to do this and, in the dark, fell through the hole and fractured his spine. His claim for damages was upheld at trial and by the Court of Exchequer. The jury found that the plaintiff had not been negligent. The defendant argued that there was no duty to fence as the plaintiff was a mere licensee and there was no misfeasance. The judgment of the court⁵² was delivered by Willes J. The argument that the plaintiff was a bare licensee was rejected on the ground that he was there 'on lawful business, fulfilling a contract in which both the plaintiff and defendant had an interest.'⁵³

It seemed that there would be liability to a bare licensee in the case of 'active negligence in respect of unusual danger known to the host and not to the guest' as distinct from 'a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.'⁵⁴

⁵¹ The analysis was not wholly convincing. The difficulties of distinguishing omissions from 'acts of commission' were overstated.

⁵² Erle CJ, Willes, Keating and Montague Smith JJ.

⁵³ At 285. No distinction here was to be drawn between the position of Indermaur and his employer, Duckham, should the latter have entered the refinery.

⁵⁴ This was how Willes J (at 286) described the distinction drawn by Bramwell B in *Southcote v Stanley*, above. Willes J also said that there was a resemblance although not a strict analogy to the principle that there was no remedy against a voluntary lender or giver, for damage sustained from the loan or gift, except in the case of unusual danger known to and concealed by the lender: *MacCarthy v Young* (1861) 6 H & N 329; *Farrant v Barnes* (1862) 11 CB (NS) 553. Note that the expression 'unusual danger' was used in respect of liability to invitees as well as liability to licensees: see n.55.

However, the duty of an occupier of a building with respect 'to persons resorting there in the course of business, upon his invitation, express or implied' was different. Such an entrant

is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced and unlighted.⁵⁵

Where there was evidence of neglect, the question whether reasonable care had been taken 'by notice, lighting, guarding or otherwise'⁵⁶ and whether there had been contributory negligence was a question of fact. On the facts, it had not been shown that there was any usage never to fence such shafts and it had been shown that when the shaft was not in use, 'a fence might be resorted to without inconvenience.'⁵⁷ The danger here was an unusual danger known to the defendant.

This was subsequently treated as a classic case. However, it is a little difficult to see what Willes J's judgment added to the law beyond clarity of exposition. Willes J articulated a distinction already discernible in the law between the position of persons invited to enter on business⁵⁸ and 'bare licensees'. He confirmed the level of duty owed to the former on essentially the same basis as before, confirming the liability as being one for a negligent omission.⁵⁹ One unfortunate consequence was that Willes J's

⁵⁵ At 287 His Lordship cited *Lancaster Canal Co v Parnaby* and *Chapman v Rothwell*, above. The formulation of principle was repeated at 288, adding the point that the entrant had to take reasonable care of his own safety.

⁵⁶ At 288.

⁵⁷ At 288.

⁵⁸ Willes J did not use the term 'invitee'. The term was used in argument in *Anglo-American Steamship Co v Houlder Line Ltd* [1908] 1 KB 659, 662 and by Hamilton LJ in *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, 410.

⁵⁹ Some commentators, however, suggested that this was a form of strict liability or a 'limited duty of insurance', albeit falling short of liability under *Rylands v Fletcher*: F Pollock, *A Treatise on the Law of Torts*, 4th edn (London, Stevens and Sons, 1893) pp 459-460 (in that the occupier 'cannot discharge himself by employing an independent

definition of the class to whom the higher level of duty was owed was subsequently treated as exhaustive.⁶⁰ That ruled out an argument that even where there was not a business element, a duty of affirmative action might arise, for example, from an invitation that held out premises as safe.⁶¹ Willes J did usefully make it clear⁶² that the liability of a shopkeeper to a customer did not turn on whether a contract was actually concluded.

The terms used to set out the duty owed to a licensee were less clear. (This can perhaps be explained by the fact that they were *obiter*.) There was endorsement of the idea that there was liability for 'active negligence' as distinct from a negligent omission and introduction of a possible analogy with cases in respect of voluntary loans or gifts. Willes J warmed to that analogy about 12 months later in *Gautret v Egerton*,⁶³ when he spoke⁶⁴ of liability to a licensee arising in cases where the defendant was guilty of a

wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers....To create an action something like fraud is shown....Some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or to do any act which may place them in danger.⁶⁵

contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor....Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so.') See to similar effect P H Winfield, *Law of Tort*, 1st edn (London, Sweet & Maxwell, 1937), pp 582, 591.

⁶⁰ It is not absolutely clear whether Willes J intended it to be exhaustive. His judgment in *Gautret v Egerton* (1867) LR 2 CP 371, 374 suggests that he did.

⁶¹ Cf Cockburn CJ in *Corby v Hill*, above n 31. Implicit in this formulation is the notion of reasonable reliance by the entrant. It is debateable whether all invitations to enter premises (as distinct from permissions) carry such an implied representation.

⁶² At 287-288.

⁶³ (1867) LR 2 CP 371.

⁶⁴ At 374-375.

⁶⁵ In *Gautret*, the Court of Common Pleas held that a licensee could not complain of an injury caused because a bridge was out of repair; it was not alleged that the defendant had done 'anything, equivalent to laying a trap' (Wilkes J at 374). It should be noted

It is submitted that the applicable principle was perhaps more helpfully captured in the earlier proposition that an occupier would be liable for an unusual danger known to him or her and not to the licensee. However, the position was complicated unnecessarily by the invocation of expressions such as 'trap', 'something like fraud' and 'wilful'. This language raised but did not address an analytical uncertainty as to whether liability to a licensee was indeed liability in negligence. Was liability confined to cases where the occupier intended to harm the licensee directly or indirectly or was reckless?⁶⁶ One further uncertainty left by the supposedly 'classical' judgments in *Indermaur* and *Gautret* was whether liability to a licensee might arise in the case of what might be termed reckless omissions.⁶⁷

C Developments after *Indermaur v Dames*

The ninety or so years after *Indermaur v Dames* saw the creation of a vast, complex body of case law that put (somewhat mangled) flesh on the bones of the distinction confirmed in that case.⁶⁸ Among the points addressed (and not necessarily solved) were (1) the boundaries of the distinctions between invitees and licensees⁶⁹ and between licensees and trespassers;⁷⁰ the content of the duties owed respectively to these two

that the plaintiff's argument, unsuccessful on the facts, was that the defendants knew the bridge to be unsafe; they did not argue that there should be liability on the basis that the defendants ought to have known of the defect.

⁶⁶ ie D actually foresees harm to P and goes on unreasonably to take the risk. The concept of 'recklessness' was not referred to in those terms in occupiers' liability cases outside liability to trespassers.

⁶⁷ A concept lying between the two propositions of Willes J reproduced at nn 54 and 55. It subsequently became clear that the occupier was obliged to warn a licensee of a concealed danger in the nature of a trap of which he or she knew, irrespective of when it was created and by whom: see eg Lord Sumner in *Mersey Docks and Harbour Board v Procter* [1923] AC 253, 274. For another ambiguity see n 115 below.

⁶⁸ See eg J Charlesworth, *The Law of Negligence*, 2nd edn (London, Sweet & Maxwell, 1947) Ch VIII. The case law on the invitee/licensee distinction was described as 'a chaos': Lord Wright, 'Invitation' (1951-53) 1 *University of Western Australia Annual Law Review* 543, 549. Other critics included W Friedmann, 'Liability to visitors of premises' (1944) 1 *SALJ* 418.

⁶⁹ See eg *Smith v London and St Katharine Docks Co* (1868) LR 3 CP 326 (dock company provided gangway enabling person with business on board ship to go aboard; gangway held to be provided as part of the dock company's business); *Heaven v Pender* (1883) 11 QBD 503 (staging provided by dock owner to enable ship to be painted there for business in which dock owner was interested).

⁷⁰ See eg *Lowery v Walker* [1911] AC 10.

classes of entrant;⁷¹ (2) whether a higher level of duty should be owed to trespassers;⁷² (3) whether a higher level of duty should be owed to child entrants;⁷³ (4) what level of duty should be owed to entrants with a right to enter conferred by law;⁷⁴ (5) what level of duty should be owed to contractual entrants;⁷⁵ (6) the position that arose where the plaintiff was aware of the danger;⁷⁶ (7) whether an occupier was liable for the negligence of a carefully selected independent contractor;⁷⁷ and whether the occupiers' liability cases were relevant to non-occupying contractors.⁷⁸ Cases might arise because litigants were seeking to change the law, normally to impose higher standards on occupiers, or simply because uncertainties needed to be resolved.

The most significant decisions were four cases in the House of Lords, each in its different way unfortunate. First, the House in *Fairman v Perpetual Investment Building Society*⁷⁹

⁷¹ On licensees see eg *Tebbutt v The Bristol and Exeter Railway Co* (1870) LR 6 QB 73 (company vicariously liable for negligence of porter who negligently drove a truck so that a portmanteau fell off and injured a licensee; liability imposed for 'act of misfeasance'); *White v France* (1877) LR 2 CPD 308 (bale of goods left balanced at the edge of a warehouse trap-door held to be a 'concealed source of mischief'); *Ellis v Fulham Borough Council* [1938] 1 KB 212 (council liable to child in respect of glass in paddling pool; sufficient that the council knew of the possibility of danger); cf *Coleshill v Mayor of the City of Manchester* [1928] 1 KB 776 (trench in road under construction not a 'concealed trap'). On invitees see eg *Norman v Great Western Railway* [1915] 1 KB 584 (duty of railway company to persons entering on business not higher than duty owed to invitee by occupier of private premises; criticised by WH Griffiths, (1916) 32 LQR 255, arguing that the duty was indeed higher).

⁷² See *Addie v Dumbreck*, below.

⁷³ See *Cooke v Midland Great Western Railway of Ireland* [1909] AC 229, HL (as explained in *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398 and *Addie v Dumbreck*) (no special rules for child entrants; defendant company in *Cooke* held liable where child licensee was injured on an unguarded turntable held to be a 'trap').

⁷⁴ The position remained confused, except that it came to be settled that persons using public facilities such as a park were licensees *Norman v Great Western Railway* [1915] 1 KB 584, above.

⁷⁵ See eg *Maclean v Sugar* [1917] 2 KB 325; WTS Stallybrass, *Salmond on the Law of Torts*, 7th edn (London, Sweet & Maxwell, 1928), pp 446-451.

⁷⁶ See eg *Woodley v The Metropolitan District Railway Co* (1877) 2 Ex D 384 (volenti defence applied); *Norman v Great Western Railway* [1915] 1 KB 584 (unattended horse (with cart) in large station yard backed into unfenced culvert; no evidence of any negligence or that any negligence caused the harm); *London Graving Dock v Horton*, below n 112.

⁷⁷ No: *Haseldine v CA Daw and Son Ltd* [1941] 2 KB 343, CA; Yes: *Thomson v Cremin* [1953] 2 All ER 1185, HL (but decided in 1941 before *Haseldine*).

⁷⁸ No: *AC Billings & Sons Ltd v Riden* [1958] AC 240.

⁷⁹ [1923] AC 74.

held by a majority⁸⁰ that a visitor to a tenant of a flat using a common staircase maintained by the landlord was only a licensee vis-à-vis the landlord. This was not an obvious conclusion, given that the value of premises to the tenant (and therefore the rent chargeable by the landlord) would obviously be significantly greater if the landlord permitted the tenant to have visitors.⁸¹ Lord Atkinson seemed to have been influenced by the label 'invitee' rather than the principle underlying the category. The plaintiff was using the stairs at the 'invitee of the tenant, though not of the landlord:'

There is nothing in the case to support the suggestion that the tenant was authorised by the landlord to act as the latter's agent to invite her. The landlord gave her no invitation, it would appear to me, either direct or indirect, to use these stairs.⁸²

Lord Wrenbury propounded⁸³ a clear *non sequitur*: 'She was....the invitee of the tenant, and, in consequence, the licensee of the landlord.' Lord Sumner said⁸⁴ that in this case it made no difference to liability whether the plaintiff was an invitee or licensee, but then applied the test appropriate for licensees.

The lack of distinction in the speeches was compounded by dicta erroneously suggesting that a *licensor* was liable for dangers of which he or she "has knowledge, or ought to have knowledge".⁸⁵ The House was in fact not invited to modify the structure

⁸⁰ Lords Atkinson, Sumner and Wrenbury. Lord Buckmaster stated at 84 that the plaintiff, as a lodger, 'had...a material interest in the use of the premises and could not be regarded as a mere guest or casual visitor.' Lord Carson (at 98-99) was unclear on the point. Lord Buckmaster and Carson were agreed that on the facts there was a concealed danger not obvious to the plaintiff using ordinary care.

