The Law Commission

Working Paper No 52

Liability for Damage or Injury to Trespassers and related questions of Occupiers' Liability

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The Law Commission will be grateful if comments can be sent in by the end of February 1974.

All correspondence should be addressed to:

C. W. Dyment,
Law Commission,
Conquest House,
37/38 John Street,
Theobalds Road,
London WC1N 2BQ
(Tel: 01-242 0861, Ext.: 1)

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WORKING PAPER NO. 52

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Table of Contents

THE LAW COMMISSION

LIABILITY FOR DAMAGE OR INJURY TO TRESPASSERS AND RELATED QUESTIONS OF OCCUPIERS' LIABILITY

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I Introduction

1. On 21st April, 1972, the Lord Chancellor, under section 3(1)(e) of the Law Commissions Act 1965 asked us:

> "to consider, in the light of the decision of the House of Lords, in British Railways Board v. Herrington[1], the law relating to liability for damage or injury suffered by trespassers".

2. Acting on that reference, we have prepared the following Working Paper. In it we first summarise the existing law as to liability towards trespassers. We deal only briefly with its historical development, in view of the recent statement of the law on this topic by the House of Lords in Herrington's case. We have found it necessary to give a fairly full summary of the speeches in that case, as they provide not only a statement of the existing law but also arguments of policy in favour of those legal conclusions. We next consider various criticisms which may be made of the existing law and state our view that some reform of the law in this field is desirable and make provisional proposals for its improvement. Finally, we have found it necessary to

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1. [1972] A.C. 877; throughout the text of this Paper we refer to this as Herrington's case.

consider the problem of exemption from liability in relation to occupiers' liability generally, a matter within Item II of our First Programme (Law Com. No. 1). The law and the recommendations of law-reforming bodies in a number of other countries are set out in Appendix 2.

3. We invite comment on the provisional proposals and other matters which we set out in paragraphs 66 and 67 and welcome suggestions for any alternative solution which may be thought preferable.

II The development of the existing law

4. It is worth mentioning, as a preliminary, that the question of liability to trespassers fell within the terms of reference of the Law Reform Committee who were invited to consider "whether any, and if so what, improvement, elucidation or simplification is needed in the law relating to the liability of occupiers of land or other property to invitees, licensees and trespassers". In the Committee's Third Report, however, they found it unnecessary to recommend any change in this aspect of the law[2], with the result that, after implementation of the Committee's recommendations by the Occupiers' Liability Act 1957, while the categories of invitees and licensees were fused and treated as visitors to whom a common duty of care was owed, the third category, that of trespassers, continued to be dealt with according to the common law.

5. "Trespassers", it should be noted, embrace a wide category of persons ranging from the innocent child to the adult intending to commit a criminal offence; yet the

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2. See Law Reform Committee's Third Report, "Occupiers' Liability to Invitees, Licensees and Trespassers", (1954) Cmd. 9305, para. 80: and see, as to the relevant provisions of the Occupiers' Liability Act 1957, Appendix 1 (p. 62 below).

common law, because of this categorisation under a single label, has been obliged to treat all these differing types of individual as belonging to members of one class. This in itself has undoubtedly influenced the way in which the law has developed, both before and after the 1957 Act. Various reasons may be suggested for the exclusion of the trespasser from the category of visitors to whom an occupier of land owed before that Act a duty of varying weight according to whether the visitor was an invitee or a licensee. In origin, however, the exclusion appears not to have been so much a matter of deliberate policy as the natural consequence of an imperfectly developed law of negligence. While refusing to recognise a general duty of care for negligent conduct[3], the English courts in the nineteenth century, by a development culminating in the judgment of Willes J. in Indermaur v. Dames,[4] imposed on the occupier a differentiated duty towards "invitees" and "licensees" respectively. It was thought reasonable that the occupier should be treated as having accepted a certain

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3. Rejected by Parke B. in Langridge v. Levy (1837) 2 M. & W. 519, 530.

4. (1866) L.R. 1 C.P. 274; affirmed L.R. 2 C.P. 311. For an account of the way in which the law reached this stage and how trespassers failed to be taken into account, because they did not come within the categories of invitees or licensees, see Marsh, "The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 L.Q.R. 182, 359. For further details of the development of the law regarding liability to trespassers see Hughes (1959) 68 Yale L.J. 633, especially from the comparative point of view. Much material, so far as it deals with English law, is superseded by the decision of the House of Lords in Herrington's case but the following writings are among those still relevant for their comparative angle or discussion of principle: Milner, Negligence in Modern Law (1967) pp. 47-54; Goodhart (1963) 79 L.Q.R. 586 and (1964) 80 L.Q.R. 559; Thompson and Trail (1965) 39 A.L.J. 187; and North, Occupiers' Liability (1971) pp. 162-203. We should like to record our appreciation of the helpful advice on a number of points given to us by Mr. North.

measure of responsibility towards these categories of entrants by the fact of his invitation or licence, but such an approach allowed no concession to the trespasser, who enters land without the authority and often without even the knowledge of the occupier.

6. The trespasser was not left without a remedy in all circumstances. The occupier was liable if he deliberately injured a trespasser, directly or indirectly (as by a spring-gun[5]), and to such deliberate conduct was added in course of time "reckless" conduct on the part of the occupier. The attitude of the courts is exemplified by the speeches in the leading case of Robert Addie & Sons (Collieries) Ltd v. Dumbreck[6]; here, a four year old boy was killed by the terminal wheel of a haulage system belonging to a colliery company, which, at the time of the accident, was dangerous and attractive to children, and inadequately protected. The machinery was situated in a field, surrounded by a hedge inadequate to exclude the public, which was, to the company's knowledge, used as a playground by young children. The machinery was set in motion without precaution for the safety of those in the field; but it was held that the father could not recover as his son was a trespasser to whom no duty was owed. To give an injured trespasser a remedy against the occupier there had to be, in the much quoted words of Lord Hailsham L.C.[7], "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". In the context of civil liability for trespassers it would seem that Lord Hailsham in Addie v. Dumbreck was referring to the state of mind of an occupier who, knowing of the presence of the trespasser, acts if not with an actual

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5. Bird v. Holbrooke (1828) 4 Bing. 628.
6. [1929] A.C. 358.
7. [1929] A.C. 358, 365.

intention to injure at least with indifference as to whether he causes injury or not.[8]

7. Some concessions in favour of trespassers were soon made by the courts, taking advantage of the elements of doubt in the concept of "reckless disregard". Thus, only a year after Addie v. Dumbreck the House of Lords in Excelsior Wire Rope Co. v. Callan[9] held that an occupier might be liable for his reckless conduct towards a trespasser if he knew that the presence of the trespasser was "extremely likely". In Videan v. British Transport Commission[10] Pearson L.J. was of the opinion that in respect of the presence of the trespasser it is sufficient to give rise to a duty "if the person concerned knows or has good reason to anticipate the presence of the trespasser". On the other hand there was the later persuasive authority of the Privy Council in Commissioner for Railways v. Quinlan[11], accepted obiter it would appear in another Privy Council decision[12], to the effect that the presence of the trespasser had, in order to give rise to a duty, to be known, as good as known or very probable, which certainly extended the duty-creating circumstances laid down in Addie v. Dumbreck[13] but did not go as far as the Court of Appeal was prepared to go in Videan's case.[14]

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8. See Lord Wilberforce in Herrington's case [1972] A.C. 877, 919. Lord Reid in the same case at p. 894 also emphasises that the speeches in the House of Lords in Addie v. Dumbreck were referring to an occupier who knows that trespassers are already on his land, when they imposed on the occupier a duty not to act with reckless disregard for the trespassers' safety.

9. [1930] A.C. 404.

10. [1963] 2 Q.B. 650, 680-1.

11. [1964] A.C. 1054; see especially 1075-8.

12. Commissioner for Railways v. McDermott [1967] 1 A.C. 169, 190.

13. [1929] A.C. 358.

14. [1963] 2 Q.B. 650.

8. Just as on the eve of the decision in Herrington's case[15] there was considerable room for discussion, as far as English law was concerned, regarding the circumstances in which some duty arose on the part of an occupier towards a trespasser, so there was argument about the precise nature of that duty. As stated in paragraph 6 above, Addie v. Dumbreck laid down that this duty was limited to (a) acts done with the deliberate intention of causing injury (b) acts done with conscious indifference to whether injury was caused or not. This subjective approach to liability was not directly questioned by the Privy Council in Quinlan's case. In that case, however, Viscount Radcliffe, while citing Lord Hailsham's statement as to liability towards a trespasser, also referred with apparent approval to the opinion of the Privy Council delivered by Lord Robson in Grand Trunk Railway Company of Canada v. Barnett.[16] Lord Robson said that liability of an occupier towards a trespasser required "wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care". This test also has a subjective character although it introduced the objective, if somewhat elusive concept of "ordinary humanity". The more significant development came with Pearson L.J.'s judgment in Videan's case[17] in which he described the duty to a trespasser as "only a duty to treat him with common humanity", thus introducing an objective standard of conduct applicable to the occupier, although one which, he is at pains to point out, "is substantially less than the duty of care which is owing to a lawful visitor". He drew attention to the Occupiers' Liability Act 1957, contrasting the duty of the occupier

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15. [1972] A.C. 877.
16. [1911] A.C. 361, 370.
17. [1963] 2 Q.B. 650, 681.

towards any lawful visitor under that Act[18] with the much more limited duty which he said was owed to a trespasser.

9. However, Lord Denning M.R. and it would seem Harman L.J. in Videan's case[19] took the view that, where a duty is owed to a trespasser (which all members of the Court of Appeal considered depended on the reasonable foreseeability of the presence of the trespasser[20]), then an occupier carrying out activities on his land has to conduct those activities with reasonable care in accordance with the principles of Donoghue v. Stevenson.[21] In reference to Pearson L.J.'s distinction between "reasonable care" and "common humanity" Lord Denning said that he would not restrict the duty owed to a duty "to treat them [i.e. trespassers] with common humanity" for he "did not know quite what that means". Rather, he considered that the occupier's duty in respect of his activities was the same as that which was owed by a person on the land (although not technically in occupation of it) towards those whom he should reasonably

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18. See Section 2(2) where the common duty of care is defined as a duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to to be there" (emphasis added).