⁸¹ Cf *Scott v London and St Katharine Docks Co*, above, n 69.

⁸² At 85. The decision in *Scott* was distinguished by Lord Atkinson at 90 on the implausible basis that it turned on there having been an 'unusual or covert danger of which the plaintiff knew nothing'. The court in *Scott* clearly imposed the standard applicable to an invitee.

⁸³ At 95.

⁸⁴ At 92.

⁸⁵ Lord Atkinson at 86; Lord Wrenbury at 96, 97. These dicta were rejected by the Court of Appeal in subsequent cases.

established in the nineteenth century and showed no inclination to do so outside these dicta.⁸⁶

The second case was *Robert Addie and Sons (Collieries) Ltd v Dumbreck*.⁸⁷ The defendant colliery established a haulage system for carrying spoil from the pithead to an adjoining field in their ownership. An endless cable passed round a large wheel in the field. The wheel was not visible from the pithead. The defendant knew that the field was used as a playground by young children, there being many gaps in the hedges between the fields and the public road, 100 yards away from the wheel. Colliery officials from time to time warned children out of the field, but the defenders were aware that children disregarded the warnings. A boy of 4½ was crushed in the wheel when it was set in motion by colliery employees, without any precautions being taken. The boy had been told by his father not to go near the field or the wheel. The Court of Session⁸⁸ found for the pursuer. Lord Clyde⁸⁹ held that the defenders were liable either on the basis that they had consented to the boy's presence, given that they had done little to prevent public resort to the field or, if the boy was a trespasser, on the ground that they were aware that adults or children might be at the machine when it was started. The latter situation was not to be distinguished from the situation if the collier employees had at the time they started the machine seen the trespasser on or so near the mechanism as to be likely to be injured. In the House of Lords the respondents defended the outcome in the court below on the ground that the boy had been an implied licensee. It was conceded that the principle that there might be liability of the landowner 'knew that a child was likely to be there' had never been applied to a trespasser.⁹⁰ Lord Hailsham LC regards the status of the boy as an entrant as the only question arising for

⁸⁶ Lord Atkinson at 86 referred to the passage from Willes J's judgment in *Indermaur v Danes* setting out the duty owed to an invitee (LR 1 CP 274, 288) as having 'for the last fifty-six years been accepted as a full and accurate statement of the law.'

⁸⁷ [1929] AC 358. See WO Hart, 'Injuries to trespassers' (1931) 92 LQR 92.

⁸⁸ 1928 SC 547.

⁸⁹ At 553-554. Lord Sands agreed with Lord Clyde. Lord Blackburn dissented, stating that the result would have been different if the employees had known when they started the wheel that a child was in the vicinity: p.559.

⁹⁰ Counsel for the respondents at 363.

determination, and found that he was a trespasser, in view of the warnings given. The law recognised only three categories of entrant, invitee, licensee and trespasser. There was no fourth category.⁹¹ An occupier had no duty to take reasonable care to protect a trespasser, even from a concealed danger:

The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be 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.⁹²

Two earlier decisions of the House⁹³ (in which a generous view had been taken or upheld in classifying the entrant as a licensee) afforded no ground for the contention that a higher duty than this was owed to trespassers.

This decision came to be widely criticised as adopting an unduly restrictive approach. The statements of legal principle were consistent with the previous case law,⁹⁴ but there was no previous ratio by which the House was bound. The two main criticisms that can be made lie in their application to the facts. First, as it was obviously a borderline case, it would have been open to the House to decline to interfere with the inference from the facts apparently⁹⁵ drawn by the Court of Session.⁹⁶ Why were they insistent on the

⁹¹ Lord Hailsham LC at 364-365. At 365 his Lordship misstated *obiter* the level of duty owed to a licensee by referring to liability for concealed dangers that 'ought to be known' to the occupier. This echoed *Fairman* (above n 79) which was not cited. See PMW [1930] CLJ at 79, pointing out the problem. See also Viscount Dunedin at 371 stating that 'the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories.' He acknowledged that on the facts of a case it might be difficult to decide which category applies.

⁹² At 365.

⁹³ *Cooke v Midland Great Western Railway of Ireland* [1909] AC 229; *Lowery v Walker* [1911] AC 10.

⁹⁴ 'The House, led by Hailsham and egged on by that éminence grise, the editor of the *Law Quarterly Review* (Pollock), in a speech that looked solely to precedent, willingly held the child a trespasser and thus owed no duty of care': R Stevens, *Law and Politics* (London, Weidenfeld and Nicolson, 1979), 242. Pollock commended the decision: (1929) 45 *LQR* 280.

⁹⁵ Viscount Dunedin at 372 said that 'there is no finding in terms that licence was implied'. Lord Clyde's opinion is open to a different interpretation.

conclusion that the boy was a trespasser? An indication can be seen in Viscount Dunedin's wish to protest at a proposition that seemed to be countenanced in some of the cases: 'that unless a proprietor takes such measures as effectively to stop trespass, the trespasser becomes a licensee.'⁹⁷ Such a position would obviously place significant burdens on landowners. However, a finding in this case that the boy was a trespasser would not have depended on any such proposition. On the evidence, the steps taken to prevent trespassers seemed desultory.⁹⁸ The second problem was the lack of attention, both in argument and in the opinions, to the possibility of a finding on the facts of recklessness. The defenders knew children frequented the field and had no system to prevent an accident, of which there was an obvious risk.⁹⁹ There was no analysis of the concept of "recklessness" and members of the House seemed to assume that it was a very narrow concept.¹⁰⁰ Viscount Dunedin¹⁰¹ referred with apparent approval, to a case where the defenders employees had begun shunting knowing that the child trespassers were on the line as an example of 'malicious' injury for which liability was imposed.¹⁰²

That the concept of recklessness, properly understood, is wider than that was illustrated by the subsequent decision of the House in *Excelsior Wire Rope Co v Callan*.¹⁰³ Here, the defendants, licensees of the land in question, used a wire rope, which passed through a sheave, to move trucks in a siding. They knew children from a neighbouring playground (there was no boundary fence) played round the sheave. The practice on the occasions when the rope was to be used was for the defendants' employees to go across to the

⁹⁶ As the House of Lords in *Lowery v Walker* [1911] AC 10 had restored the finding of the county court judge that the plaintiff had been a licensee.

⁹⁷ Viscount Dunedin at 372.

⁹⁸ 'The watch kept by the appellants servants was casual and ineffective, except in so far as it was directed to guarding the wood piles and coal bings': statement of facts at 360.

⁹⁹ Lord Hailsham LC noted at 369 that, had the child been a licensee, the claim would have succeeded on the basis that the wheel was a 'trap' (ie a concealed trap of which the defender knew).

¹⁰⁰ Lord Hailsham LC (at 367) also referred to the duty to a trespasser as 'the duty not maliciously to cause him injury'; Viscount Dunedin (at 377) to 'acting so reckless as to be tantamount to malicious acting'; Lord Shaw (at 378) to 'loss and injury wilfully inflicted'.

¹⁰¹ At 376.

¹⁰² *Devlin v Jeffray's Trustees* (1902) 5 F 130.

¹⁰³ [1930] AC 404.

sheave and drive children away. On one occasion they did this, went back and started the machine. If they had looked up they would have seen that a girl of 5 had returned and was swinging on the rope. Her hands were crushed. The Court of Appeal held that, on the assumption she was a trespasser, this was a case of reckless disregard. The House of Lords dismissed the appeal, although the precise grounds were unclear.

Lord Atkin regarded the cases on occupier's liability as irrelevant as the defendants were mere licensees; they owed a duty to the children to take reasonable precautions to see that they were not injured.¹⁰⁴ Lord Thankerton dealt with the matter as one involving liability to a licensee.¹⁰⁵ Lords Buckmaster and Warrington simply asserted that on the facts there was a duty to see that no child was there, without explaining why.¹⁰⁶ Viscount Dunedin regarded this as a case of reckless disregard, but would have been prepared to find that the child was a licensee.¹⁰⁷ The task of reconciling *Addie* and *Excelsior* proved difficult for subsequent cases and commentators. The only factual difference appeared to be that in *Excelsior*, the defendants' employees could have seen the child if they had looked.¹⁰⁸

The third troublesome decision was in *Jacobs v London County Council*,¹⁰⁹ where the plaintiff crossing on foot the forecourt outside a shop on her way to the shop tripped on a stopcock and broke her leg. The shop was let to a tenant by the LCC; the LCC remained as owner and occupier of the forecourt. The House of Lords held that the plaintiff was only a licensee on the forecourt. The sole opinion was delivered by Lord Simonds, who strongly rejected an argument that the observations in *Fairman*¹¹⁰ on the

¹⁰⁴ At 412-413. But could it have been argued that the defendants were occupiers of the structure? Cf Viscount Dunedin at 411.

¹⁰⁵ At 413-414.

¹⁰⁶ At 410, 412.

¹⁰⁷ At 416.

¹⁰⁸ See eg *Mourton v Porter* [1930] 2 KB 183.

¹⁰⁹ [1950] AC 361.

¹¹⁰ Above, n 79. This view had been taken by Scott LJ in *Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343.

status of the entrant in that case were *obiter*, holding them to be a second *ratio decidendi*.¹¹¹ On the facts, *Fairman* was indistinguishable.

The fourth was *London Graving Dock Ltd v Horton*¹¹² where the House of Lords held by 3 to 2,¹¹³ reversing the Court of Appeal,¹¹⁴ that an occupier was not liable to an invitee where the invitee had full knowledge of the unusual danger in question, inadequate staging in a ship where the plaintiff was engaged in welding operations. This resolved an ambiguity in the law as stated in *Indermaur v Dames* that had long been recognised,¹¹⁵ notwithstanding the supposedly classical nature of Willes J's judgment. The majority judges simply asserted that the narrower interpretation of *Indermaur* was correct.¹¹⁶ There were two strong dissents. Lord MacDermott noted that on the majority's approach in effect 'sciens can be said to come to the same thing as volens'¹¹⁷ and found it difficult to discern any sound reason in favour of the rule adopted by the majority.¹¹⁸ Both he and Lord Reid regarded the matter as one of principle which was not settled by previous authority.¹¹⁹ Both accepted that, in particular circumstances, the duty of care might on the facts be discharged by giving notice.¹²⁰ Lord Reid said that in the realms of negligence 'rigid rules give rise to what I believe to be avoidable injustice' and saw 'no reason to depart unnecessarily from the simple method of asking in any case what a

¹¹¹ Lord Simonds was not always consistent on this kind of issue: see R Stevens, *Law and Politics* (London, Weidenfeld and Nicholson, 1979), pp 352-353.

¹¹² [1951] AC 737.

¹¹³ Lords Porter, Normand and Oaksey, Lords MacDermott and Reid dissenting.

¹¹⁴ [1950] 1 KB 421.

¹¹⁵ See eg. WTS Stallybrass, *Salmond on the Law of Torts*, 7th edn (London, Sweet & Maxwell, 1928), pp 461-464. Was the minimum duty one to take reasonable care that the premises were safe or merely to warn?

¹¹⁶ See Lord Porter at 747, 749; Lord Oaksey at 757-758. Lord Normand (at 754) thought the point settled by a series of decisions concerning harbour authorities and ships entering the harbour.

¹¹⁷ ie knowledge was sufficient to establish consent, a proposition firmly rejected in cases on the volenti defence. See to similar effect Lord Reid at 783-784.

¹¹⁸ At 764.

¹¹⁹ At 762, 774.

¹²⁰ At 772, 777.

reasonable man in the shoes of the defendant might have done.¹²¹ The dissents were cogent and persuasive, and were strongly endorsed by commentators.¹²²

The results of these four House of Lords decisions was to leave the law in an unsatisfactory state in a number of respects. In each case the House had exercised choices in such a way as to limit the liability of the occupier as against the entrant. Whether this can be explained on the theory that the judges were predisposed by their social background to favour the interests of property owners can only be speculative. What is reasonably clear is that the processes of reasoning adopted by many of the judges was not untypical of the era in which the case was decided, being marked by reliance on precedents rather than principle and a lack of any apparent wish to identify and analyse the purposes served by competing principles.

III Law Reform and the Law Reform Committee

Law reform by judges depends on the accidents of case law, the willingness of judges to develop the law and the extent to which the legal system gives them room for manoeuvre. Law reform by Parliament largely depends on the priorities of the government of the day, both in determining their own legislative programme and in deciding which Private Members Bills should be given a fair wind. It is relatively easy for Private Members Bills to be blocked. In the nineteenth and twentieth centuries there were many voices raised in support of the reform of different aspects of the law.¹²³ Themes in the nineteenth century were reforms promoting the rights of the individual, a gradual rationalisation of the court structure and the growth of collectivism, with a shift of attention from the individual to the group and from the middle class to the working

¹²¹ At 785.

¹²² Including Lord Wright, 'Invitation' (1951-53) 1 *University of Western Australia Annual Law Review* 543. Lord Wright, unusually for a former Law Lord writing extra-judicially, subjected the opinions in *Horton* to detailed adverse criticism. See also D Lloyd, (1950) 13 *MLR* 230.

¹²³ See JH Farrar, *Law Reform and the Law Commission* (London, Sweet & Maxwell, 1974) Ch 1.

class.¹²⁴ There were some examples of codification.¹²⁵ A Law Revision Committee was established in 1934 by the Lord Chancellor Lord Sankey.¹²⁶ Its reports were regarded as reforming “lawyers’ law”; its work lapsed on the outbreak of the second world war and there was thought to be no room for re-establishing such machinery in the immediate post-war years, given the extensive legislative programme of the 1945-51 Labour government. However, the Law Reform Committee was established as the successor to the Law Revision Committee in 1952, by the Conservative Lord Chancellor, Lord Simonds.¹²⁷ It continued as a part-time body but, unlike its predecessor, it had a permanent secretariat from within the Lord Chancellor’s Department.

The topic of ‘Occupiers’ liability to invitees, licensees and trespassers’ was the subject of the Committee’s Third Report in 1954.¹²⁸ The choice of topic is readily understandable given the growing tide of criticism of decisions in this area. At least at first sight the distinction between invitees and licensees would seem also to be more ‘lawyers’ law’ than ‘politicians’ law’, although any extension of liability to trespassers might be expected to arouse political controversy.

Part I of the Report summarised the existing law, but did contain criticisms as it went along. The terminology of ‘invitee’ and ‘licensee’, while no doubt the best that could be devised, was ‘unfortunate and, to the uninstructed, misleading’.¹²⁹ While many cases spoke of the need for a ‘common interest’ for there to be a relationship of invitor-invitee,

¹²⁴ Ibid, p 7.

¹²⁵ Ibid, pp 8-9; partnership; bills of exchange and sale of goods; real property.

¹²⁶ Ibid, pp 10-11. Among its reports that led to legislation affecting tort Law were reports on contribution between tortfeasors, limitations and contributory negligence.

¹²⁷ pp 11-14; Viscount Kilmuir, (1957) 4 *JSPTL (NS)* 75; ECS Wade, (1961) 24 *MLR* 3.

¹²⁸ Cmd 9305. For a full list see Farrer, op cit pp 135-137. The committee at the time of this report was chaired by Jenkins LJ and comprised judges (including Lord Goddard (to August 1954 and Devlin J)), practising lawyers (including Kenneth Diplock QC and Gerald Gardiner QC) and academics (including Professors AL Goodhart, Sir David Hughes Parry and ECS Wade).

¹²⁹ p 7: for example, a person invited to dinner was a mere licensee whereas a customer entering a shop was an invitee notwithstanding the absence of any invitation ‘in the ordinary sense of that expression’.

the more logical view¹³⁰ was that what was needed was that the occupier had a material interest in the purpose of the other party's visit, whether or not that was shared by the other party.¹³¹ On the issue of the effect of an invitee's knowledge of the existence of an unusual danger, the Committee preferred the view of the Court of Appeal and the minority in the House of Lords in *Horton*.¹³² The term 'unusual danger' 'defies comprehensive definition'.¹³³ The distinction between a 'concealed danger or trap' and an 'unusual danger' was a narrow one.¹³⁴

In contrast, the duty of an occupier of premises to trespassers did not call for much comment.¹³⁵ The conventional categories were said to be exhaustive, but

it can hardly be denied that there are certain types of visitor to whom none of the existing categories seems wholly appropriate, and many others whose allocation to one rather than another of the existing categories is a matter of doubt and difficulty.¹³⁶

The Committee's own attempt at enumerating classes of entrants identified seven: (i) persons exercising public rights of way;¹³⁷ (ii) persons exercising private rights of way;¹³⁸ (iii) persons lawfully using premises provided for the use of the public;¹³⁹ (iv) persons entering by lawful authority;¹⁴⁰ (v) contractual licensees;¹⁴¹ (vi) persons (other than contractual licensees) coming upon premises at the invitation or by the permission of the occupier (express or implied); (viii) trespassers.¹⁴²

¹³⁰ Scott LJ in *Haseldine v Daw* [1941] 2 KB 343, 352.

¹³¹ Third Report, p7. The Committee was critical of the decision in *Fairman*: p 9.

¹³² pp 10-13. See above n 112.

¹³³ p 14.

¹³⁴ Ibid.

¹³⁵ pp 15-16.

¹³⁶ p 16.

¹³⁷ Really a special category, subject to *Gautret v Egerton* (1867) LR 2 CP 371, 373, above, n 63.

¹³⁸ Should be governed by the law of easements and of landlord and tenant.

¹³⁹ Arguably should be regarded as invitees not licensees as laid down in the case law.

¹⁴⁰ Should be regarded as invitees.

¹⁴¹ Practical difficulties in deciding which contractual term should be implied.

¹⁴² 'No particular difficulty arises' in respect of liability to an undoubted trespasser although the line between trespasser and implied licensee was a debateable area.

Part II of the Report set out criticisms of the existing law and suggested amendments. It noted on the one hand Atkin LJ's view¹⁴³ that while the current law compelled distinctions to be drawn that were 'subtle and apt to be confused', they did 'correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use. On the other was the view *Salmond on Torts*¹⁴⁴ that the law was still in a confused state.

Had it been earlier and more generally recognised that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into strait jackets to fit the character in which the plaintiff comes on to the premises and the law would then have been freed of some needless refinements and profitless distinctions.

The recommendations as to the substance of the law were these.¹⁴⁵

First, as regards contractual entrants, there were no precise and satisfactory tests for the application of two or more standards of care of differing degrees of stringency, the relevant standard of care should be either that specified in the contract or the common duty of care owed to all lawful visitors. In the latter case, the existence and nature of the contract should be included in the circumstances to which regard should be had in determining whether the common duty of care had been discharged in any particular case. Where a person contracting for the use of premises enabling him to permit third persons to use them, then the common duty of care should be owed unless the contract provided for a higher duty.¹⁴⁶

¹⁴³ *Coleshill v Manchester Corporation* [1928] 1 KB 776, 791.

¹⁴⁴ WTS Stallybrass, 10th edn (London, Sweet & Maxwell, 1945), p 471.

¹⁴⁵ pp 22-39.

¹⁴⁶ Changing the law as set out in *Fosbroke-Hobbes v Airwork Ltd* [1937] 1 All ER 108, 112, which was that the duty was the same as that owed to the party to the contract.

Secondly, as regards non-contractual entrants, the distinction between invitees and licensees should be abolished. Starting with a 'clean slate' the committee thought that an occupier should be under a duty of care, apart from contract, for these reasons.

An occupier of premises has them under his control. Their condition, be it safe or dangerous, is a matter peculiarly within his own knowledge or potential knowledge.¹⁴⁷

The occupier must be assumed to know that dangers on his premises which he causes or permits to exist may be a source of danger to lawful entrants:

It is therefore an act or neglect *prima facie* constituting an actionable wrong to any persons in fact so damaged.¹⁴⁸

This was 'comparable in point of ethical origin' to the duty to prevent the wall of a house falling on and injuring a person lawfully present on adjoining premises. It would seem to follow from this that as a general rule, the same standard of care should apply to all lawful visitors.

However, that was not the law. The justification for the higher duty owed to an invitee was analogous to a contractual duty arising from an implied bargain. While there was an air of reasonableness about this when applied to the stock examples of a shop customer and a person allowed for his own convenience to take a short cut across a field, the distinction could not be rationally maintained in respect of the 'whole range of almost infinitely variable circumstances' of entry to premises. Many examples were given of the arbitrary nature of decisions on the borderline.¹⁴⁹

¹⁴⁷ p 25.

¹⁴⁸ *Ibid.*

¹⁴⁹ eg dinner guests one of whom talks business; a person who goes into a shop to ask the way; a knife grinder visiting premises and given knives to grind.

Thirdly, persons lawfully using premises provided for the use of the public should be owed no less stringent a duty than that owed to invitees.

Fourthly, persons entering premises by lawful authority were not easily characterised as an invitee or licensee and the duty owed to them should be ascribed to the legality of their entry and the occupier's knowledge that such persons may enter.

Fifthly, no workable exception could be made in respect of persons allowed to use premises merely for own convenience or advantage, or benefitting merely from implied permission.

Sixthly, the standards owed to invitees at common was, with two modifications,¹⁵⁰ suitable to be adopted as the standard owed to all lawful entrants,¹⁵¹ and was equivalent to a duty to take reasonable care to see that the premises are reasonably safe.

Seventhly, a landlord should owe the common duty of care to any third party using means of access remaining in the landlord's occupation.¹⁵²

Eighthly, no change was recommended in the law concerning adult or (by a majority¹⁵³) child trespassers.

¹⁵⁰ Reversing *Horton and Thomson v Cremin*: above nn 112, 77.

¹⁵¹ One factor was recent decisions expanding liability on the basis of imputed knowledge: *Ellis v Fulham Borough Council* [1938] 1 KB 212; *Pearson v Lambeth Borough Council* [1950] 2 KB 353; *Hawkins v Coulsdon and Purley UDC* [1954] 1 QB 319.

¹⁵² Reversing *Fairman and Jacobs*.

¹⁵³ It was difficult to evolve an exception for child trespassers which would provide a substantial degree of protection without imposing too heavy a burden on occupiers: p.35.

Ninthly, members of a tenant's family and lawful visitors to the tenant injured by defects arising from breach of the landlord's repairing obligations owed to the tenant should be able to sue the landlord.¹⁵⁴

There was a minority report by Kenneth Diplock QC¹⁵⁵ (as he then was) whose view was that this branch of the common law was not suitable for a statutory code.¹⁵⁶ A statutory definition of the duty would be less flexible than a definition laid down by a court of law able to draw factual distinctions that might not have been in the draftsman's mind. A wide statutory definition would create uncertainty. The courts would seek to ascribe meaning to departures from the formulation in *Indermaur v Dames*. Overall the law was now reasonably certain and not unsatisfactory. The only changes should be the statutory elevation to invitees of persons lawfully on land to which the public have access and persons lawfully using means of access to let premises; the last point of the first change, and the ninth change proposed by the majority.

There are a number of observations that can be made about the Report. First the kinds of arguments deployed were essentially those used by judges when free to develop the common law. Much is made of inconsistencies between judgments in decided cases and of hypothetical examples constructed to demonstrate the awkwardness of the distinctions drawn in the case law. The likely views of 'the hypothetical reasonable men of ordinary prudence' were invoked.¹⁵⁷ There was no reference to empirical evidence of how the law worked in practice. Indeed it was clear that the committee was not expected and indeed was not given the resources to commission such research.

¹⁵⁴ Reversing *Cavalier v Pope* [1906] AC 428.

¹⁵⁵ pp 43-44.

¹⁵⁶ Lord Diplock subsequently acknowledged he had been wrong: () Australian law Journal .

¹⁵⁷ p 29. There was no reference, however, to the Clapham omnibus or the London Underground.

Secondly, the Committee made a powerful case against the distinction between invitees and licensees on the ground of unworkability; there were indeed too many difficult borderline cases where the line was essentially arbitrary. However, the theoretical analysis was unclear. A major gap in the Report is the lack of any discussion of the restricted application of the ordinary law of negligence to an omission (in the sense of a failure to confer a benefit upon the plaintiff, such as protecting him or her from harm).

The Committee's 'clean slate' position¹⁵⁸ applied without differentiation to acts and omissions and was that an act or neglect that might damage a lawful visitor was 'therefore' *prima facie* an actionable wrong.

There are two ways of interpreting this. First, it may be that the Committee overlooked the act/omission distinction and thought it was simply applying *Donoghue v Stevenson* to occupiers' liability. However, *Donoghue v Stevenson* was not mentioned. Secondly, it may be that the Committee understood that it was dealing with liability for omissions and was of the view that the occupier/visitor relationship, rather than the narrower analogy to contact, was sufficient to justify imposition of a duty of affirmative action. If so, the basis for that to be sufficient was asserted rather than explained. The suggested analogy with the liability of an occupier to a person on neighbouring premises was contained in a sentence and no authorities were cited.¹⁵⁹

The report was both welcomed¹⁶⁰ and criticised for not going far enough or being uncertain.¹⁶¹ Its recommendations were generally accepted by the government and taken forward in the Occupiers' Liability Act 1957.

¹⁵⁸ n 147, above.