19. See [1963] 2 Q.B. 650, 665-6, 674-5. Harman L.J. was principally concerned with the question whether, in the case under consideration, the presence of the child on the railway line was or was not reasonably foreseeable, but the implication of his remarks is that if that presence had been foreseeable the test to be applied would have been one of reasonable care.

20. See [1963] 2 Q.B. 650, 666, 674 and 680-1.

21. [1932] A.C. 562.

foresee as likely to be affected by his activities.[22] He cited in this connection Buckland v. Guildford Gas Light and Coke Co.[23] where Morris J. held that, even if the plaintiff's daughter was a trespasser on the land where the accident occurred (which was not proved) the defendants, who had erected electrically charged lines across the land, without themselves being in occupation of it, owed a duty to her based on the "neighbour" principle of Donoghue's case.

10. There was also disagreement between Lord Denning and Harman L.J. on the one hand and Pearson L.J.[24] on the other with regard to the distinction made by the former between liability for activities on land and liability for the state of the land. Pearson L.J. conceded that "normally a person who does something on the land is more likely to incur liability than a person who lets things be but", he continued, "there is no difference of duty involved: conduct, whether active or passive, gives rise to liability if and only if it constitutes a breach of duty that is owing (whether that duty be to show ordinary care, or not to show reckless disregard of a person's safety, or to attain some other standard of conduct)". He went on to suggest that in any event the

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22. See Videan's case [1963] 2 Q.B. 650, 666-7. In the Scottish appeal of Miller v. Scottish Electricity Board 1958 S.C. (H.L.) 20 in the House of Lords (which concerned the liability of contractors for the electrocution of a boy in a partially demolished house where the contractor had been requested by the owners, a local authority, to disconnect the electricity supply) Lord Denning (at pp. 37-38) said that even if the boy was a trespasser vis-a-vis the local authority, a person - whether occupier, contractor or anyone else - doing work on land owed a duty to those so closely affected by the work that he ought to have them in contemplation, and that duty was to take reasonable care to prevent injury to them. But the other Law Lords either did not mention, or reserved their view on, this point.

23. [1948] 1 K.B. 410.

24. See [1963] 2 Q.B. 650, 678.

distinction between static condition and current operations would be very difficult to apply in practice. The distinction, in so far as it might affect the liability of an occupier, was also denied by the Privy Council in Quinlan's case.[25]

11. In the preceding paragraphs the development of the law giving protection to the trespasser as such has been summarized. Mention, however, should also be made of those cases where the courts, by a process involving a greater or lesser degree of fiction, allowed him to be treated not as a trespasser but as one who was on the land in question with the implied permission of the occupier and who, therefore, could claim a higher degree of protection[26] than that accorded to the trespasser.[27]

III Statistical information on accidents to trespassers on railway property

12. It has not proved possible to obtain any general estimate of the number or seriousness of personal injury accidents suffered by trespassers of all kinds. Such figures, however, as are available in respect of injuries to trespassers on railway property are set out in Appendix 3. They show that even within this limited sphere a substantial number of cases of death or serious injury is involved, but that between Addie v. Dumbreck and Herrington's case the number has fallen although there has been an increase - to be expected with more general electrification - in the number of cases involving death or injury as a result of electric shock. It should however be mentioned, in relation to the reduction in

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25. [1964] A.C. 1054, 1075.

26. I.e. protection against concealed dangers actually known to the occupier but not to the licensee.

27. See e.g. Cooke v. Midland Great Western Railway of Ireland [1909] A.C. 229, and Lowery v. Walker [1911] A.C. 10.

the total number of accidents, that, in the period between the two groups of years taken, the total railway mileage was also considerably reduced. It will also be noted that out of a total of 721 trespassers killed or injured on railway property in the years 1968 to 1971 inclusive 309 (42.9%) were children.

IV British Railways Board v. Herrington

(a) The facts[28]

13. The plaintiff in the above case was a boy aged nine. On June 7th, 1965, being Whit Monday and a Bank Holiday, he was playing with his two brothers, who were a little older than he was, in Bunce's Meadow, near Mitcham, a National Trust property open to the public. The Meadow was bounded on one side by an electrified railway line protected by a chain fence four feet high, supported by concrete posts eight feet six inches apart. Beyond the railway line was a second line of fencing separating the railway line from another National Trust property, Morden Hall Park, also open to the public. The Meadow was situated in a heavily populated suburban area and was used by childred as a playground. A path crossed the Meadow in the direction of the railway, turning to the right shortly before the railway fence and leading to a footbridge to the Park on the other side of the line. At the turning another path led straight on to the fence, which at this point was detached from one of the posts and pressed down so that the top was about ten inches from the ground; the result was that "anybody, adult or child, could quite easily get across on to the line".[29] Directly opposite the dilapidated fence there was a hole in the fence on the Morden Hall Park side of the line, showing how people could use the gaps in the

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28. A synoptic version taken from Salmon L.J. in the Court of Appeal [1971] 2 Q.B. 107, 117-8, and in the House of Lords from Lords Reid, Morris, Wilberforce and Diplock [1972] A.C. 877, 892, 900-01, 922, 930-31.

29. per Lord Morris [1972] A.C. 877, 900.

two fences as a short cut between the Meadow and the Park. The fence had been in its dilapidated condition for a considerable time before the accident. Shortly after noon the plaintiff was missed by his brothers who found him on the railway line between the conductor rail and the running rail; he was severely burnt. Nearly two months before the accident a railway guard had seen children on the line between Mitcham and Morden. There were, it was said, three places in the vicinity where children could get through the fence.

(b) The judgments of the lower courts

14. The trial judge, Cairns J., held[30] that, as the presence of the child on the line was reasonably foreseeable, the defendants were guilty of negligence in allowing the fence to fall and remain in disrepair. All three judges in the Court of Appeal[31] upheld the result but on different grounds. The three judges, however, make it clear that they would have liked to have been able to apply to the case different principles of law from those by which they felt they were bound. Salmon L.J.[32] thought that "the duty of care owed to a trespasser should be the same duty as that owed to anyone else - a duty to take such care (if any) as, in all the circumstances, is reasonable", and he pointed out that this was the law of Scotland under section 2(1) of the Occupiers' Liability (Scotland) Act 1960.[33] Edmund Davies L.J. agreed[34], adding

30. (1970) 214 E.G. 561.

31. [1971] 2 Q.B. 107: as the law has been authoritatively stated by the House of Lords, we do not analyse the judgments of the Court of Appeal and confine ourselves to the observations of the their Lordships on what they considered should be the law had they not been bound by earlier authority: but see, as to the reasons given for the decision in the Court of Appeal, [1971] 2 Q.B. 107, 126-7 (Salmon L.J.) 134-5 (Edmund Davies L.J.) and 140-142 (Cross L.J.).

32. [1971] 2 Q.B. 107, 120.

33. Section 2(1) covers all persons entering property, therefore including, without specifically mentioning, trespassers: see further, Appendix 2, para. 2.

that the decision of the House of Lords in the Scottish Appeal of M'Glone v. British Railways Board[35] (where it was held that the Board was not liable for burns suffered by a 12 year old boy who climbed up an electric transformer protected by barbed wire) showed that the Scottish test of "reasonableness" did not cast an impossible burden on the occupier. Cross L.J.[36] also was in favour of the Scottish statutory test.

(c) The speeches in the House of Lords

15. The five speeches in the House of Lords in Herrington's case all upheld the finding for the plaintiff, although all were separately argued. Lord Reid[37] was prepared to assume that in 1957 and in 1960, at the time of the Occupiers' Liability Act and the Occupiers' Liability (Scotland) Act respectively, Parliament was simply undecided as to what to do as to liability for trespassers under English law. Thus, although he disliked "usurping the function of Parliament" he decided in favour of a "drastic" modification of the rules laid down in Addie v. Dumbreck, rather than any attempt to develop the law as stated in that case. The test he laid down was in effect twofold: (1) did the occupier know that there was a "substantial probability" of the presence of trespassers? (2) could a "conscientious humane man" with that knowledge, and with the skill and resources which the occupier in fact had, be reasonably expected to have done or refrained from doing before the accident something which would have avoided it? He justified the strongly subjective character of the liability of the occupier towards the trespasser by reference to the involuntary character of the

34. [1971] 2 Q.B. 107, 127.
35. 1966 S.C. (H.L.) 1.
36. [1971] 2 Q.B. 107, 140.
37. [1972] A.C. 877, 897-8.

occupier's relationship with the trespasser - "[trespassers] must take the occupier as they find him".

16. Although he makes clear that, in his view, the test laid down in Addie v. Dumbreck was too narrow and inadequate in several respects[38] Lord Pearson was not prepared to impose on the occupier onerous obligations towards a trespasser, and emphasised that in his view, in relation to an occupier, the position of a trespasser was radically different from that of a lawful visitor. To establish liability towards an occupier the trespasser would have to show (1) that his presence was known to or "reasonably to be anticipated" by the occupier (this may be compared with the more subjective standard laid down by Lord Reid) and (2) that the occupier has failed to treat him with "ordinary humanity". What standard Lord Pearson understood to be implied by the latter words is not entirely clear. He said that it would be "plainly inadequate" to limit it to mere abstention from deliberately or recklessly causing injury to the trespasser (as was held in Addie v. Dumbreck)and at the conclusion of his speech he spoke about the obligation on the Railways Board to take "reasonable steps" to prevent children straying on to the track. On the other hand it has already been pointed out in paragraph 8 above that Lord Pearson had spoken of "common humanity" in connection with the liability towards a trespasser when he sat in the Court of Appeal in Videan's case and when he made it very clear that these words implied a lower standard than that required vis-à-vis a lawful visitor. Finally, it should be mentioned that Lord Pearson specifically denied[39] that there was any distinction to be made between liability for activities on land and static conditions of land either in respect of the occupier or the non-occupier lawfully carrying out work on the land; and he also thought that the test of liability

38. Ibid, 927.

39. Ibid, 929.

applied equally in respect of trespassers on land and trespassers in installations or railway vehicles.