¹⁵⁹ One relevant authority is *Cunard v Antifyre Ltd* [1933] 1 KB 551, which was decided in the light of *Donoghue v Stevenson*, and imposed liability in respect of the fall of guttering from the roof of a building, in respect of which the defendant was the occupier, through the glass roof of a kitchen of which the plaintiff's husband was the tenant, injuring the plaintiff.

¹⁶⁰ RFV Heuston, (1955) 18 *MLR* 271. FJ Odgers ([1955] *CLJ* 1) thought there would be substantial agreement with most of the recommendations, but was against codification.

IV The Occupiers' Liability Act 1957

Unlike its successor the Law Commission, the Law Reform Committee did not have the support of a Parliamentary draftsman to help prepare a draft Bill.¹⁶² The proposed reform was taken up by the government. A draft Bill was prepared and discussed with members of the Law Reform Committee, which discussions led to a number of changes.¹⁶³ The Bill was initially introduced in the House of Lords in the 1955-56 session, 'to give it an airing'.¹⁶⁴ It was reintroduced in the Commons in December 1956¹⁶⁵ and passed both Houses without amendment.¹⁶⁶ It was generally welcomed on all sides, although there was concern from one member about the 'considerable new burdens on owners and occupiers',¹⁶⁷ a proposal (defeated on a vote) that a child under 11 who would otherwise be a trespasser should be treated as a lawful visitor unless the occupier has taken reasonably sufficient steps to prevent the child entering or using the premises;¹⁶⁸ an express defence of the right of the occupier to exclude liability by putting

¹⁶¹ DW Bowett, 'Law reform and occupier's liability' (1956) 19 *MLR* 172, criticising the position that a landlord or premises would not be liable for defects in the means of access to them unless it remained in occupation of them, and noting uncertainties in the distinction between a 'movable structure' and a chattel, and on the question whether an occupier is liable only for structural defects.

¹⁶² See N. Hutton, 'Mechanics of Law Reform' (1961) 24 *MLR* 18. Hutton was First Parliamentary Counsel to the Treasury. The purpose of his article was to discuss how law reform committee recommendations were carried into effect.

¹⁶³ Hutton, *op cit* pp 27-29.

¹⁶⁴ *Ibid*, p 27. See 197 HL Deb, 21 June 1956, cols 1181-1196; 119 HL Deb, 25 October 1956, cols 1083-1086. The report was issued too late to be considered for the 1954-55 session.

¹⁶⁵ HC Bill No 82.

¹⁶⁶ 566 HC Deb, 6 March 1957, cols 461-480 (2nd reading); 568 HC Deb, 8 April 1957; col 910 (report and 3rd reading; Standing Committee A, 26 March 1957; 203 HL Deb, 2 May 1957, cols 255-272 (2nd reading) 204 HL Deb, 4 June 1957 199-202 (committee); 204 HL Deb, 4 June 1957, col 246 (3rd reading).

¹⁶⁷ Lord Clitheroe, 197 HL Deb, 21 June 1956, col 1194.

¹⁶⁸ Standing Committee A, 26 March 1957, cols 12-30: the government resisted this on the basis that the Law Reform Committee had recommended no change on the Law relating to trespassers; that this would be a 'very hard standard to impose in practice'; that it was difficult to justify picking a particular age; and that no reference had been made to whether the presence of the child was to be anticipated: the Solicitor-General at col 19. Some members of the House of Lords were also concerned about the position of child trespassers: see 203 HL Deb, 2 May 1957 cols 259-272. The Lord Chancellor's view

up an exclusion notice;¹⁶⁹ and an unsuccessful attempt to secure for the occupier the right to have an action under the Act tried by a jury.¹⁷⁰

As enacted the Occupiers' Liability Act 1957 was clearly structured and generally well drafted. Sections 1 to 4 concerned liability in tort, including in s 4 the liability of a landlord; section 5 liability in contract.

As regards liability in tort, the scope of sections 2 and 3 was said to be to regulate the duty owed by the occupier of premises to his or her visitors

in respect of the dangers due to the state of the premises or to things done or omitted to be done on them.¹⁷¹

This expression, which also appears in the Occupiers' Liability Act 1984, has given rise to some definitional difficulty to which we shall return. The scheme of sections 1 to 3 both refers back to the common law in answering the question 'who owes a duty to whom?' and establishes new rules as to the content of the duty owed. Thus 'occupier' means a person who would at common law be treated as an occupier and 'visitor' means a person who would be an invitee or licensee at common law.¹⁷² The new rules were that a 'common duty of care', 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, is owed to all

was that it was difficult 'to find a solution to this problem which would not place an intolerable burden on the occupiers of land': 204 HL Deb, 4 June 1957, col 201.

¹⁶⁹ The Solicitor-General, Standing Committee A, cols 30-32, defending inclusion of the words 'or otherwise' in clause 2. See n 192.

¹⁷⁰ Standing Committee A, cols 41-46.

¹⁷¹ 1957 Act s.1(1). In addition, the rules enacted by ss 2 and 3 are to 'regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises': s.1(2). They also apply to the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft: s.1(3)(a); and obligations in respect of damage to property, including the property of non-visitors: s.1(3)(b).

¹⁷² s 1(2). A person entering premises in the exercise of access agreement or order under the National Parks and Access to the Countryside Act 1949 was expressly declared not to be a visitor: s.1(4) an exclusion subsequently applied to rights under s.2(1) of the Countryside and Rights of Way Act 2000 (the 'right to roam').

lawful visitors.¹⁷³ The wording of the old duty to invitees is improved by removal of the reference to 'unusual dangers', and extended to licensees. Circumstances relevant in determining the level of care that is reasonable include the degree of care to be expected of visitors, examples¹⁷⁴ of which were that an occupier must be prepared for children to be less careful than adults and may expect that a person, in the exercise of his or her calling, will appreciate and guard against any special risks incident to it.¹⁷⁵ These propositions reflected both common sense and the existing law. In determining whether the common duty of care has been discharged, regard is to be had to all the circumstances. Two examples are given. First, a warning of danger is not to be treated 'without more' as discharging the duty unless it is enough to enable the visitor to be reasonably safe. Second, an occupier is not to be answerable 'without more' where damage is caused by a danger due to the faulty execution of any work of construction, maintenance and repair by an independent contractor, and the occupier has acted reasonably in using, selecting and supervising the contractor. These reversed previous decisions,¹⁷⁶ the latter to the benefit of the occupier. The volenti defence was preserved.¹⁷⁷

Section 3 deals with the liability in tort applicable where the occupier of premises is bound by a contract with a third party to permit entry to or use by a stranger to the contract.¹⁷⁸ The common duty of care owed to this person as a visitor cannot be excluded; any additional objections under the contract must be performed, although this element can be excluded.¹⁷⁹

¹⁷³ s 2(2). For the purposes of s 2, persons entering for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose: s.2(6).

¹⁷⁴ The 1957 Act was at that date unusual in using examples as a technique of drafting. Other early examples are the Bills of Exchange Act 1883 and the Geneva Conventions Act 1957.

¹⁷⁵ s 2(3)(a) and (b).

¹⁷⁶ *Horton and Thomson v Cremin*, above nn 112, 77.

¹⁷⁷ s 2(5).

¹⁷⁸ Defined in s.3(3).

¹⁷⁹ s(3)(1). Section 3(2) makes somewhat convoluted provision in respect of liability for independent contractors that is not thought to be intended to be different in outcome:

Section 4 provided for the reversal of *Cavalier v Pope*¹⁸⁰ stating that where a landlord has under a tenancy an objection to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who or whose goods are lawfully on the premises the same duty in respect of danger arising from any default in carrying out the objection as if he or she were the occupier and the persons or goods were there by invitation or permission.¹⁸¹ This provision was repealed¹⁸² and replaced by broader provisions in s 4 of the Defective Premises Act 1972.¹⁸³

Section 5 dealt with liability in contract. Where persons enter or use or bring or send goods to any premises in exercise of a contractual right, the duty owed in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as it depends on an implied term, is to be the common duty of care.¹⁸⁴

The 1957 Act generally binds the Crown, does not extend to Scotland and Northern Ireland and came into force on 1 January 1958.¹⁸⁵

AM Dugdale and MA Jones, *Clerk and Lindsell on Torts* (19th edn, 2006), para 12-59. A contract may expressly provide that the occupier may be liable for an independent contractor.

¹⁸⁰ [1906] AC 428.

¹⁸¹ s 4(1). Extended to sub-tenancies by s 4(2).

¹⁸² By the Defective Premises Act 1972, s 6(4).

¹⁸³ This provides that where a landlord has an obligation to the tenant for the maintenance and repair of the premises, the landlord owes to all persons who might reasonably be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect (s 4(1)). The duty is owed if the landlord knows or ought to have known of the defect (s 4(2)). A 'relevant defect' is a defect in the state of the premises, existing at or after the earliest of the start of the tenancy, entry into the tenancy agreement or the taking of possession, and arising from a failure to carry out the objection (s 4(3)). This is broader than s 4 of the 1957 Act in that the duty can be owed to persons on or off the premises, including the tenant.

¹⁸⁴ s 5(1). This applies to fixed or moveable structures; s.5(2); but does not affect obligations under a 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 under a contract of bailment: s 5(3).

¹⁸⁵ ss 6-8.

The academic commentary on the Act was rather critical. Payne¹⁸⁶ found it 'curious' that the Law Reform Committee had considered that the element of material advantage to the occupier should in principle be irrelevant to the standard of care required given the general reluctance of English law to impose liability for omissions in the absence of a special relationship. However, he noted that this factor might remain relevant on the facts of a particular case in determining whether there had been a breach of duty. Overall, while some reform was needed, 'not everyone, it is thought, will agree that the method....adopted by the legislature was the best way of dealing with the subject.' Many would think that the element of material advantage to the occupier 'was a not inapt consideration on which to hinge different rules of liability.'¹⁸⁷ As to the 'supposedly ludicrous operation of the distinction between invitees and licensees in borderline cases,' there were few legal distinctions that could not 'to the untutored mind at least' be made to appear ludicrous in borderline cases. Rules were needed both to control the vagaries of juries and to limit the discretion of judges. The more uncertain the law, the more cases would go to trial and appeal.

Newark¹⁸⁸ echoed Payne's endorsement of the validity of the old distinction but was also critical of the drafting¹⁸⁹ and foresaw a 'spate of litigation'.

In the event the Act does not seem to have proved problematic.¹⁹⁰ Leaving aside the issue of the scope of both the 1957 and 1984 Acts, which is considered below,¹⁹¹ matters

¹⁸⁶ D Payne, 'The Occupiers' Liability Act 1957' (1958) 21 *MLR* 359, 363. Another who expressed a preference for specific limited amendment rather than codification was FJ Odgers, 'Occupiers' liability: a further comment' [1957] *CLJ* 39.

¹⁸⁷ *Ibid*, p.372.

¹⁸⁸ (1956-58) 12 *NILQ* 203; a comment in the Occupiers' Liability Act (Northern Ireland) 1957, which was based on the 1957 Act.

¹⁸⁹ For example, he regarded the use of examples as a 'distinct novelty' and 'not a good precedent' as the courts might use the examples to limit the general words by reference to the examples: p 210. Section 2(4) contained 'more concealed traps than any licensee was ever called upon to face': p 211. The operation of the words 'without more' in s 2(4)(a) and (b) was unclear.

¹⁹⁰ See Carnwath LJ (a former Law Commissioner expressing enthusiasm for such reforms) in *Maguire v Sefton Metropolitan Borough Council* [2006] EWCA Civ 316, [2006] 1 WLR 2550 at para [33]: 'The Act has given rise to relatively little contentious

that have been settled include whether s 2(1) enables an occupier to exclude liability under the Act by putting up a notice and taking reasonable steps to draw it to the attention of the visitor;¹⁹² whether a person exercising a right of way is a visitor;¹⁹³ and whether an implied term in a contract can impose a higher duty to a contracted entrant than the common duty of care.¹⁹⁴ There has been clarification of the common law concept of 'occupier'.¹⁹⁵ Other cases have simply provided examples of recurring situations that can constitute a breach of the common duty of care.¹⁹⁶ There seem to have been no calls for reform of any aspect of the 1957 Act; s 4 was not replaced because it was inherently unsatisfactory, but simply because it was superseded by a broader provision. Overall, the 1957 Act must be accounted a success.

Two points in conclusion. First it would indeed be open to a defendant to argue that, on a particular set of facts, less is required by reasonableness as to the affirmative steps needed where the entrant is a bare licensee as opposed to someone with a material interest. Such argument does not seem to have been presented.

case law, and, when problems have arisen, it has provided a clear and reliable framework for resolving them.'

¹⁹¹ nn 291-320.