17. Lord Diplock[40], like Lords Reid and Pearson, gave separate attention to the circumstances in which an occupier's duty towards a trespasser might arise as compared with what that duty, once in existence, might require. He appeared to take a middle position between Lord Reid's requirement of actual knowledge of a "substantial probability" of the presence of the trespasser and Lord Pearson's test of knowledge of such presence, or of the existence of circumstances in which the trespasser's presence was "reasonably to be anticipated". The occupier should not in Lord Diplock's view become subject to any duty until he either knows that the trespasser is present or knows facts from which a reasonable man would recognise that the trespasser was likely to be present on the land. But Lord Diplock did not make a rigid division between the two aspects of his enquiry into the liability of the occupier towards the trespasser. The relevant degree of likelihood of the presence of a trespasser must be judged by reference to all the circumstances including the nature of the danger to which the trespasser is subjected and the expense of giving effective warning of it. Like Lord Reid he would appear to permit an assessment of this expense relative to the means of the particular occupier. He referred to the distinction made by the common law between the kind of duty owed to a licensee and that owed to a trespasser[41] and explained how the courts, conscious that the inability of many trespassers to recover against occupiers caused hardship, particularly where the injured persons were children, had by a benevolent fiction treated some trespassers as licensees. But now, he considered, the time had come boldly to ignore the fiction and lay down principles of liability towards trespassers, so that liability would arise in similar circumstances to those in which in earlier times such liability could only have been admitted by the fiction of a licence.

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40. Ibid, 939-40.

41. Ibid, 937 et seq: and see para. 5 above.

Hence the duty of an occupier towards a trespasser, once it had come into existence, consisted of a duty to give reasonable warning against dangers known to the occupier or to take other reasonable steps whereby injury from these known dangers could be avoided. Among the factors determining what in this context was reasonable Lord Diplock mentioned "the expense involved in giving effective warning ..... to the kind of trespasser likely to be injured, in relation to the occupier's resources in money or labour". However, just as under liability towards licensees before the Occupier's Liability Act 1957, "knowledge" of a danger came to mean knowledge of facts from which the danger might reasonably be inferred[42], so under the present law where there was a duty towards a trespasser "knowledge" of a danger by the occupier must be similarly understood.

18. Lord Morris[43] described the duty upon the Railways Board as a limited one. But the special circumstances of the case, "all known and obvious", gave rise to a duty "which, while not amounting to a duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate; they would be steps calculated to exclude or to warn or otherwise within reasonable and practicable limits to reduce or avert danger". Lord Morris did not feel able to treat this test of liability merely as an expression in other words of the test laid down in Addie v. Dumbreck[44] of a "deliberate intention of doing harm to .... or .... reckless disregarded of the presence of the trespasser". Hence he was prepared to hold that that

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42. See Hawkins v. Purley and Coulsdon U.D.C. [1954] 1 Q.B. 319.

43. [1972] A.C. 877, 909.

44. [1929] A.C. 358.

case wrongly decided. He also agreed with Lord Pearson that a sharp distinction could not be made between liability for the static condition of land and liability for current operations on land.

19. Lord Wilberforce[45] thought that Addie v. Dumbreck had laid down the general rule, namely, that there was a duty on occupiers who knew of the presence of trespassers not to injure the latter deliberately or (such being his understanding of "recklessness" in this context) with indifference as to whether they were injured or not; and that this rule had been properly extended to cover occupiers who "as good as knew" of the presence of trespassers[46] or who knew that their presence was "extremely likely".[47] But apart from the general rules and the extensions referred to, there was "the possibility both of a duty to foresee and of a special and limited duty of care arising out of and quantatively measured by particular circumstances". The requirement of "particular circumstances" implied a "test more specific than that of 'foresight of likelihood of trespass' and a definition of duty more limited than that of the 'common duty of care'". In regard to content of the duty, once it has arisen, Lord Wilberforce, in this respect coming to a similar conclusion to that of Lords Reid and Diplock, said that not only must what had to be done be judged in relation to the nature and degree of the danger but also having regard to means and resources of the occupier - "what is reasonable for a railway company may be very unreasonable for a farmer, or (if this is relevant) a small contractor". It should be noted that this description of the nature of the duty which in certain circumstances is owed to trespassers seems to differ from that of the "humanity" criterion advocated by Lord Pearson; indeed Lord Wilberforce specifically says that what must be reached is "a compromise between the demands of humanity and the necessity to avoid placing undue burdens on occupiers".

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45. [1972] A.C. 877, 919.
46. See Quinlan's case [1964] A.C. 1054, 1076.
47. See Callan's case [1930] A.C. 404, 410.

(d) Summary of the House of Lords' decision

20. There is certainly one point on which there is clear unanimity of view between the five Law Lords; in cases where the question of the liability of an occupier for injury done to a trespasser is raised it is not sufficient simply to ask: "did the occupier exercise such care as in all the circumstances was reasonable to prevent injury being done to the trespasser?" The occupation of land as such does not automatically create a duty-situation between the occupier and all those who are on the land, but only between the occupier and those who are lawfully on the land. Before considering whether the occupier has failed to exercise due care towards the trespasser, and what in this context due care means, it is necessary for a court to find some additional and special facts (beyond the facts of occupancy and trespassing) entitling it to hold that the occupier was under a duty to the trespasser. The speeches in the House of Lords, however, show considerable variations of language in the way they deal with these additional and special facts and it is not easy to decide whether there is underlying agreement on the test to be employed or some real difference of view. Thus there does seem a difference between Lord Reid's test (knowledge by the occupier of a "substantial probability" of the presence of trespassers) and Lord Pearson's test (presence of the trespasser "reasonably to be anticipated"); the former seems to be more subjective than the latter. On the other hand there may be little difference in result in applying Lord Pearson's test and that of Lord Diplock (knowledge of facts from which a reasonable man would recognise that a trespasser was likely to be present on the land). Lord Morris did not purport to lay down a general rule as to when an occupier has a duty of care towards a trespasser, but in listing the particular features of the case, "all known and obvious", which led him to the conclusion that there was in the particular instance a duty of care he seemed to be taking a similar approach to that of Lord Diplock. On the other hand

Lord Wilberforce's treatment of special duty-creating facts ("they must satisfy a test more specific than that of 'foresight of likelihood of trespass'") seems to suggest that a good deal more is required to give rise to a duty on an occupier towards a trespasser than would seem to follow from Lord Diplock's test. In one respect, however, Lord Wilberforce's test of when the duty arises seems to admit a factor as relevant which is not mentioned in this context by the other Law Lords, except for Lord Diplock. He was prepared to take into account, in determining whether a duty had arisen, the "lethal character" of the danger. Thus the required degree of likelihood of the presence of a trespasser varies on this approach according to the seriousness of the risk of injury.

21. In respect of what is required of an occupier once a duty has arisen there is, at least on the face of the language used, some difference of view. Lord Reid's standard - that of the "conscientious, humane man" - seems close to that of Lord Pearson who speaks of the occupier's duty to treat the trespasser with "ordinary humanity", while Lord Morris refers in this connection to taking such steps as "common sense or common humanity would dictate". Lord Wilberforce speaks of "reasonableness" but contrasts it with a higher standard which "humanity" might require, whereas it is clear the other judges in referring to "humanity" as a standard think of it as demanding less than "reasonable care". There is a rather different treatment of the standard of care by Lord Diplock, who requires an occupier once he is under a duty to take "reasonable steps to enable a trespasser to avoid the damage". Finally, it should be noted that Lords Diplock, Reid and Wilberforce give an especially subjective emphasis to the standard of care expected of the occupier in relation to trespassers, in that they would take into account not merely the expense of the precautions in relation to the danger (a normal consideration in assessing what would be reasonable in

the circumstances) but also in relation to the individual resources of the particular occupier.

22. The decision of the House of Lords can be taken as repudiating with some emphasis the distinction made in Videan's case[48] between the liability of the occupier for activities on his land where the liability was there said to depend on Donoghue v. Stevenson principles of reasonable foresight and the more limited liability for the static condition of the land. But only Lord Pearson expressed a decisive view on the liability of a non-occupier towards a person who was a trespasser vis-à-vis the occupier of the land where the non-occupier is carrying out activities. Presumably because he was influenced by what he called the "moral aspect" of the matter, namely that trespassing is a form of wrongdoing, he would have limited the trespasser's rights against the non-occupier to those which he could exercise aginst the occupier. Lord Diplock declined to decide this issue although he made it clear that in his view it would not necessarily be illogical to enable the trespasser to recover against the non-occupier in respect of activities on land when an action against an occupier of the land in respect of similar activities might fail. The liability of the non-occupier towards trespassers on land where the non-occupier is engaged in activities must therefore be regarded as uncertain.

(e) Subsequent interpretation by the courts

23. In Pannet v. P. McGuinness & Co. Ltd.[49] the facts were that the infant plaintiff, aged five, frequently had trespassed on and been chased off a site, adjoining a public park in a densely populated area. The defendants were demolition

48. See para. 9 above.

49. [1972] 2 Q.B. 599.

contractors engaged by a local authority to demolish a warehouse on the site, although in the Court of Appeal only Lord Denning M.R.[50] raised the question of whether the defendants were not merely contractors but also occupiers; he took the view that they were occupiers - "but that is no reason for putting them under any lower duty than they are as contractors. The question is whether, as contractors, they are liable". The watchmen, posted for that purpose, had failed to keep a look-out to prevent children entering the site where fires had been lit; the plaintiff entered the site and fell into a fire, being severely injured.

24. Lord Denning M.R. interpreted the decision of the House of Lords in Herrington's case as having decided inter alia that:

> "the duty owing to a trespasser is not found by any general principle applicable to all trespassers alike ..... 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."

Lord Denning mentioned among the circumstances to be taken into account: the gravity and probability of injury; the character of the trespasser - "you may expect a child when you may not expect a burglar"; the nature of the place where the trespass occurred - whether it is, for example, an electrified railway line or merely a warehouse; and the knowledge which the defendant had or ought to have had of the likelihood of trespassers being present. If in all the circumstances a duty arises the standard of care owing could in Lord Denning's view be described as:

> "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."

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50. [1972] 2 Q.B. 599, 605.

25. Edmund Davies L.J. cited Lord Wilberforce in Herrington's case to the effect that the duty of care demanded vis-à-vis a trespasser was a compromise between humanity and the necessity of avoiding placing undue burdens on occupiers; he also referred to a passage in Lord Reid's judgment where the latter said "most people would think it inhumane and culpable" for an occupier not to take action, which could be taken at small trouble and expense, to avoid injury to trespassers whose presence on his land was "substantially probable". Applying these tests to the facts in the case Edmund Davies L.J. agreed with the Master of the Rolls in dismissing the appeal. Lawton L.J. said that:

> "Any reasonable contractor with the resources and manpower which these appellants have would as a matter of common sense and humanity have taken the steps which the appellants themselves tried to take [i.e. by posting workmen to prevent children from trespassing]"

and that was enough to bring the case within the ratio decidendi of Herrington's case and to require the dismissal of the appeal.

26. Herrington's case was also referred to in Westwood v. The Post Office [51], in which an employee of the Post Office trespassed by entering a part of the premises forbidden to him and there suffered a fatal accident. Lawton L.J. singled out Lord Reid's test of whether the occupier knew there was a "substantial probability" of the presence of a trespasser (see paragraph 15, above) and, holding that there was no such probability, found there was no liability on the defendant.

IV Liability towards trespassers: some critical questions

27. It is clear from Herrington's case that the mere fact of occupation of land in itself does not give rise to a duty of care towards potential trespassers.[52] There has to be a

51. [1973] 2 W.L.R. 135.

52. See para. 20 above.

certain degree of likelihood of the presence of trespassers, but there seems room for argument as to how likely that presence has to be.[53] But whatever words are used for this purpose - such as "substantial" or "reasonable" - the precise degree of likelihood which gives rise to a duty of care cannot be ascertained in the abstract; it must depend on the surrounding circumstances, in particular, the degree of danger, as well as the relative value put on the one hand on an occupier's freedom and on the other on freedom from injury or damage to the person or to property. Thus, an occupier might not have to anticipate that trespassers will enter his garden over a surrounding low wall when the worst that can happen to them if they do so is to fall into a trench which he has dug for his celery. But if he has dug a well 30 feet deep in that garden it might well be that he ought to come under a duty of care even when there is only a fairly slight likelihood of anyone entering the garden. Yet if this approach is correct, it may be questioned whether there is such a sharp line between deciding as to existence of a duty of care and fixing the standard of care as most of the speeches in Herrington's case tend to suggest.[54] Is there, in fact, any real justification for undoubtedly complicating the process of determining the liability of an occupier to a trespasser by asking two questions instead of one? In other words, instead of asking whether a duty of care has arisen and then whether there has been a breach, in spite of the fact that the same overall circumstances and social criteria (sanctity of the occupier's landed rights as compared with the security of human life or limb) are relevant to both questions, what would be lost if only a single question was asked: "has the occupier behaved reasonably towards the trespasser in all the circumstances?".

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53. Ibid.

54. Exceptions are the judgments of Lords Diplock and Wilberforce. See para. 17 and 19 above.

28. As we have pointed out[55] the Court of Appeal in Herrington's case believed that the foregoing question would provide a satisfactory test determining the liability of the occupier towards a trespasser. Lord Reid[56] however thought that, even if such test appeared to work satisfactorily in Scotland, where juries normally decide what is "reasonable", it would not be suitable in England, where the decision would rest with judges, whose reasons would be subject to appeal, with consequent uncertainty of the law at least for a time. Yet, whether the decision rests with the judge or with a jury, the standards of "the reasonable man" are always "normally a question of fact and degree and not a question of law, so long as there is evidence to support the finding of the court"[57]; and it is only where there is no evidence to support the finding of the judge or jury that the question of an appeal may arise. Furthermore, it may be thought that the danger of uncertainty to which Lord Reid referred is no greater and probably less than that which would result if the question whether the occupier was under a duty of care to the trespasser had to be determined as a matter of law according to the circumstances of each case. Subtle variations in the circumstances of a case from those in earlier cases in which a duty had been judicially declared to arise, or not to arise, might make it very difficult to forecast the result of the case in issue; a contrary decision on appeal, the issue being one of law, would always remain a possibility. In other words, is there not in any event, the possibility that treatment of the question in accordance with the approach of the House of Lords may result in a built-in element of uncertainty in the law? What a legal adviser might hope to be able to calculate by reference to the standards of the "reasonable man" would become a difficult

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55. See para. 14 above.

56. [1972] A.C. 877, 898.

57. In re W (an Infant) [1972] A.C. 682, 699, per Lord Hailsham of St. Marylebone L.C.

calculation; he would have to estimate the extent to which a particular set of facts might be considered by the court sufficiently to resemble the facts of earlier decisions, in which a duty of care has been imposed or denied, to justify a similar legal conclusion on the basis of the facts in question.

29. No doubt one of the considerations which weighed heavily with the House of Lords was the undesirability of imposing upon occupiers in the interests of the safety of potential trespassers excessive restrictions in the use and enjoyment of their land. It does not appear to follow that those fears would necessarily be realised even if an occupier was under a duty to exercise reasonable care vis-à vis potential trespassers. There is force in the suggestion made by Lord Pearson[58] that occupiers should not be inhibited in their activities by the "mere general possibility" of the presence of trespassers, but is it not precisely the limit set by the condition that the occupier would only be required to do what is reasonable which would entitle him to disregard such a possibility?

30. Assuming that a duty of care has come into existence between a particular occupier and a trespasser, the state of the law after the decision of the House of Lords in Herrington's case is also open to comment on the ground that the standard of care required is unnecessarily difficult to apply. The criticism can be made on two grounds. First, there is the reliance of most of the Law Lords on the concept of "humanity" as something different from, and in their view less exacting than, "reasonableness". It may be doubted whether in any future legislation this would be a workable distinction. Probably, the basic aim of the Law Lords was to ensure that, where there was a serious danger to life or limb and some likelihood of the presence of a trespasser, the occupier should be under an

58. [1972] A.C. 877, 924.

obligation to take some preventive action. But is this not the kind of situation which an obligation to do what is reasonable in the circumstances would adequately cover and would indeed do so by reference to a test which is perfectly familiar? Secondly, it may be questioned whether the standard of care to be observed by the occupier should vary according to the resources of the particular occupier. Is not liability insurance a device for distributing loss which can lessen the burden which might otherwise fall on the impecunious individual defendant? Lord Reid said that as "an occupier does not voluntarily assume a relationship with trespassers ..... they [trespassers] must take the occupier as they find him".[59] But the voluntary act of the trespasser in entering the occupier's land does not necessarily imply an acceptance of all the risks attendant upon that entry, and still less does it necessarily imply acceptance of the financial position of the occupier (of which the trespasser may be completely ignorant) as determining the standard of duty owed by the occupier to the trespasser. Lord Wilberforce referred to the advice of the Privy Council which he himself delivered in Goldman v. Hargrave[60] where the duty of an occupier in respect of a fire which had arisen on his land without his fault was stated to be to do "what it is reasonable to expect of him in his individual circumstances". In such a situation it may be, as the Privy Council suggested obiter[61], that "a rule which required of [the occupier] ..... an excessive expenditure of money..... would be unenforceable or unjust", although this seems to ignore the possibilities of insurance. In many occupier and trespasser relationships, however, the occupier, even if he has very limited financial resources, cannot be said to be powerless to prevent injury to the trespasser. If he feels

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59. [1972] A.C. 877, 899.

60. [1967] 1 A.C. 645, 663.

61. It was not argued that the action necessary to put the fire out was not well within the capacity and means of the occupier on whose land it began.

that the risk of injury to trespassers is too great, he may simply desist from some activity which he is pursuing on land; or he will be able to put up, at small expense, warning notices which would adequately discharge him from any liability he may owe. But, of course, quite apart from the means of the individual occupier, in deciding whether an occupier is liable, the cost of taking action to prevent injury has to be weighed against the seriousness of the risk and of the injury or damage which will result if that risk is realised.

31. The state of the law left by the decision of the House of Lords in Herrington's case may be criticised on more general grounds. Even if there is in the five speeches a common basis of principle from which a further body of case law may be developed, it may be thought that this branch of the law has become over-refined in much the same way as the former law governing liability towards invitees and licensees had become unduly complicated, and that what is now required is a statutory clarification and simplification of the position comparable to that which was achieved in respect of lawful entrants by the Occupiers' Liability Act 1957. Against this view it has been suggested[62] that Pannett v. McGuinness & Co. Ltd.[63] has demonstrated that the Court of Appeal at least had no difficulty in applying the law as laid down in Herrington's case. But in the former case Lord Denning M.R. said only that the Court of Appeal would "have to try to solve the difficulties pointed out by counsel for the defendants from time to time as the cases came before us".[64] As far as the facts of Pannett's case were concerned, Lord Denning does not seem to have distinguished very sharply between the existence of a duty of care affecting the particular occupier and the standard

62. By Professor Goodhart, (1972) 88 L.Q.R. 457.
63. [1972] 2 Q.B. 599.
64. Ibid, 605.

of care which the occupier, assuming he is under a duty of care, should show towards the trespasser. In fact he sums up the position of the occupier in a sentence[65] which seems tantamount to saying that he must behave reasonably to the trespasser having regard to all the circumstances, an approach which is very difficult to reconcile with the House of Lords' rejection in Herrington's case of the solution of occupiers' liability towards trespassers adopted by the Occupiers Liability (Scotland) Act 1960. Edmund Davies L.J. and Lawton L.J. also seemed mainly concerned with the standard of care rather than the existence of a duty of care, which in the particular facts of the case they appear to have taken for granted. In regard to that standard Edmund Davies L.J. referred both to Lord Wilberforce's "compromise ... between the demands of humanity and the necessity to avoid placing undue burdens on occupiers"[66] and to the not easily reconcilable standard laid down by Lord Reid of the "conscientious, humane man"[67]. It was, however, sufficient for the decision, as Edmund Davies L.J. held, that the judge at first instance, if he had been able to apply "the test derived from the later speeches in Herrington's case" to the facts as he found them, would have been entitled to reach the same conclusion as that which he expressed. Lawton L.J., in a short judgment, simply said that, as a matter of "common sense and humanity", the appellants were trying to prevent children entering a site where a fire had been lit; but owing to the

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65. "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." There follow what in effect are "guide-lines" indicating in general terms the relevant considerations, namely (1) the gravity and likelihood of injury (2) the character of the intrusion - "you may expect a child when you may not expect a burglar", (3) the place, dangerous or otherwise, where the trespass occurs and (4) the knowledge which the defendant had or ought to have had of the likelihood of the presence of trespassers: [1972] 2 Q.B. 599, 606-607.