¹⁹² Yes. *White v Blackmore* [1972] 2 QB 651; *Ashdown v Samuel Williams & Sons* [1957] 1 QB 409 (decided at common law); *Ashdown* was widely criticised essentially that on the basis that such notices are inherently objectionable rather than that they were specifically inappropriate in the context of occupiers' liability: see LCB Gower, (1950) 19 *MLR*, at 532-537; FJ Odgers, [1957] *CLJ* 42-49; (1956) 72 *LQR* 71; D Payne (1958) 21 *MLR* at 364-365. Such exclusions are now subject to the Unfair Contract Terms Act 1977.

¹⁹³ No: *Greenhalgh v British Railways Board* [1969] 2 QB 286 (public right of way); *Holden v White* [1982] 2 QB 679 (private right of way).

¹⁹⁴ No: *Maguire v Sefton Metropolitan Borough Council* [2006] EWCA Civ 316, [2006] 1 WLR 2550.

¹⁹⁵ *White v E Lacon & Co Ltd* [1966] AC 552, 'per Lord Denning at 578: 'wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier"....'

¹⁹⁶ eg the lack of an appropriate inspection regime: *Tedstone v Bourne Leisure Ltd* [2008] EWCA Civ 654; *Hall v Holker Estate Co Ltd* [2008] EWCA Civ 1422; lack of care in the selection of an independent contractor; *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575.

Secondly, it is anomalous that a different standard, the 'measured duty of care' is applicable to the liability of an occupier to a neighbour for a nuisance created by nature¹⁹⁷ or a licensee¹⁹⁸ (or presumably a trespasser).¹⁹⁹ The difference is that the 'measured duty of care' enables the court to adopt a more subjective approach to the standard of care than normal, factoring in the resources available to the kind of defendant involved.²⁰⁰ Given that the difference in approach has not affected outcomes, the most appropriate solution to the anomaly might well be to extend the normal standard of care to the occupier's liability in nuisance.

V Liability to Trespassers after *Addie v Dumbreck*

In the period after *Addie v Dumbreck* was decided there were voices affirming that the 'humanitarian' view that would impose on a landowner a duty to protect a child who is allowed or tempted to enter should be resisted, *Addie* correctly stating the law.²⁰¹ However, there were also voices expressing dissatisfaction.²⁰² Most outspoken was Lord Denning MR. In *Videan v British Transport Commission*²⁰³ boy of 2, the son of a stationmaster who lived at a station, strayed onto the line and was seriously injured by a powerdriven trolley on the line. The driver had driven fast, failed to keep a proper look-out and had not braked hard enough soon enough. Lord Denning MR regarded the *Addie* rule as fair as regards burglars and poachers, but as working most unfairly for trespassers 'innocent of any wicked intent' such as a child or an adult who had lost his or her way. The harshness of the rule was to be mitigated in the case of an occupier's

¹⁹⁷ *Goldman v Hargrave* [1967] 1 AC 645; *Leakey v National Trust* [1980] AC 485.

¹⁹⁸ *Lippiatt v South Gloucestershire Council* [2000] QB 51.

¹⁹⁹ Cf *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

²⁰⁰ *Goldman*; *Leakey*.

²⁰¹ Scrutton LJ in *Liddle v Yorkshire (North Riding) County Council* [1934] 2 KB 101, 110-111, expressing agreement with WTS Stallybrass, *Salmond on Torts*, 7th edn (London, Sweet & Maxwell, 1928) at p 472.

²⁰² eg Scott LJ (dissenting) in *Adams v Naylor* [1944] KB 750, 757-758: 'I do not see why [an occupier] should not be called on to take all reasonable precautions to keep children out of a place where he knows they will be blown up.'

²⁰³ [1963] 2 QB 650, generally endorsed by AL Goodhart, (1963) 79 LQR 586.

activities on land by the simple device of applying *Donoghue v Stevenson* instead.²⁰⁴ On the facts, however, the presence of the child trespasser was not reasonably foreseeable. This approach was, however, firmly rejected by the Privy Council in *Commissioner for Railways v Quinlan*.²⁰⁵ The judgment, given by Viscount Radcliffe, was largely based on a full analysis of the precedents, which clearly demonstrated that *Addie* had consistently and authoritatively been regarded as applying to activities and that *Donoghue v Stevenson* could not be interpreted as intended to qualify the established law on occupier's liability.²⁰⁶ The only concession to the interests of trespassers was the proposition that the *Addie* formula

may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct.²⁰⁷

The only substantive justification for the law given was that

to accept the proposition that a trespasser who insists on forcing himself on to the occupier's premises and lets him know that he intends to enter in this way can impose upon the latter, against his will, a duty to take precautions and have care which may seriously impede the conduct of his lawful activities.²⁰⁸

²⁰⁴ pp 662-668. 'Activities' would include operating a moving staircase or digging a hole on land: p 668. Lord Denning traced this approach to his own opinion in *Miller v South of Scotland Electricity Board* 1958 SC (HL) 20, 37. Harman LJ (at 673) agreed with Lord Denning's distinction. Pearson LJ's view (at 676-682) was that a (lesser) duty of common humanity would be owed where the presence of a trespasser was reasonably foreseeable.

²⁰⁵ [1964] AC 1054, reversing a decision of the Supreme Court of New South Wales. See AL Goodhart, (1964) 80 *LQR* 559, criticising the 'confused state' of the law.

²⁰⁶ As evidently accepted by Lord Atkin himself in *Hilden and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65, 70.

²⁰⁷ Viscount Radcliffe at 1084.

²⁰⁸ Viscount Radcliffe at 1086. See also p 1085. A slightly more extended explanation of the point was subsequently given by Lord Gardiner LC in *Commissioner for Railways v McDermott* [1967] AC 169, 190.

The contrast between the attention devoted to the precedents and to the underlying policy tells its own story. It reaffirmed that absent a new power to overrule or statutory intervention, *Addie* was set in stone, with very limited room for manoeuvre.

VI *British Railways Board v Herrington*

The *Practice Statement (Judicial Precedent)*,²⁰⁹ by which the Law Lords declared that in future the House would in appropriate circumstances be prepared to depart from its own previous decisions, paved the way for the decision in *British Railways Board v Herrington*.²¹⁰ Peter Thomas Herrington, a boy of 6, was injured on June 7, 1965, by contact with a live rail on the defendants' railway line. He had trespassed over a fence at a point where it had, for several months, been broken down. The defendants' station master responsible for that stretch of line had been informed in April 1965 that children had been seen on it. The fence had not been repaired. As Lord Diplock noted in the House of Lords²¹¹ all nine judges who heard the case were convinced that it should succeed.²¹² In the House of Lords, all were agreed that liability should be found; that this could not be based on there being a duty of care under *Donoghue v Stevenson*;²¹³ and that liability on these facts could not be based on *Addie v Dumbreck*.²¹⁴ There was some coyness as to whether *Addie* needed formally to be overruled.²¹⁵ Where there were differences in the five extended speeches was in the formulation of the conditions under which the new duty would arise and of its scope. A number of the Law Lords explained

²⁰⁹ [1966] 1 WLR 1234.

²¹⁰ [1972] AC 877.

²¹¹ [1972] AC at p.931.

²¹² Cairns J, following *Videan*, held the defendants liable for negligence; the Court of Appeal ([1971] 2 QB 107) held that the defendants had been reckless.

²¹³ The approach in *Videan* was expressly rejected: see eg Lord Diplock at 942-943.

²¹⁴ See eg Lord Reid at 897-898.

²¹⁵ Yes: Lord Reid at 897-898 (at least by necessary implication); Lord Morris of Borth-y-Gest at 911; Lord Pearson at 930 (the *Addie* formulation 'should be discarded'). Lord Diplock (at 935) thought the point did not matter. Lord Wilberforce (at 917) seemed to accept *Addie* as the general rule, with room in specific circumstances for a special duty of care.

the duty as one of humanity rather than care²¹⁶ and stated that it was to an extent subjective in that account could be taken of the resources available to the occupier.²¹⁷ Lord Diplock stated²¹⁸ (broadly speaking) that no duty could arise until the occupier actually knows of physical facts which a reasonable person would appreciate would involve a danger of serious injury to the trespasser and showed that the trespasser's presence was so likely that in all the circumstances it would be inhumane not to take steps (normally an effective warning) to mitigate the risk of injury. The other judges were less precise.²¹⁹ It was noted that there would no longer be 'any need to strive to imply a fictitious licence'.²²⁰ There was also some discussion of the position of independent contractors on land. Lords Wilberforce and Pearson suggested that they might now owe the same duty as the occupier,²²¹ while Lord Diplock left the point open.²²²

Academic response to the decision in *Herrington* was muted. While the outcome seemed to be approved, the variety of formulations was noted and it was thought regrettable that the standard of conduct demanded was 'not expressed in terms of the familiar requirement of acting with reasonable care'.²²³ Judicial responses were more positive, Lord Denning MR in particular seizing on the uncertainties in formulation to say that in considering when a duty arises

²¹⁶ Lord Reid at 898-899; Lord Morris at 906-907, 909 ('common sense and common humanity'); Lord Pearson at 923 ('ordinary humanity').

²¹⁷ Lord Reid at 899 ('knowledge, ability and resources'); Lord Wilberforce at 920 citing *Goldman v Hargrave* [1967] 1 AC 645, 663; Lord Diplock at 942.

²¹⁸ At 939-942. A more detailed summary is at 941-942.

²¹⁹ Lord Reid (at 899) gave an example (inhumane not to take effective action at small trouble an expense where occupier knows of a substantial probability that trespassers would come); Lord Morris avoided generalisations; Lord Wilberforce (at 920) focussed particularly on the lethal dangers arising from electrical conductors near to the public, which dangers were not apparent to children; Lord Pearson (at 922-923) stated that if the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then there is a duty to act with ordinary humanity.

²²⁰ Lord Reid at 899; Lord Diplock at 934. It is submitted that this does not mean that a licence can never properly be inferred from acquiescence.

²²¹ [1972] AC at 914, 929.

²²² At 943.

²²³ CJ Miller, 'Acting with common humanity' (1972) 35 *MLR* 409, 413. See also AL Goodhart, (1972) 88 *LQR* 305, 310-314, arguing that it would have been better for there to have been a single judgment or a statute.

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

The duty was

a duty to take such steps as 'common sense or common humanity' or whatsoever you like to call it would dictate for the safety of children who might trespass on the site.²²⁴

VII Involvement of the Law Commission

On 12 May 1971, Karl Newman of the Lord Chancellor's Office wrote to JM Cartwright Sharp, Secretary to the Law Commission, to say that the Lord Chancellor, Lord Hailsham of St Marylebone, had read a note by AL Goodhart in the Law Quarterly Review²²⁵ welcoming the decision of the Court of Appeal in *Herrington*.²²⁶ Lord Hailsham's view tended to be that while *Addie* could be used as a good guide in respect of trespassers unknown to the occupier, his father²²⁷ never really explored the view that there might be a duty to fence against children foreseeably present on neighbouring land, at least where the danger is not otherwise avoidable should they enter on the land as trespassers. It was suggested that the matter be brought to the attention of the Chairman of the Law Commission.²²⁸ Sharp replied²²⁹ 'You are pushing at an open door.' If the proposed appeal to the House of Lords did not go ahead, they wished to ask the Lord Chancellor to refer the topic for advice under s. 3(1)(e) of the Law Commission Act 1965. They had already had occasion to give a good deal of thought to the subject in connection with

²²⁴ *Pannett v P McGuinness & Co Ltd* [1972] 2 QB 599, 607. This concerned a child who entered an unguarded building site where fires had been lit; the defendants were held liable. See AL Goodhart, (1972) 88 LQR 457. Other cases applying *Herrington* included *Westwood v The Post Office* [1973] 1 QB 591, CA; *Penny v Northampton Borough Council* (1974) 72 LGR 733; *Harris v Birkenhead Corporation* [1976] 1 WLR 279.

²²⁵ AL Goodhart, 'Occupiers' Liability towards trespassers' (1971) 87 LQR 168. Goodhart suggested the area should be referred to the Law Commission.

²²⁶ See above, n 210.

²²⁷ Lord Hailsham LC, who participated in the decision in *Addie*.

²²⁸ Material on Occupier's Liability Towards Trespassers is found in Law Commission File 127/130/01.