66. [1972] A.C. 877, 920.

67. ibid., 899.

failure of the watchmen appointed for this purpose to carry out their duties the plaintiff in fact entered and was injured; and this failure brought the case within the ratio decidendi (not otherwise elaborated) of Herrington's case. We do not think therefore that Pannett's case can be cited as a demonstration of the ease with which the House of Lords' decision in the former case can be applied to future cases. What is important is not the ease with which a court, having decided on which side justice lies, can find ways of fitting its conclusion within the principles laid down by a higher court. The principles laid down by the higher court should afford some reasonably certain guide to the law in future cases, before they are actually decided.

32. It was not necessary to decide in Herrington's case the question of liability which arises when a non-occupier carries out work on land on which the plaintiff is a trespasser vis-à-vis the occupier. Of the two Law Lords who deal with the question, one only expresses a clear view[68] while the other is non-committal.[69] However, as far as the future development of the law is concerned, we think that the question is of practical importance and requires clarification.

VI Liability to trespassers: the law in other countries

33. In dealing with a problem which must to some extent arise in any country which attempts to strike a balance between the protection of property and the protection of life and limb, we have found it helpful to consider the law and law reform proposals in a number of other countries. Developments under other legal systems, as regards judge-made law and legislation, as well as in regard to law reform proposals, seem in this context particularly relevant when the law in

68. See Lord Pearson [1972] A.C. 877, 929.
69. Lord Diplock, ibid, 943.

question has or once had a close link with English law, and in Appendix 2 we have made a critical survey of a number of countries in this category.

VII Conclusions and provisional proposals

(a) Introductory

34. In Herrington's case Lord Wilberforce referred to "our outdated law of fault liability which involves the need to establish a duty of care towards him [the plaintiff] and a breach of it".[70] In view of these remarks we should make clear that this Working Paper is concerned with reform of an occupier's liability to a trespasser only in so far as such liability is based on fault.[71]

(b) General considerations

35. The decision of the House of Lords in Herrington's case has removed a number of obstacles to an easier and more flexible development of the law regarding the liability of an occupier towards a trespasser, in particular (as Lord Denning M.R. pointed out in Pannett v. McGuinness & Co. & Co.)[72] the test of liability (for intentionally or recklessly inflicted damage) propounded in Addie v. Dumbreck[73] and the

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70. [1972] A.C. 877, 911.

71. The wider question as to circumstances in which compensation should be payable in respect of the death of or any personal injury to a person on premises belonging to or occupied by another is one of the questions referred to the Royal Commission under the chairmanship of Lord Pearson. The setting up of the Commission was announced by the Prime Minister in the House of Commons on 19 December 1972 (H.C. Debates, vol. 848, col. 1119).

72. [1972] 2 Q.B. 599, 605-606.

73. [1929] A.C. 358, 365 (per Lord Hailsham L.C.).

various devices, such as an artificial extension of the meaning of recklessness[74], an implied licence[75], a distinction between liability for the static condition of land, contrasted with liability for current activities on land[76] and a distinction between the liability towards a trespasser of an occupier and a contractor.[77]

36. The question which remains is whether, in the light of Herrington's case, the law relating to the liability of occupiers towards trespassers is satisfactory and, in particular, sufficiently certain safely to be left to the courts to apply without legislative intervention. This question may be considered from two points of view. In the first place, it involves asking whether the speeches in Herrington's case provide adequate guidance as to the circumstances in which an occupier will owe a duty of care to a trespasser. It is certainly true that all the Law Lords were agreed that the mere facts of occupancy and trespassing do not of themselves, and should not, give rise to a duty of care as between the occupier and the trespasser; but there is considerable variety of view as to the circumstances in which such a duty

74. See para. 7 above.
75. See para. 11 above.
76. See para. 9 above.
77. But see para. 32 above.

of a care will arise.[78] In the second place, the question may be directed to the standard of care which is required of an occupier once he has been held to be under a duty of care to a trespasser. We have already expressed our doubts[79] about the distinction made by most of the Law Lords between doing what is reasonable and what is demanded by a sense of humanity, and about the possibility of exempting an occupier from liability because he lacks the requisite resources to prevent the injury or damage. Our provisional answer, therefore, to the question posed at the beginning of this paragraph is that the law relating to the liability of an occupier towards trespassers is unsatisfactory and that legislative intervention is desirable. We consider the form which that legislation might take in paragraph 43 below.

(c) Categories of "non-visitors" other than trespassers

37. Before setting out our provisional proposals for reforming the law governing liability of occupiers towards trespassers it seems necessary to consider the position of two

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78. Lord Reid requires a "substantial probability" of the presence of the trespasser ([1972] A.C. 877, 899). Lord Wilberforce (ibid, 920) speaks of the duty of an occupier towards a trespasser arising "because of the existence, near to the public, of a dangerous situation". Lord Morris (ibid, 929-30) does not appear to put forward any single formula of his own in regard to the existence of the duty but he quotes with approval from Pearson L.J. in Videan v. British Transport Commission ([1963] 2 Q.B. 650, 680-81) where the latter says that an occupier owes a duty of care (albeit of a lesser standard than that owed to a lawful visitor) "when he knows or has good reason to anticipate the presence of the trespasser". Lord Pearson in the House of Lords says in respect of the duty of care in effect the same as he said in the Court of Appeal in Videan (supra). Lord Diplock sides with Lord Reid in requiring a subjective element in a test of the duty of care otherwise based on reasonableness: "actual knowledge either of the presence of the trespasser... or of facts which make it likely that the trespasser will come; and .... also actual knowledge of facts as to the condition of [the] land or of activities [thereon] likely to cause personal injury to a trespasser .....unaware of the danger" ([1972] A.C. 877, 941).

79. See para. 30 above.

categories of entrants upon land who are probably not "visitors" within the meaning of the Occupiers' Liability Act 1957 but who are also not trespassers in the sense that the occupier could bring an action for trespass against them. The first category covers those entering upon land in exercise of rights conferred by virtue of an access agreement or order under s. 60(1) of the National Parks and Access to the Countryside Act 1949; these persons by s. 1(4) of the Occupiers' Liability Act 1957 are declared not to be visitors for the purposes of the latter Act. It would seem that if a person enters upon land solely by virtue of s. 60(1) of the 1949 Act, any liability of the occupier towards him in respect of the condition of the land or of things done or omitted to be done on the land, must depend on the common law. As such entrants could hardly be in this respect in a worse position than a trespasser at common law, it seems reasonable to assume that, in respect of their rights against an occupier, they are to be treated as if they were trespassers. But if the liability of an occupier towards trespassers in the strict sense is to be put on a new statutory basis, it would not seem satisfactory to leave persons entering land solely under an access agreement or order to be treated under the common law as it applied to trespassers before the statutory change. We therefore provisionally propose that any statutory statement of the occupier's liability to trespassers should also be applicable to persons on land solely by virtue of an access agreement or order under the National Parks and Access to the Countryside Act 1949.

38. The second category of entrants to be considered concerns those lawfully using a public or private right of way over land. Although s. 2(6) of the Occupiers' Liability Act 1957 says that persons who enter premises for any purpose in exercise of a right "conferred by law" are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not, nevertheless it has

been held in Greenhalgh v. British Railways Board[80] that a person exercising a public right of way over a bridge, in which there was a pothole, could not claim under the Occupiers' Liability Act 1957 that she was a visitor vis-à-vis the Railways Board to whom the bridge belonged; s. 2(6) was preceded by the important words "for the purposes of this section", which defines the extent of the occupier's duty to acknowledged visitors. The latter, according to s. 1(2), were those who before the Act would have been, or would have been treated as, invitees or licensees by the common law; and, although persons entering public parks or policemen entering on search warrants were so treated, persons entering by virtue of a public (or, according to Lord Denning M.R., private) right of way were not treated as invitees or licensees at common law and so were not "visitors" for the purposes of the Occupiers' Liability Act 1957.[81] As far as private rights of way are concerned, apart from the obiter dictum of Lord Denning M.R. referred to above, it was certainly the intention of the Law Reform Committee in their Third Report[82] which led to the Occupiers' Liability Act 1957, as it was also the understanding of the Standing Committee[83] of the House of Commons which considered the Occupiers' Liability Bill, that an occupier of land over which there was a private right of way should not be subject to the common duty of care in respect of persons exercising that right. Of course,

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80. [1969]2 Q.B. 286, 292-3.

81. It should however be borne in mind that where a highway authority is responsible for the repair of the highway it may be liable for injury to a person lawfully using the highway as a result of the authority's failure to repair under the Highways (Miscellaneous Provisions) Act 1961.

82. (1954) Cmd. 9305, para. 34.

83. Standing Committee A, Official Report, Occupiers' Liability Bill, 26 March 1957, Cols. 5-7.

although the occupier is not liable to the person exercising his private right of way for damage resulting from his failure to repair the way (except where he is under a contractual liability to the plaintiff to repair) he may be liable for any activity (misfeasance) making the way dangerous.[84]

39. The question therefore arises whether in regard to persons exercising public or private rights of way the position should remain as it has generally been understood to be, namely, that they are unaffected by the Occupiers' Liability Act 1957; or whether they should have at least the same rights as may be laid down for trespassers vis-à-vis the occupier of land over which the trespass takes place. Were new statutory provisions to be introduced having the effect of imposing certain duties upon the occupier in regard to trespassers, an anomalous situation might be thought to arise. On the one hand, a person unlawfully using a private right of way, or using a public right of way other than for legitimate passage, and therefore a trespasser vis-à-vis the occupier, could claim that, in respect of the occupier's acts or omissions he was entitled to the benefit of the duties to be owed under the new provisions as to trespassers whereas, on the other hand, a person lawfully using a right of way could not.