²²⁹ 14 May 1971. Sharp to Newman.

their projects on Animals and Defective Premises.²³⁰ In the event, a reference was made on 21 April 1972, after the decision in the House of Lords in *Herrington*.²³¹ The Law Commission published a Working Paper on 6 July 1973.²³² This criticised the variations in formulation in the different speeches in *Herrington* and concluded that the law was unsatisfactory and that statutory intervention was desirable. They proposed two models for consultation: A amending the Occupiers' Liability Act 1957 to extend the common duty of care to trespassers, with or without additional guidelines; B to add to the 1957 Act three provisions to the effect that the mere relationship of occupier and trespasser does not itself give rise to a duty of care; that an occupier owes a duty of care to any trespasser whom he ought as a reasonable man to have in contemplation as likely to be affected by his acts or omissions; and that the determination whether there is in the particular case a duty of care is a matter of law to be decided by the court. A provisional preference was expressed for A. Comments were also sought on the suggestion that the duty would cover damage to property; that there should be no absolute ban on exemption conditions, but that such conditions in tickets and similar documents of admissions should be banned in relation to death and personal injury and a reasonableness test applied in other cases; and that the defence of assumption of risk should be abolished in relation to occupiers' liability.²³³ Features of the approach of the Law Commission that went beyond the methodology of the Law Reform Committee included an extensive consideration of the position in other common law systems²³⁴ and an interest in empirical evidence on accidents suffered by trespassers.²³⁵ However, neither proved particularly helpful.

²³⁰ See Law Commission, *Civil Liability for Animals* (Law Com No 13, 1967) and *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No. 40, 1970). Little mention is made of this matter in the Final Reports.

²³¹ Letter from Sharp to H. Boggis-Rolphe of the Lord Chancellor's Office, 3 May 1972.

²³² Law Commission Working Paper No 52, *Liability for damage or injury to trespassers and related questions of occupiers' liability* (HMSO).

²³³ Paras 41-66.

²³⁴ Appendix 2.

²³⁵ Para 12. In the event the only evidence it was possible to obtain concerned injuries to trespassers on railway property: Appendix 3.

The consultation process 'evoked a very wide and diverse response,'²³⁶ including some who thought no reform was needed. Notwithstanding some criticisms, the Law Commission remained of the view that the initial imposition of a general duty of care towards a trespasser remained the preferable course, but modified the form of the recommendations. It accepted that, as the common duty of care under the 1957 Act was defined by reference to the purposes for which the visitor was invited or permitted to be on the premises, it was not appropriate to effect the reform by amending 1957 Act. It also took account of objections that it was not appropriate to impose a general duty of care which would require an occupier to make premises safe for persons whom they do not desire to be there.²³⁷ Accordingly, it proposed that there should be separate legislation under which an occupier would owe a duty to an invited entrant if, but only if, the danger was one against which, in all the circumstances of the case, the occupier could reasonably be expected to offer him some protection. The duty would be one to take such care as was reasonable in all the circumstances of the case to see that the entrant did not suffer personal injury or death by reason of the danger. The defence of *volenti* would be available and it would be possible for the occupier to exclude liability by a notice provided reasonable steps had been taken to draw it to the attention of the entrant.²³⁸ It would not be appropriate to take account of the occupier's particular resources.²³⁹ Contract terms and notices purporting to exclude or restrict liability under the 1957 Act or the new Act would be ineffective if they were not fair and reasonable.²⁴⁰ Lord Pearson, at that time Chair of the Royal Commission on Civil Liability and Compensation²⁴¹ had written to Mr Rippengal,²⁴² commenting on an internal draft of the final report, and expressing doubts as to the appropriateness of a general duty of care

²³⁶ Law Commission, *Report on Liability for damage or injury to trespassers and related questions of Occupiers' Liability* (Law Com No 75), para. 2.

²³⁷ Paras 19, 20. This was said not to be intention of the original proposals.

²³⁸ Draft Bill, clause 2.

²³⁹ Para. 29.

²⁴⁰ Draft Bill, clause 3.

²⁴¹ Which eventually reported: *Royal Commission on Civil Liability and Compensation for Personal Injury* (London, HMSO, Cmnd 7054, 1978).

²⁴² A Parliamentary draftsman attached to the Law Commission.

that would be owed to every trespasser 'however deliberate and criminal and evil-minded the trespass might be':

Thus the turkey-stealer, which his charisma of criminality, a hero for the media, a darling of the Permissive Society, will get his charter and will triumph over the farmer, who merely produces food for the nation and does not normally commit newsworthy crimes.²⁴³

The view of Norman Marsh, the responsible Law Commissioner, on this was that the matter would be dealt with at the breach stage, the duty being one to take 'such steps (if any) as in all the circumstances of the case are reasonable....' The draft bill was redrafted in a way 'less likely to give rise to Lord Pearson's fears,'²⁴⁴ by distinguishing clearly between whether a duty is owed and the content of the duty.²⁴⁵

The Lord Chancellor's Office queried whether the Bill was sufficiently clear that the particular resources of the occupier would not be relevant,²⁴⁶ but was reassured²⁴⁷ that express provision on the point was both unnecessary²⁴⁸ and undesirable.²⁴⁹ In the event the Lord Chancellor sought and obtained policy approval for agreeing to the Law Commission's recommendations. The intention was to have the Bill taken up as a Private Member's Bill.²⁵⁰ However this was subject to the need for further consideration of Clause 3 to ensure that an occupier's duties could *not* be excluded by notice unless

²⁴³ Letter from Lord Pearson to D Rippengal, 22 August 1975. Lord Pearson accepted that this was not the intention of the Law Commission.

²⁴⁴ Note by NSM, 24 November 1975.

²⁴⁵ Note by D Rippengal, 21 November 1975. Rippengal also had reservations on the policy of allowing exclusion of the duty by notice: *ibid*.

²⁴⁶ LC File 127-130-01, Part 4. Letter from MC Blair to JM Cartwright Sharp, 18 June 1976.

²⁴⁷ Letter from D Rippengal to MC Blair, 29 June 1976.

²⁴⁸ 'The duty is expressed as a duty of care' and that the court would not look at D's financial circumstances 'can be regarded as axiomatic when one looks at the cases on negligence.'

²⁴⁹ Because of the implication for other Acts imposing a duty of care and for the law of negligence generally.

²⁵⁰ Memorandum by the Lord Chancellor to the Home and Social Affairs Committee of the Cabinet, 19 November 1976.

explicitly part of a contract.²⁵¹ The Law Commission (informally) strongly resisted this suggestion.²⁵² Those advising the Lord Chancellor were not persuaded.²⁵³ However, it was noted that while there was now a taker for the Bill

I see little chance of the Bill getting through, because it is low on the list and will be strongly opposed by farmers and land-owners in both Houses....²⁵⁴

A further difficulty was identified by P Graham-Harris when drafting Notes on Clauses for the Bill. Clause 2 as drafted seemed to be limited to dangers arising from the state of the premises or from acts or omissions which render the premises unsafe; did this mean that the 'activity duty' would continue to be that of common humanity under *Herrington*?²⁵⁵ The view from the Law Commission was that if the position of the 'activity duty' after *Herrington* was not clear, the Bill should be clarified so that, where it had no operation, the common law of tort (trespass or negligence under *Donoghue v Stevenson*) would apply.²⁵⁶ Nevertheless, the policy subsequently agreed was that the Bill should cover all dangers to uninvited entrants, not just dangers due to the state of the premises or to things done or omitted to be done on them. This would secure complete replacement of *Herrington*. Other points included were that the duty would only be owed in respect of death or personal injuries; that the concept of 'uninvited entrant' would extend to include trespassers and persons entering land under an access agreement or order under the National Parks and Access to the Countryside Act 1949 or a private right of way; that the duty would not apply to persons using the highway; and that the volenti defence would be retained. Clause 3 would reverse *Ashdown v Samuel Williams & Sons Ltd*.²⁵⁷

²⁵¹ This was the Attorney General's view. Draft letter for Lord Chancellor to send to the Attorney General, attached to letter from MC Blair to NS Marsh, 9 December 1976. The draft letter expressed support from the Lord Chancellor for this view.

²⁵² Letter from NS Marsh to MC Blair, 13 December 1976, noting that such a change (reversing *Ashdown v Samuel Williams*) would lead to occupiers excluding non-paying entrants.

²⁵³ Letter from JW Bourne (House of Lords) to NS Marsh, 11 January 1977.

²⁵⁴ Ibid.

²⁵⁵ Letter from P Graham-Harris to CW Dymont (Law Commission), 18 January 1977.

²⁵⁶ Letter from CW Dymont to P Graham-Harris, 26 January 1977.

²⁵⁷ Notes on Clauses on the Occupiers' Liability Bill, enclosed with letter from MC Blair to JBK Rickford (Attorney General's Chambers), 25 February 1977.

In the event the Bill²⁵⁸ was presented as a Private Member's Bill but was objected to four times on Second Reading²⁵⁹ and was not debated. Given the government's insistence on including the clause reversing *Ashdown v Samuel Williams*, contrary to the Law Commission's recommendation and without further public consultation, this is not surprising.²⁶⁰ It was hoped that the Bill would proceed in the 1977-78 session,²⁶¹ but the private member willing to take it up was unsuccessful in the Ballot for Private Members' Bills. A further development was the approval of the Law Commission's proposals by the Pearson Commission.²⁶² No further attempt was then made to re-introduce the Bill.

The story in the Law Commission files resumes in 1981, when it was reported that discussions involving the County Landowners' Association, the National Farmers' Union, the Central Council of Physical Recreation and the Lord Chancellor's Office indicated that the prospects for legislation 'may be rather better than they once were.'²⁶³ These organisations had come round to the view that a 'statutory formulation of the duty would be preferable to the present uncertainty.' Their main concern was now that the extent of a farmer's liability to ramblers and climbers on their land was not clear if they were injured while pursuing their activities. Liability could not now be excluded because of the Unfair Contract Terms Act 1977. As a result the tendency was to restrict or prohibit access to land for leisure purposes. They also felt strongly that under no circumstances

²⁵⁸ 1976-77 HC Bill 31.

²⁵⁹ 927 HC Deb 880, 4 March 1977; 927 HC Deb 1872, 11 March 1977; 928 HC Deb 869, 18 March 1977; 928 HC Deb 1739, 25 March 1977. The Bill was presented by Donald Anderson MP.

²⁶⁰ It was subsequently said that failure was due in part to the lack of a provision excluding liability to criminal trespassers: LCD Note, n 264 below, p 3.

²⁶¹ A fresh draft Bill was prepared (3 November 1977). It was envisaged that Clause 3 would remain alongside the provisions of what would become the Unfair Contract Terms Act 1977.

²⁶² *Royal Commission on Civil Liability and Compensation for Personal Injury* (London, HMSO, Cmnd 7054, 1978), pp 321-325. The Royal Commission regarded this as an unsuitable area for either a no-fault scheme or strict liability: p 328.

²⁶³ Letter from MD Huebner (Lord Chancellor's Office) to RH Streeten (Law Commission), 13 May 1981.

should there be any liability to criminal trespassers, something that might be possible under *Herrington*. Discussions continued into 1982.²⁶⁴

An amendment to the Unfair Contract Terms Act 1977 to disapply s 2 of that Act in respect of entry to or presence on land for recreational purposes was proposed by Lord Stanley in proceedings on the Administration of Justice Bill 1982.²⁶⁵ The Lord Chancellor, Lord Hailsham of St Marylebone, stated that he had consulted a range of bodies on both this matter and enactment of the duty to trespassers, with a range of responses. The amendment was withdrawn.²⁶⁶ It was subsequently suggested that a composite Bill covering these two matters might succeed.²⁶⁷ The Lord Chief Justice, Lord Lane, also proposed that the issue of the use of land for recreational purposes might best be addressed by amending s 1(3)(b) of the 1977 Act to enable the occupier to exclude liability where entry was unconnected with the business use of the premises, a proposal endorsed by the Lord Chancellor's Department.²⁶⁸ It was subsequently suggested that the question of the exclusion of liability should be dealt with by amendment to the 1977 Act, including the addition of a reference to the duty established by the new Act in s 1(1), which sets out the duties whose exclusion is controlled by the Act.²⁶⁹ The Law Commission also argued that express provision should be made

²⁶⁴ Letter from MD Huebner to CF Hart (DoE), 13 May 1981; CLA, NFU, CCPR, 'Occupiers Liability: Joint Submission to Lord Chancellor's Office' (29 January 1981); 'Occupier's Liability and Access to the Countryside Note by the Lord Chancellor's Department', February 1982.

²⁶⁵ 429 HL Deb cc 1290-93, 6 May 1982.

²⁶⁶ It had been agreed between the government and opposition that the Bill would not include controversial proposals.

²⁶⁷ Letter from PKJ Thompson (Lord Chancellor's Department) to PM North (Law Commissioner), 1 July 1982.

²⁶⁸ Letter from MD Huebner to EJ Lindley (Department of Trade), 5 July 1982. This also noted that there was general support for a statutory formulation of the duty to trespassers but that there were considerable practical difficulties in formulating a workable exclusion covering criminal trespassers. The Law Commission thought the LCJ's amendments too wide: Letter from PM North to PKJ Thompson, 2 August 1982.