40. Accordingly our provisional view is that the occupier of land over which there is a public or private right of way should owe to persons lawfully exercising such rights a duty of care which should not be lower than that which he would owe

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84. This is not a liability peculiar to the occupier (see Corby v. Hill (1858) 4 C.B. (N.S.) 556) and is now better regarded as an aspect of negligence liability in respect of activities, as distinguished from liability for omissions, under the general principles of Donoghue v. Stevenson [1932] A.C. 562.

to a trespasser. But it is necessary to ask who for this purpose should be regarded as an "occupier". As far as private rights of way are concerned, there appears to be no difficulty; the "occupier" is the person who occupies the land over which the right is exercisable. Where there is a public right of way, the surface of the land in question will normally be maintainable at the public expense by the appropriate authority,[85] in whom it is vested under the Highways Act 1959.[86] In these cases we think that, since the control and ownership of the surface is in the hands of such public authority, it is the latter who should be regarded for our purposes as the occupier and not the occupiers of the adjoining land, notwithstanding that they still occupy the land below the surface of the highway.[87] There are, however, some public highways which are not maintainable at the public expense,[88] and where there is therefore no public authority which can be regarded as in control of the highway and so as an occupier. In these exceptional cases the effective control remains in the owner of the land over which the public right of way subsists, and, as in the case of a private right of way, we think he should be treated as the occupier.

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85. Highways Act 1959, s. 38(2).

86. ibid, ss. 226-230.

87. Such occupancy of the sub-soil may however be sufficient to enable the adjoining occupier to bring an action of trespass against persons using the highway in an unlawful manner. See R. v. Pratt (1855) 4 El. & B. 860; Harrison v. Duke of Rutland [1893] 1 Q.B. 142; Hickman v. Maisey [1900] 1 Q.B. 752.

88. The liability to repair may rest on individuals or corporations by virtue of prescription, enclosure awards or other special statutes; in some case there may be no liability to repair on the part of anyone. See Pratt & Mackenzie, Law of Highways, 21st ed. (1967), pp. 75-83.

(d) Provisional proposals

41. We have considered the proposals made by the various law reform agencies overseas which are summarised in paragraphs 8-13 of Appendix 2, as well as the formulation of liability of an occupier towards trespassers contained in the second edition of the Restatement of the Law of Torts of the American Law Institute.[89] Our provisional view is that the Restatement, as well as the recommendations of the New Zealand Torts and General Law Committee, although they have the merits of making plain the special considerations which may make it undesirable to give a cause of action to trespassers in particular circumstances, would, if applied in the context of English law, lead to undesirable complications and refinements in much the same way as the former distinction between invitees and licensees confused the law governing the liability of occupiers to lawful entrants. The recommendations of the Institute of Law Research and Reform of the University of Alberta do not as regards adults go even as far as the House of Lords was prepared to go in Herrington's case and as regards liability to children they closely follow the American Law Institute's Restatement. The recommendations of the New South Wales Law Reform Commission, which would in effect allow the courts to reconstruct afresh a framework of legal duties to all categories of entrants on a case to case basis, seems to us too uncertain in its operation and hardly relevant in a country which already has the common duty of care towards invitees and licensees. We are, however, initially attracted by the recommendation of the Ontario Law Reform Commission[90] that occupiers should be subject to a common duty of care in respect of all entrants, including trespassers.

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89. See Appendix 2, paras. 14-15.

90. See Appendix 2, para. 12.

42. If, however, occupiers automatically come under a duty of care to all trespassers by virtue of statute, the present distinction emphasized in Herrington's case between the determination of the existence of a duty of care owed to the trespasser and the decision as to whether there has been a breach would be lost. The practical result, as in Scotland under the Occupiers' Liability (Scotland) Act 1960, would be that the fact that an entrant on land was a trespasser would only be "a circumstance of the case" which the court could take into account in deciding as an issue of fact whether the duty to take reasonable care had been discharged.[91] It may be thought that there is value in preserving, in respect of the liability of occupiers towards trespassers, the power of the court initially to decide as a question of law whether on the facts of any given case there is any duty at all owed to the trespasser. In other words, on this approach the question whether there was in any particular circumstances a duty of care to the trespasser would depend on whether, in the familiar language of Lord Atkin in Donoghue v. Stevenson, the trespasser was in law a "neighbour" of the occupier.[92] If this distinction between deciding whether a duty of care exists and, if it exists, whether there has been a breach, is retained, then it may enable the courts to exercise by way of appeal on a point of law a tighter control over the law governing liability towards trespassers than would be possible if the whole question of whether the occupier was liable to a trespasser were decided by reference

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91. See Walker, The Law of Delict in Scotland, (1966), vol. II, p. 589, quoted in Appendix 2, para. 3. And compare the position in the law of South Africa, Appendix 2, para. 16.

92. Cf. Salmon L.J. in Herrington's case in the Court of Appeal, [1971] 2 Q.B. 107, 120. "A burglar in your your house can hardly be regarded as your "neighbour" within the meaning of that word, and I should have thought that no duty of care would be owed to him".

to the standard of the reasonable man, as found by the jury or, in the English setting, by the judge as the trier of fact. But, as we pointed out in an earlier paragraph[93] there is a danger, if the duty of care remains to be separately determined from case to case as a matter of law, that the law will remain uncertain; at least it will not be easy to say whether particular types of trespassers are or are not protected by a duty of care until the existence of this duty of care has been established by the courts. And the possibility would have to be accepted that, where the existence of a duty of care to a particular trespasser was in doubt, the issue might again ultimately have to be decided by the House of Lords, as happened in Herrington's case.

43. Proposals, therefore, for the reform of the law relating to trespassers, might, according to the view which is taken of the considerations raised in the previous paragraph, take two alternative forms:-

A. If it is considered desirable to impose on the occupier an obligation to show reasonable care towards any entrant on his land, including a trespasser, leaving the fact that an entrant was a trespasser to be taken into account in deciding whether the care shown was reasonable in the circumstances, then the Occupiers' Liability Act 1957 would have to be amended to bring all entrants within the common duty of care at present owed only to "visitors" within the meaning of that Act. It would also be possible to add special guide-lines which might be thought especially relevant in determining what may reasonably be expected of an occupier as far as trespassers are concerned. These

93. See para. 28.

guide-lines might, in respect of a trespasser, draw attention to:-

(i) the likelihood of the presence of the trespasser on the occupier's land;

(ii) the degree of risk of injury or damage to the trespasser or to property he has brought on the land;

(iii) the seriousness of the injury or damage which may occur if that risk is realised;

(iv) in the light of (i), (ii) and (iii), the extent to which it is reasonable to require the occupier to take preventive measures against the injury or damage.

However, the Occupiers Liability (Scotland) Act 1960 contains no such guide-lines and does not appear to have given rise to difficulty, and, if alternative A were adopted we doubt whether guide-lines would be necessary.

B. If, however, it is considered desirable to retain the question of whether there is a duty of care towards any trespasser as a matter of law for the courts, then it would be necessary to add to the Occupiers' Liability Act 1957 three inter-connected

provisions to the effect that:-

(i) the mere relationship of occupier and trespasser does not of itself give rise to a duty of care; but

(ii) an occupier owes a duty of care to any trespasser whom, in the light of all the circumstances, he ought as a reasonable man to have in contemplation as likely to be affected by his acts or omissions; and

(iii) the determination of whether there is in the particular case a duty of care owed to a trespasser is a matter of law to be decided by the court.

At this stage, we express a provisional preference for alternative A of the proposals set out above, but we have endeavoured to draw attention to the respective advantages and disadvantages of both proposals, in the light of which we should particularly welcome the comments of the recipients of this paper.

44. We have assumed that our proposals would cover damage to property as well as to the person, but that is an open question on which we would welcome comment. As the main argument in favour of the liability of an occupier towards a trespasser rests on the necessity of recognising in certain circumstances the superior claims of the preservation of life and limb over the sanctity of property, there would seem a less strong case for putting an occupier under a duty of care, or for requiring him to exercise reasonable care, in regard to property than as respects the physical safety of human beings. Furthermore, it is possible for the owner of property to insure it against damage, whereas it would not generally be

considered reasonable to expect every individual to take out insurance against his death or personal injury. Nevertheless it would, we think, probably be regarded as unsatisfactory if, for example, a trespassing child could recover for his physical injuries resulting from an accident on an occupier's land but not for the suit of clothes which was thereby damaged. It is more doubtful, however, whether the occupier should be at risk in respect of other property which the trespasser brought on to the occupier's land. But on the other hand it should be borne in mind that, in such a case, it would be necessary, if our alternative proposal A were adopted, to take into account whether the occupier should have anticipated the presence of the property and, in finally determining whether there was liability, whether the risk to the property outweighed the burden which measures to protect it from damage would put on the occupier; and if alternative B were adopted, it would remain open to the courts to decide as a matter of law whether there was in the circumstances a duty of care in respect of the property. The same considerations probably justify making the occupier subject to liability in respect of the property of third parties brought on to the occupier's land by a trespasser in the same

way as he is subject to the common duty of care in respect of the property of third parties brought on his land by lawful entrants.[94]

94. See Occupiers' Liability Act 1957, s. 1(3)(b) (Appendix 1). North, Occupiers' Liability, pp. 94-105, deals at length with the liability of the occupier for damage to property in respect of lawful entrants. He finds the main difficulty of s. 1(3)(b) to arise where the owner of property, as distinguished from the entrant who brings the property on to land of the defendant, sues the latter for damage suffered by the property on the land. S. 1(3)(b) provides:- "The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees and licensees would apply, to regulate ... (b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property including the property of persons who are not themselves his visitors" (emphasis added). Mr. North doubts whether the cited provision of that Act does more than give an action to the entrant, the owner of the property only having recourse against the entrant and not directly against the occupier. We incline to the view that the express language of the Act (see the emphasised words above) either assumes, or is intended to create, a relationship between the occupier and the owner of the property brought on the land by a lawful entrant. If liability in respect of damage to property were assumed in principle where the property had been brought on to the land of an occupier by a trespasser to whom the occupier owed a duty of reasonable care, then it must be borne in mind that it would be very rare for liability to be established. What would have to be shown would be that a reasonable occupier would have known of the presence not merely of the trespasser but of the property and that in the circumstances it was reasonable for him to have taken precautions (which he in fact failed to do) for its safety.