²⁶⁹ Letter from PM North to PKJ Thompson, 14 September 1982. This would prevent the owner of business premises excluding the new duty to trespassers, although such an owner would be able to exclude liability to any entrant entering business premises exclusively for his own purposes and not in connection with any purposes (business or otherwise) of the occupier.

enabling an occupier to exclude liability to an uninvited entrant by notice.²⁷⁰ By November 1982, work on the Bill had been taken up by the Lord Chancellor's Department, whose policy on exemption clauses was different from the Law Commission's position, being 'one permitting the occupier wide freedom to exempt himself from liability both to trespassers and to those lawful visitors to his premises for their own, rather than his, purposes.'²⁷¹

In 1983, a revised Occupiers' Liability Bill was drafted for the Lord Chancellor's Department. In this new version there were

two significant omissions. First we have given up any attempt to make the exclusion of liability to trespassers etc subject to control by the Unfair Contract Terms Act. Secondly, we have not attempted to give the occupier a right to restrict or exclude his liability to trespassers etc. by means of a notice.²⁷²

These two points were connected. The instructions to the draftsmen did not require inclusion of an express right to exclude liability,²⁷³ as policy approval had not been given for such a provision in the present Bill.²⁷⁴ Counsel was instructed that s.1(1) of the Unfair Contract Terms Act 1977 should be amended to make express reference to the duty under the new Act if the existing definition of 'negligence' for the purposes of UCTA²⁷⁵ might not cover it.²⁷⁶ In response, the draftsman, Euan Sutherland, asked why an amendment to UCTA was necessary:

If an occupier owes a duty to a trespasser he has in general no machinery for excluding it. He will not have a contract with the trespasser (unless the trespasser came on the land as a visitor under an agreement and subsequently

²⁷⁰ Ibid. For some reason, now forgotten, this had been excluded from the 1976/77 and 1977/78 drafts of the Bill. (The reason is presumably that it was then government policy to reverse *Ashdown v Samuel Williams*.)

²⁷¹ Memo by PM North to Law Commissioners, 24 November 1982.

²⁷² Letter from PKJ Thompson to PM North, 27 May 1983.

²⁷³ As originally proposed in Clause 2(4) of the Law Commission Bill attached to Law Com No 75.

²⁷⁴ 'Occupiers' Liability: Instructions for the drafting of a Bill' (undated), para. 5.

²⁷⁵ Defined as including 'any common law duty to take reasonable care or exercise reasonable skill': s. 1(1)(b).

²⁷⁶ Instructions, para 5.

became a trespasser) and a notice to the trespasser would not be effective to exclude liability because, as the trespasser is not supposed to be there at all, the notice cannot be said to govern the terms of his admission (cf. *Ashdown v Williams*.)²⁷⁷

The force of this argument was accepted.²⁷⁸ Other points made by Sutherland that were reflected in the Bill ultimately enacted were, first, that the wording of the original Law Commission draft Bill providing that the new rules would apply in respect of 'any danger due to the state of the premises or to things done or omitted to be done on them' was sufficient to cover both the occupancy and activity duties, on the basis that there was a single occupier's duty to trespassers and that that was the *Herrington* duty. Secondly, redrafting the duty provisions so that a duty would only arise

in relation to a person whom the occupier knows or has reasonable grounds to believe will come into the vicinity of the danger

'might go some way towards quieting the fears' of the NFU, CLA and others.²⁷⁹ It was also subsequently agreed that the modification to UCTA would only operate in respect of persons entering land for recreational purposes.²⁸⁰

The Occupiers' Liability Bill proceeded through Parliament²⁸¹ with some minor amendments. The government resisted amendments designed to exclude criminal trespassers from the ambit of the duty and to provide for the purposes of UCTA that making a charge for entry did not necessarily make it one for the business purposes of

²⁷⁷ Letter from E. Sutherland to PKJ Thompson, 9 May 1983. Sutherland was also critical of the proposed amendment of UCTA s 1(3), reducing the scope of protection for entrants.

²⁷⁸ Letter from PKJ Thompson to E Sutherland, 13 May 1983.

²⁷⁹ Letter from E Sutherland to PKJ Thompson, 4 May 1983. Thompson agreed, regarding the second suggestion as 'most valuable': Letter from PKJ Thompson to E Sutherland, 5 May 1983.

²⁸⁰ Letter from PKJ Thompson to E Sutherland, 24 May 1983.

²⁸¹ 443 HL Deb, 12 July 1983, cols 719-725, 735-744 (Second Reading); 444 HL Deb, 27 October 1983, cols 367-378, 384-391 (Committee); 444 HL Deb, 8 November 1983, cols 1696-708 (Report); 444 HL Deb, 17 November 1983, cols 1378-1380 (Third Reading); HC Standing Committee J, 2 February 1984; 54 HC Deb, 20 February 1984, cols 661-670 (Third Reading).

the occupier (the NFU and similar bodies being particularly exercised by this point).

Overall, the Bill was regarded as 'modest and useful'.²⁸²

IX The Occupiers' Liability Act 1984

The Act that ultimately emerged achieved the major intended purpose of providing a single formulation of the duty owed to entrants other than lawful visitors,²⁸³ and enabling occupiers to exclude a duty arising out of the state of the premises owed to persons who enter for recreational or educational purposes other than the business purposes of the occupier.²⁸⁴ Neither aspect seems to have given rise to difficulty. It has been confirmed that the formulation that a duty to a non-visitor will only arise where the occupier has reasonable grounds to believe there is a danger and that the entrant may come into the vicinity of it imports a more restrictive test than simply asking whether the occupier knows or ought to know of the danger or presence.²⁸⁵ This must be right logically, but the difference is limited and arguably mainly presentational. In practice, in the reported cases only one claimant seems to have successfully established a claim under the 1984 Act.²⁸⁶ Some of the points on which a clear view was taken by those preparing the 1983 Bill have in fact led to speculation and some litigation. In particular, the 1984 Act has *not* been interpreted as covering both occupancy and activity, although the same outcome has been achieved through the curious device of reading the principles of the 1984 as also stating the common law liability to a non-visitor for activities.²⁸⁷ There have

²⁸² John Morris MP, 54 HC Deb, 20 February 1984, col 670, agreeing with the Solicitor-General on the point.

²⁸³ s 1.

²⁸⁴ s 2, amending the Unfair Contract Terms Act 1977. See generally M Jones, 'The Occupier's Liability Act 1984' (1984) 47 *MLR* 713.

²⁸⁵ *Swain v Puri* [1996] PIQR P442.

²⁸⁶ *Young v Kent County Council* [2005] EWHC 1342 (QB), criticised in *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39, [2006] 1 WLR 953. The first reported case where an adult was awarded damages under the 1984 Act was the Court of Appeal decision in *Tomlinson*, subsequently reversed: n 310 below.

²⁸⁷ *Revill v Newbery* [1996] QB 567, criticised by T Weir, [1996] *CLJ* 182, inter alia on the ground that the 1984 Act did apply. It can be argued in defence of the position taken by the draftsman that as *Herrington* made it clear that ordinary negligence principles do not apply as between occupier and trespasser, the common law applying differently *because of that relationship*, the wording s 1(1)(a) that the rules enacted by s 1 'have effect, in place of the rules of the common law, to determine...whether any duty is owed

been suggestions that the duty *can* be excluded by a notice on the basis that it would not be reasonable for the entrant to expect any protection where reasonable steps had been taken to bring such a notice to his or her attention.²⁸⁸ This is not an argument that appears to have occurred to the draftsman or the Lord Chancellor's Department. That of itself is of course not decisive, but the background does show that the decision not to amend UCTA was based on the assumption that the duty could not in any event be excluded, the government having decided as a matter of policy not to agree with the Law Commission's proposal that an express power to exclude be incorporated in the legislation. That did indeed leave as an anomaly the apparent position that while the duty to a trespasser cannot be excluded,²⁸⁹ a non-business occupier is able to exclude the duty under the 1957 Act in respect of a lawful visitor. One final point is that, while there is much to be said for the approach in the Occupiers' Liability (Scotland) Act 1960, under which a single duty is owed to all entrants,²⁹⁰ and differences as to the kinds of entrant addressed as a matter of breach, it is clear that in the circumstances it would not have been practicable for that approach to law reform to have been adopted.

X The scope of the Occupiers' Liability Acts and the problem of 'obvious risks'

The exact scope of the Occupiers' Liability Acts has remained a matter of some difficulty. It is associated with the question of whether there is a proper basis for a distinction between 'occupancy' and 'activity' and if so whether that has survived the enactment of the two pieces of legislation. As to the principles, it is submitted that this distinction is soundly based. In the case of an activity that gives rise to a reasonably foreseeable risk of physical harm, a duty normally arises simply because the activity is undertaken,²⁹¹ and the normal standard of care one of reasonableness. Where occupiers drive their car

by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them' do naturally cover both activity and occupancy.

²⁸⁸ See *Clerk and Lindsell on Torts*, 19th edn, para 12-74; M Jones, 'The Occupier's Liability Act 1984' (1984) 47 *MLR* 713, 723-725.

²⁸⁹ Apart from presumably by contract, which would not be subject to UCTA.

²⁹⁰ An approach commended by Jones, *op cit*.

²⁹¹ *Donoghue v Stevenson* [1932] AC 562.

on their own land so as carelessly to injure a lawful visitor, it is clear that the duty of care arises in the defendant's capacity as motorist and not as occupier.²⁹² By contrast, where a lawful visitor is injured because of a defect in the state of the premises, then any duty in tort to take affirmative action can only be founded on the special relationship of occupier and visitor. It is also clear that in the case of lawful visitors it has since the 1957 Act made no substantive difference exactly where the line between occupancy and activity is drawn as the standard of liability is the same. There leaves a technical question of whether the Act or the common law applies. As regards liability to non-visitors, the application of the normal negligence standard of liability to 'activities' would make the occupancy/activity distinction crucial. For the moment at least, *Revill v Newbury*²⁹³ has put an end to that. The point remains that the approach in some of the decisions on the distinction are not persuasive. These tend to focus narrowly on the nature of the events that give rise to the injury rather than on the nature of the occupier's responsibility for those events. As the issue is the nature of any duty of care owed it is the latter that is in point. Accordingly, where the occupier (or the occupier's employee) negligently creates a risk that a visitor may reasonably foreseeably be physically injured, the common law should apply, whether the risk arises from a change to the physical state of the premises or from the activity of the occupier (or employee). Conversely, there are a number of situations where the occupier can only be held liable because of his or her status as an occupier, because the liability is essentially one for an omission. These include: (1) where the risk arises from a natural deterioration in the state of the premises;²⁹⁴ (2) where the risk arises from an act of the occupier (or employee) that was not careless at the time it was done;²⁹⁵ (3) where the negligent act of a third party (not an employee of the occupier) creates a risk either in itself²⁹⁶ or by

²⁹² See eg Lord Gardiner LC in *Commissioner for Railways v McDermott* [1967] AC 169, 186-7.

²⁹³ Above n 287.

²⁹⁴ eg stairs become rotten.

²⁹⁵ eg a reclusive occupier digs a hole in the driveway to his house at a time when it is not reasonably foreseeable that anyone will use the driveway; the occupier decides he likes people after all and invites them to use his driveway.

²⁹⁶ eg a visitor drives carelessly on the occupier's driveway injuring another visitor.

changing the physical state of the premises.²⁹⁷ Where the occupier creates the risk there will be co-existent duties in that, apart from the initial liability, there will also be a duty to warn, both because he or she created the risk and because he or she is the occupier.

It is submitted that an approach that focuses on the whether it is sought to hold the defendant liable for an act or an omission (in the sense of a failure to confer a benefit)²⁹⁸ is preferable to the argument of Peter North²⁹⁹ that the crucial distinction is whether or not the risk arises from the 'state of the structure or premises themselves',³⁰⁰ given that the defendant's responsibility arises from the control that can be exercised by him or her as occupier over both the premises themselves and what goes on on them. North's response is this:

It is hard to see the logic in a situation where, if the occupier shoots a visitor, the case falls to be considered at common law, whereas if the occupier's visitor shoots another visitor the liability falls to be determined under the Occupiers' Liability.³⁰¹

It is submitted that this is not at all anomalous: it simply means that the 1957 Act applies where the responsibility of the defendant arises from his capacity as occupier.

If this is right, then Lord Wright was correct in *Glasgow Corporation v Muir*³⁰² to treat the liability of the defendants' shop manageress arising from her decision to permit third parties to carry an urn of hot tea through a narrow space next to a sweet counter as arising from the invitor-invitee relationship.³⁰³ It also follows that Lord Keith in *Ferguson*

²⁹⁷ eg visitor carelessly digs a hole in the occupier's driveway.

²⁹⁸ This argument was made by EC Harris in AM Linden (ed), *Studies in Canadian Tort Law* (Toronto, Butterworths, 1968), 250, 263, cited by North, op cit, at 86. See also FH Newark, (1954) 17 MLR 102, 109-110.

²⁹⁹ *Occupiers' Liability* (London, Butterworths, 1971), 71-87.

³⁰⁰ p 86.

³⁰¹ North, op cit, at 87.

³⁰² [1943] AC 448, 462-463.

³⁰³ The plaintiff was scalded when the urn was dropped. Lord Romer (at 466) also expressly invoked the invitor-invitee relationship. The majority spoke in terms of a general duty of care; as the plaintiff was an invitee, nothing turned on the difference in

*v Welsh*³⁰⁴ was right to conclude that an occupier can in certain circumstances be liable to the employee of an independent contractor where the occupier knows or has reason to suspect that the latter is using an unsafe system of work. On the other hand, Lord Goff³⁰⁵ drew an unhelpful and obscure distinction when he concluded that the plaintiff's injury 'arose not from his use of the premises but from the manner in which he carried out his work on the premises,' and so the 1957 Act did not apply. Mr Ferguson was standing on a wall which collapsed as a result of an unsafe system for demolition work adopted by his employers, who claimed to be sub-contractors of the defendant occupier. It is well established that an occupier *can* be liable to a visitor as occupier in respect of risks created by third parties.³⁰⁶ This is not, with respect, limited to special circumstances where they would be liable as a joint tortfeasor, which Lord Goff suggested was the only basis for liability in such circumstances.³⁰⁷

It is curious that the Court of Appeal in *Fairchild v Glenhaven Funeral Services Ltd*³⁰⁸ regarded Lord Goff's interpretation of approach as correct, given that the majority clearly approached the case on the basis that the 1957 Act was in principle applicable although there was no liability on the facts. It is submitted that the Court of Appeal in *Fairchild* wrongly concluded that the liability of an occupier in respect of an injury caused by the activity of a third party in dealing with asbestos arose only at common law. They seemed to think that this was an application of the occupancy/activity distinction; overlooking the point that it was not the *occupier's* activity that gave rise to the risk.³⁰⁹

formulation. The key point of the case is that the House unanimously found there to have been no breach of duty.

³⁰⁴ [1987] 3 All ER 777, 783. Lords Brandon and Griffiths agreed with Lord Keith. It is submitted that Lord Oliver of Aylmerton's view that the liability would be rather that of a joint tortfeasor than an occupier usually be the case; the liability would normally be for failing to prevent harm.

³⁰⁵ [1987] 3 All ER, 777, 786.

³⁰⁶ *Cox v Coulson* [1916] 2 KB 177; *Glasgow Corporation v Muir*, above.

³⁰⁷ [1987] 3 All ER 777, 786. Lord Oliver of Aylmerton (at 785) inclined to the same view on this point.

³⁰⁸ [2002] 1 WLR 1052, paras [122]-[155].

³⁰⁹ This point was also overlooked by Brooke LJ in *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, where he attributed an occupiers' liability for activities permitted or encouraged to the 'activity duty'.

This brings us to the leading modern case on the Occupiers' Liability Acts, *Tomlinson v Congleton Borough council*,³¹⁰ which raised a number of interesting points. The defendant local authorities occupied a country park which included a lake that had formed in a disused quarry. They posted notices that said 'Dangerous water: no swimming' and rangers gave warnings against swimming, but they were aware that many visitors entered the water and that there had been several accidents. They decided to plant vegetation round the shore to prevent people going into the water, but did not have the financial resources to implement that decision by the time of the accident. The plaintiff, aged 18, dived from a standing position in shallow water, struck his head on the sandy bottom and broke his neck. The Court of Appeal³¹¹ by a majority found the defendant liable in respect of this injury, but this was reversed by the House of Lords. The leading opinion was given by Lord Hoffmann.³¹² His Lordship held that it had rightly been conceded that the plaintiff was a trespasser when he dived into the water and so the question was whether there was any liability under the 1984 Act.³¹³ However, there was no 'danger due to the state of the premises or to things done or omitted to be done on them' and so the 1984 Act did not apply.³¹⁴ On the facts, this was an ordinary stretch of open water, there were no hidden dangers and council was not doing or permitting anything to be done which created a danger, such as the use of power boats or jet skis. The plaintiff's misjudgement could not be attributed to the state

³¹⁰ [2003] UKHL 47, [2004] 1 AC 46.

³¹¹ [2002] EWCA Civ 309, [2004] 1 AC 59.

³¹² Lords Nicholls, Hobhouse and (subject to one reservation) Scott agreed with Lord Hoffmann.

³¹³ paras [6]-[16]. Lord Hobhouse thought it artificial to treat the plaintiff as a trespasser given that paddling was allowed and he was at the material time in water which only came a little above his knees, but concluded it made no difference: para [67]. Lord Scott (paras [87]-[91]) thought the 1957 Act applied because the plaintiff had not been 'swimming'.

³¹⁴ paras [26]-[29]. Lord Hutton inclined to the view that dark and murky water which prevented a person seeing the bottom of the lake where he was diving could be viewed as 'the state of the premises': para [53]. Lord Hobhouse thought it a 'misuse of language' to describe features such as steep slopes or cliffs close to cliff paths as the state of the premises: para [69].

of the premises; the only risk arose out of what he chose to do. 'Things done or omitted to be done'

means activities or the lack of precautions which cause risk, like allowing speedboats among the swimmers.³¹⁵

This analysis is, with respect, unconvincing. It is clear that the affirmative duties of an occupier to a lawful visitor, based on the occupier's control of the premises, is not confined to protecting careful entrants. Accidents may well happen because of the combination of a danger arising from the state of the premises and the carelessness of the entrant. An example would be an entrant who fails to keep a proper look out and trips in a small hole in the defendant's driveway. It cannot plausibly be argued that, as the hole would have been obvious if the claimant had only looked, there is no danger due to the state of the premises. Can it make a difference if the entrant sees the hole, but misjudges the change in stride pattern needed to avoid it? Surely not. The 1984 Act³¹⁶ does not say that it only applies where state of the premises is the *sole* cause of the injury. Accordingly, it is submitted that the Act *can* apply where the accident arises from the claimant's misjudgement of the risks the premises pose. A related point is that the Acts are not confined in terms to 'hidden dangers' (the other side of the coin to obvious risks). To reintroduce such a concept as relevant to whether a duty arises as distinct from whether there is a breach of duty would seem to be raising the common law concept of a 'concealed trap' from its grave. Where risks are obvious, it may well be difficult for the claimant to prove breach. It may be that that fact would enable the defendant to show that the claimant's act in running that risk was a new intervening cause or gave rise to the defence of voluntary assumption by risk.³¹⁷ It is unduly restrictive to hold that no duty can ever arise in these circumstances.

³¹⁵ para [28].

³¹⁶ The 1957 Act is identically worded in this point.

³¹⁷ Preserved in both the 1957 and 1984 Acts. See eg *Ratcliff v McConnell* [1999] 1 WLR 670.

On the contrary assumption that the 1984 Act did apply, Lord Hoffmann proceeded to hold³¹⁸ that the defendants had knowledge or foresight of the danger (albeit that the chances of such an accident were small) and of the presence of the trespasser and so s 1(1)(a) and (b) of the 1984 Act were satisfied. He held, robustly, that in deciding what steps it was reasonable to expect of the defendants (under either the 1957 Act or the 1984 Act) it was proper to take account of the social value of the activities to be prohibited and the point that it should be extremely rare for an occupier to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land.³¹⁹ On the facts here, the defendants were not required to take any steps to protect the plaintiff from dangers that were perfectly obvious. It is submitted that the appeal was rightly allowed for these reasons.³²⁰

While the outcome is right, it is to be regretted that *Tomlinson* creates a risk that the balance between occupier and visitor (lawful or otherwise) enshrined in the legislation has been tilted too far back in favour of the occupier by glosses as to the nature of the duty that reflect considerations properly relevant to breach.

XI Conclusion

The history of the law of occupiers' liability provides a number of lessons concerning the respective merits of developing the common law through judicial decisions and through statute. The problems that emerged with the common law can be traced to a number of factors. First, the structure of the law became established in the nineteenth century when the prevailing mode of legal argument involved a focus on the outcomes of previous cases and their facts rather than on underlying principles of law and the purposes that those principles might be thought to serve. This structure ultimately

³¹⁸ paras [32]-[50]. Lord Hutton agreed that the risk was not one against which the defendant might reasonably have been expected to offer the plaintiff some protection: paras [56]-[65].

³¹⁹ para. [45].

³²⁰ See J Morgan, 'Tort, insurance and incoherence' (2004) 67 *MLR* 384, welcoming the decision.

proved unsustainable: distinctions that made sense when considering the obvious examples that illustrated each category came to look arbitrary when (many) borderline cases came to be litigated. Secondly, the structure became regarded as entrenched, not least by decisions of the House of Lords, which up to 1966 could only be altered by statute. As was to be expected, there were recurring situations where at least some judges took the view that the strict rules operated harshly. They could not change the law and so the only way they could secure a just outcome was by adopting a strained interpretation of the facts, or simply asserting that the law was different from what it was generally accepted to be.³²¹ Such an approach leads to inconsistencies. Thirdly, the law on particular substantive points where the judges did have a choice arguably took a wrong turn.³²² A number were controversial to some contemporary eyes.

The common law of occupiers' liability illustrates the desirability of developing principles whose purposes are fully analysed and understood. It illustrates the undesirability of an excessive focus on the facts of cases and how they compare with the precedents; of the use of catchphrases (such as 'trap') which begin to have a life of their own; of excessive complication in the law (with many distinctions to be litigated); of a rule that the highest court in the legal system is bound by its own previous decisions (a number of the decisions in the House of Lords in this area being among the least distinguished of that body); and of an approach to decision making in the final appellate court that can lead to a plurality of opinions expressed with variations of language that leave it unclear whether there are differences of view as to the substance of the law. *Herrington* is also open to the further criticism that too much the opinions was focussed on justifying an outcome in favour of the plaintiff rather than on articulating principles to guide future courts. Two final aspects of the common law of tort illustrated by the history of the common law of occupiers' liability have been, first, the point that insufficient attention

³²¹ A tactic employed from time to time by Lord Denning. See eg. *Wheat v E Lacon & Co Ltd* [1966] AC 552, 578 (dictum that the common law obligation of the occupier had become merely a duty of reasonable care whether arising out of occupancy or activity)

³²² eg *Fairman* (n 79); *Horton* (n 112).

has been paid to the distinction between misfeasance and nonfeasance and second, the absence of a fully worked-out concept of recklessness, which might have provided a suitable halfway house between carelessness and wilful wrongdoing for some categories of case.

The intervention of statute has been largely successful.³²³ Indeed the 1957 Act has served as a model for other common law jurisdictions.³²⁴ However, the structure of the law that has emerged is one which could have been produced by a final appellate court freed of the shackles of precedent and less inhibited from being seen in effect to legislate than the House in *Herrington*. The history of the enactment of the 1984 Act also illustrates the difficulty for a law reform body in securing the passage of legislation that arouses (at least some) popular controversy. Seeking reform via a Private Member's Bill failed, it can be inferred, as a result of pressure from interest groups representing landowners. The changes were only effected when the government came to be in a position to do a deal with (amongst others) the landowners groups, and was able to find time for a government bill.

Overall, the two Bills can be seen to have enacted principles on the pattern of the common law. It may be that in future such legislation will not be needed as such reforms can be secured by a confident and effective Supreme Court, uninfluenced by pressure groups.

³²³ Issues not resolved include whether the *Herrington* standard should be regarded as non-excludable under the *Ashdown v Samuel Williams* doctrine as regards lawful visitors and employed as the standard of liability of occupiers in respect of entrants using a public right of way over their land not maintainable at the public expense: see RA Buckley, *The Law of Negligence*, 4th edn (London, LexisNexis Butterworths, 2005), paras 10.60-10.62. More recent amendments have been made in consequence of the introduction of the 'right to roam' by the Countryside and Rights of Way Act 2000 (amendments to the 1984 Act inserting s 1(6A)-(6C) and s 1A) and to s 1(4) of the 1957 Act (persons exercising the right are owed a modified duty under the 1984 Act)

³²⁴ See eg. S Todd, *The Law of Torts in New Zealand* (5th edn, Wellington, Brookers, 2009), Ch 6.2 (Occupiers' Liability Act 1962); P Handford, 'Occupiers' liability reform in Western Australia – and elsewhere' (1987) 17 U W Austl L Rev 182.

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