45. There remains for consideration the question of the principle of liability which should govern the relationship between a defendant who is carrying on activities on land of which he is not technically an "occupier" and a plaintiff who, being a trespasser on that land vis-à-vis the occupier, suffers injury or damage as a result of those activities. The scope of the problem would not under either of our proposals be as wide as it may at first sight appear, because in many cases the injury or damage would be suffered by a plaintiff who at the time was also a trespasser (in the broad sense of being an unauthorised entrant) on a "fixed or moveable structure, including any vessel, vehicle or aircraft"[95] which the defendant occupied or over which he had control. Other cases - as, for example, where a contractor is felling a tree on land occupied by another and in so doing injures a trespasser on that land - could be left to be decided on the general principles of negligence.[96] The liability of the non-occupying contractor has probably only caused difficulty in the past because it has been used as a device to evade the narrow limits of liability governing the relationship between an occupier and a person who trespasses on his land.[97]

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95. See s. 1(3)(a) of the Occupiers' Liability Act 1957 (Appendix 1) which we assume would apply to our general statement of liability of an occupier towards a trespasser.

96. As in effect happened even before those principles were given their classic formulation; see Mourton v. Poulter [1930] 2 K.B. 183.

97. See Lord Denning M.R. in Pannett v. McGuinness & Co. [1972] 2 Q.B. 599, 606, (paras. 23-25 above) who said of the devices for evading Addie v. Dumbreck: "Lastly, if we could not make a man liable as an occupier, we used to do so by making him liable as a contractor".

VIII Exemption clauses in relation to occupiers' liability both to trespassers and other entrants

46. Section 2(1) of the Occupiers' Liability Act 1957, which imposes on an occupier a common duty of care to all his visitors (i.e., those persons who at common law would be treated as his invitees or licensees), has an important qualification. The section states that the duty is owed by the occupier "except in so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise". We propose to discuss the application of this provision to the liability of an occupier to trespassers but, for reasons which will subsequently appear, it will first be necessary to consider its application to the liability of an occupier to visitors.

47. In our Working Paper No. 39[98] we referred to occupiers' liability.[99] The Working Paper contained provisional proposals for legislation to regulate exemption clauses, including the suggestion that exemption clauses might be held to be ineffective if it were shown to the satisfaction of a court or arbitrator that it would not be fair or reasonable in all the circumstances of the case to allow reliance on the clause.[100] We stated that it was for consideration how far such proposals should apply to the exclusion of an occupier's liability to visitors who entered the premises as part of the occupier's business activities.

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98. Working Paper No. 39: "The Exclusion of Liability for Negligence in the Sale of Goods and Exemption Clauses in Contracts for the Supply of Services and other Contracts", issued jointly with the Scottish Law Commission in September, 1971.

99. Ibid, para. 81.

100. Ibid, para. 62.

48. The Working Paper dealt mainly with exemption clauses in contract, but in relation to the liability of an occupier exemption clauses need not, it seems, be contractual in nature. In Ashdown v. Samuel Williams & Sons Ltd.[101] there was a conditional licence, not a contract, and section 2(1) of the Occupiers' Liability Act 1957 refers to modification of the occupier's duty "by agreement or otherwise".

(a) Ashdown v. Williams

49. The facts in Ashdown v. Williams[102] may be briefly stated. The plaintiff was making use of a short cut across a dock estate occupied by the defendants in order to reach her place of work and was held to be a licensee of the defendants. While crossing the defendants' land she was knocked down and injured by a railway truck which was being negligently shunted on rails which crossed the short cut. There was a notice visible to those using the short cut which in effect stated that the property was private property, that persons thereon were there at their own risk and that no claim would lie against the defendants in respect of their negligence or breach of duty. The Court of Appeal held that the conditions on the notice had been sufficiently drawn to the plaintiff's attention and that the license to use the short cut was subject to those conditions. The decision has been criticised[103] supported[104], and defended with qualifications.[105] On the one hand it is argued that an occupier

101. [1957] 1 Q.B. 409.

102. [1957] 1 Q.B. 409: the facts given here are limited to claim against the first defendants.

103. Gower, (1956) 19 M.L.R. 532 and (1957) 20 M.L.R. 181; Lord Denning M.R., White v. Blackmore [1972] 2 B.Q. 651, 666.

104. Winfield and Jolowicz on Tort, 9th ed. (1971) p. 186; Buckley L.J., White v. Blackmore [1972] 2 Q.B. 651, 670; Roskill L.J., ibid, at 674.

105. Odgers [1957] C.L.J. 39, 54.

cannot both grant a licence and at the same time exempt himself from the liability which he assumes in the capacity of licensor, and on the other hand it is said that is is reasonable that an occupier should be able to say "enter on the terms of my licence or stay out"; while a third view is that it may be reasonable to allow conditions in a licence excluding liability for the state of the premises but not for negligence in respect of activities which the occupier carries on there.

50. If the justification for the decision in Ashdown v. Williams[106] is that an occupier may attach such terms as he pleases to a license to enter his land, that reasoning could not support the imposition of terms as to liability on a trespasser since by definition he has no licence to which terms can be attached. There is no question of the occupier giving the trespasser a "licence to trespass" subject to the term that he is to have no rights against the occupier. Yet if the licensee might, by entering under a conditional licence, be owed no duty of care it would be strange if the trespasser, having no licence to which conditions can be attached, retains the benefit of whatever duty the occupier owes to him. That paradox would not have been apparent at the time when Ashdown v. Williams[107] was decided for it would no doubt have been held that no duty of care was owed to a trespasser; but since Herrington's case it is clear that some duty is owed to a trespasser, so that the paradox, if there is one, must be faced.

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106. [1957] 1 Q.B. 409.

107. ibid.

(b) Exemption only by contract?

51. Whatever the justification for Ashdown v. Williams[108] might have been thought to be, it seems to us to be unrealistic to suppose that a trespasser might, for what seem to be technical reasons, be better off than a licensee in otherwise identical circumstances. In White v. Blackmore[109] Lord Denning M.R. was disposed to think that a licensor could not exempt himself from liability to his licensee except by contract. This would be a possible way to deal with exemption clauses in this situation, and would have the merit of treating licensees and trespassers in the same way: the exemption clause contained in a contract could (subject to whatever control on such clauses might be imposed) take effect, but not otherwise.

52. In practice, however, this would preserve the present anomaly at least to some extent. Lawful visitors would more often be parties to contracts with the occupier than would trespassers. It would only be in somewhat unusual circumstances that a contract between an occupier and a potential trespasser could come into existence whereby the occupier purported to vary or exclude the duty he would otherwise owe if the trespasser entered his land. But such a contract is not impossible; it might arise if, for example, an occupier made a contract with a person to carry out work on a defined part of his land and made it a term of the contract that if that person without his permission entered any other part of his land he was to owe that person no duty as a trespasser. Similarly, a contract for admission to zoological gardens might include a term that the proprietors accepted no liability as occupiers in respect of injury to persons who entered any part of the gardens marked "no admittance". Nevertheless, contracts with trespassers would be exceptional,

108. Ibid.

109. [1972] 2 Q.B. 651, 666.

while contracts with lawful visitors would not be uncommon, and consequently exemption clauses would more often be effective against lawful visitors than against trespassers.

53. Moreover, to restrict effective exemption clauses to those in a contract would make it important to distinguish between contracts on the one hand and agreements which fall short of contracts on the other hand. What is it in an exemption agreement between an occupier and an entrant on to his land that might prevent it being a contract? Presumably an agreement which lacked certainty or any intention to affect the legal relations between the parties would be ineffective as an agreement to exempt the occupier even if, as seems to be the present law, agreements as such are effective.[110] The other distinguishing feature between agreements and contracts would, no doubt, be consideration. It would, we think, be unfortunate if the efficacy of an exemption clause depended on the presence of consideration: this would make technical arguments on matters of little practical significance into decisive issues. It is, furthermore, uncertain whether a distinction between contracts and agreements lacking consideration is realistic in this context: it is at least arguable that every agreement to license entry on exempting terms necessarily contains an element of consideration - the licence in return for the exemption.[111]

54. We therefore reject any attempt to avoid exemption clauses on the ground that they are not contained in a contract.

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110. In Wilkie v. London Passenger Transport Board [1947] 1 All E.R. 258 it was however recognised that conditions to which a licence was subject might affect the legal rights of the parties without having anything contractual about them: see per Lord Greene M.R. at 260. Cf. Gore v. Van Der Lann [1967] 2 Q.B. 31.

111. See Gore v. Van Der Lann [1967] 2 Q.B. 31, 42, per Willmer L.J.

(c) Exemption by contract or agreement?

55. Another way to deal with exemption clauses would be to provide that to take effect they must be contained in a contract or agreement. This would, presumably, involve amending section 2(1) of the 1957 Act by deleting the words "or otherwise" which, incidentally, do not appear in the Occupiers' Liability (Scotland) Act 1960. It is, however, far from clear that this would have any practical effect. It is, no doubt, unreal to suggest that the plaintiff in Ashdown v. Williams[112] "agreed" to the exempting conditions on the notice board, but in deciding whether she was bound by them the Court of Appeal applied the same principles as in the law of contract to find whether reasonable steps were taken to bring the conditions to her notice.[113] Mrs. Ashdown's "agreement" is, then, no more unreal than that of many contracting parties. In all likelihood restricting methods of exemption to contract or agreement would not alter the notice board cases.

(d) A total ban or a reasonableness test?

56. These considerations lead us to think that any regulation of exemption clauses in relation to the liability of an occupier must concentrate more on the particular fact situation and the substantive effect of the exemption rather than on the legal analysis of the method of incorporation. There are, broadly, two possible approaches. One is to render void any attempt to exempt from liability; the other is to subject any exemption to judicial control by a test of reasonableness. In neither case would anything turn on the distinction between trespassers and lawful entrants. We consider these alternative approaches in the following paragraphs.

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112. [1957] 1 Q.B. 409.

113. See Singleton L.J., ibid at 418, Jenkins L.J. at 425 and Parker L.J. at 428-9, all citing Parker v. South Eastern Railway Co. (1877) 2 C.P.D. 416; Burnett v British Waterways Board [1973] 1 W.L.R. 700, 705, per Lord Denning M.R.

(i) An absolute ban

57. The first alternative method of regulation would be to avoid completely any provision seeking to exclude or restrict the duty of reasonable care, or to exclude or limit liability for breach of such a duty, owed to an entrant on land in so far as liability for death or personal injury is concerned. The merits of this proposal are that it recognises that the obligation to be preserved is to do what is reasonable in all the circumstances and that it establishes as a matter of policy that, in relation to the physical safety of the entrant, it can never be reasonable for the occupier to take less than reasonable care. We confine this proposal to death or personal injury because it seems to us that the emphasis of the law should be on encouraging the occupier to take reasonable care for the physical safety of entrants who, by coming on his land, enter an environment under his control. Moreover, whereas insurance for property is relatively easy to obtain on an indemnity basis, personal accident insurance is not very common, is often more expensive than liability insurance taken out by the occupier and does not usually provide a full indemnity.

58. There is, we think, a serious objection to this proposal. An absolute ban on all exempting conditions would interfere with the freedom of occupiers to negotiate appropriate terms with entrants: it might, for example, be entirely reasonable for the occupier of a disused mill to contract with a film company to license them to enter on condition that the entrants would take out the necessary insurance and that the occupier should be relieved of liability. We do not, therefore, support an absolute ban applying to all exempting conditions.

59. There is another way in which an absolute ban on exempting conditions might be imposed. In what was, perhaps, the first legislation to control exemption clauses, the Carriers

Act 1830, Parliament singled out public notices as the subject of a prohibition, leaving carriers free to limit their liability by special contract. We think that, in the context of occupiers' liability, the proper distinction should be between notice boards and tickets on the one hand and individually negotiated documents on the other. A major objection to this approach is that, if occupiers may not impose exempting conditions, the consequence will be that entry will be forbidden. We do not think this is at all likely where entry is encouraged for profit,[114] and we think it somewhat improbable that public authorities would deny the public access to national treasures or amenities on the ground that they could not take reasonable care to see that visitors were safe and that accordingly visitors must come at their own risk or not at all. There is a risk, however, that business or private landowners might be reluctant to admit visitors (for example, to picnic or take a short cut) if exempting notices or tickets were ineffective. But in our view this risk does not outweigh the compelling reasons given in paragraph 57 in favour of a ban. We therefore put forward for consideration the proposition that, in relation to death or personal injury, there should be an absolute ban on exemption conditions contained in notices and in tickets,passes, programmes and similar documents of admission.

(ii) Reasonableness test

60. Before considering whether there should be a reasonableness test applicable to any attempts to exclude or limit liability to all categories of entrants, there is a preliminary

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114. As in White v. Blackmore [1972] 2 Q.B. 651 where the jalopies were raced for charitable purposes. In that case the organisers had insured against accidents: per Lord Denning M.R. at 667.

point which requires attention. It is not enough to show that an attempted exclusion or limitation is reasonable. It must in the first place be binding on the entrant. We have pointed out in paragraph 55 that in Ashdown v. Williams the Court of Appeal applied the same principles to a licensee as would have been applied to a contracting party in order to determine whether the conditions were binding on the plaintiff, namely, whether reasonable steps had been taken to bring the conditions to her notice; and in paragraph 50 we have indicated the technical problem that arises in deciding whether a trespasser can be bound by conditions. While admitting the existence of that problem, it seems to us unacceptable for the question whether a notice was binding or not to depend on whether the entrant was a lawful visitor or a trespasser. It would surely be anomalous if a person in the position of Mrs. Ashdown had to argue that she was a trespasser in respect of whom there was a breach of duty rather than a lawful entrant in order to avoid being bound by the notice. We therefore conclude that if an occupier takes reasonable steps to bring exclusion or limitation terms to the notice of any entrant, including a trespasser, then those terms should be binding on the entrant subject to the possibility of control by the courts of the reasonableness of the exclusion or limitation provisions, which we consider in the following paragraphs.

61. The provisional proposals in Working Paper No. 39 contemplated the possibility of a reasonableness test which would apply only to provisions seeking to exempt an occupier who allowed visitors to enter his premises as part of his business activities.[115] We are now concerned with occupiers generally since, although private persons only rarely introduce exemption clauses into contracts, it is more common for private landowners, or business landowners otherwise than in

115. Working Paper No. 39, para. 81.

connection with their business activities, to make use of exempting conditions on notice boards. The proposal we are now considering would, therefore, be in addition to any recommendations that we may make in relation to visitors entering as part of the occupier's business activities in our final report resulting from Working Paper No. 39.

62. In our view there is much to be said for a reasonableness test to be applied to terms purporting to exclude or restrict, or having the effect of excluding or restricting, the occupier's duty of care or any liability for breach thereof. That is to say, such terms would not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on them. The advantage - perhaps the only advantage - that this proposal has over the absolute ban that we have provisionally rejected is its flexibility. It is no doubt true that flexibility necessarily involves some degree of uncertainty, but the fact that the fixed and certain rule might in some circumstances be unjust persuades us that the flexible approach would be preferable. We therefore provisionally suggest that, subject to our proposal in paragraph 59, there should be such a reasonableness test applied to all attempts by occupiers to exempt themselves from liability, but this is a matter upon which we should, of course, welcome views.

63. The proposals put forward in the preceding paragraphs, upon which views would be welcomed, may be summarised as follows:

(a) There should be no absolute ban on exempting conditions in relation to occupiers' liability to entrants in all circumstances; but

(b) In relation to death or personal injury, there should be an absolute ban on exempting conditions contained in notices and in tickets, passes, programmes and similar documents of admission.

(c) In all other cases, a reasonableness test should be applied to terms purporting to exclude or restrict, or having the effect of excluding or restricting, the occupier's duty of care or any liability for breach thereof.

(d) If the proposal in (b) lacks support or otherwise proves to be unacceptable, a reasonableness test as outlined in (c) should apply to all terms purporting to exclude liability.

(e) Notices as fulfilment of the duty of care

64. These proposals do not, in our view, affect the operation of notices as warnings of danger. A notice, having regard to its position and the character and specificity of its terms, is part of the general circumstances which have to be taken into account in determining whether the occupier has discharged his duty. We envisage therefore that the principle laid down in section 2(4)(a) of the Occupiers' Liability Act 1957 - that a warning of itself does not absolve the occupier from liability unless it is enough to enable the visitor to be reasonably safe - should remain and that it should apply to all entrants, lawful or unlawful. It might also be a relevant factor for the court to take into account in considering whether an exemption is reasonable.

(f) Assumption of risk

65. Section 2(5) of the Occupiers' Liability Act 1967 preserves in relation to the common duty of care the common law principles of assumption of risk[116], and no doubt would be relevant whether the entrant was a lawful visitor or a trespasser. There is a close relationship between exempting conditions and an assumption of risk[117], but in our view the approach to the interpretation of words having a consensual effect is quite inappropriate to the question of whether the plaintiff genuinely assumed the risk of negligence. As Wills J. said "if the defendants desire to succeed on the ground that the maxim 'volenti non fit injuria' is applicable, they must obtain a finding of fact 'that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it'".[118] Put in this way it is difficult to see how the doctrine of assumption of risk could ever be relevant to occupiers' liability unless there is a warning which, in accordance with the principle in section 2(4)(a) of the 1957 Act, enabled the court to find that the occupier had discharged his duty of care. Our provisional

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116. Section 2(5) reads: "The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)".

117. See, for example, Bennett v. Tugwell [1971] 2 Q.B. 267; Winfield and Jolowicz on Tort 9th ed. (1971) p. 625 n. 14.

118. Osborne v. London and North Western Railway Co. (1888) 21 Q.B.D. 220, 223-4, (emphasis added) citing Lord Esher M.R. in Yarmouth v. France (1887) 19 Q.B.D. 647; Burnett v. British Waterways Board [1973] 1 W.L.R. 700, 705, per Lord Denning M.R.

view is that there is no room for the doctrine of assumption of risk in this area of the law. There may be a warning enabling the entrant to be reasonably safe; there may be no negligence on the part of the occupier having regard to the degree of care that would ordinarily be looked for on the part of the entrant;[119] there may be exempting conditions binding on the entrant on which it is fair and reasonable for the occupier to rely; there may be contributory negligence on the part of the entrant which might, in the extreme case where an accident was entirely his fault, lead to a finding that he was 100 per cent to blame. But if none of these is present, we do not think that it should be open to a court to dismiss the entrant's claim on the ground of assumption of risk. We therefore provisionally propose that section 2(5) of the 1957 Act should be repealed and the defence of assumption of risk abolished in this context.

IX Summary of provisional proposals and questions for comment

66. Our provisional proposals for reform of the law in the sphere of the liability of occupiers to trespassers may be summarised as follows:

(1) New and uniform provisions should be made in relation to all categories of 'non-visitors', that is, those persons who were excluded from the ambit of the Occupiers' Liability Act 1957. These categories comprise, in addition to trespassers, -

(a) those entering upon land in exercise of rights conferred by virtue of an access agreement or order under section 60(1) of the National Parks and Access to the Countryside Act 1949 (paragraph 37); and

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119. See s. 2(3) of the 1957 Act.

(b) Subject to certain clarification as to who should be regarded as an occupier in respect of public rights of way, those lawfully using a public or private right of way over land (paragraphs 38-40).

(2) The necessary provisions may take one or other of two forms:

(a) If it is desired to impose on the occupier an obligation to show reasonable care towards any entrant (including those referred to in (1) above) on his land, leaving the fact that the entrant was, for example, a trespasser to be taken into account in deciding whether the care shown was reasonable in the circumstances, the Occupiers' Liability Act 1957 may be amended to bring all entrants within the common duty of care at present owed only to "visitors" within the meaning of that Act.

(b) If, on the other hand, it is desired to retain the question of whether there is a duty of care towards a trespasser as a matter of law for the courts, this may be achieved by adding three provisions to the Occupiers' Liability Act 1957 to the effect that -

(i) the mere relationship of occupier and trespasser does not of itself give rise to a duty of care; but

(ii) an occupier owes a duty of care to any trespasser whom, in the light of all the circumstances, he ought as a reasonable man to have in contemplation as likely to be affected by his acts or omissions; and

(iii) the determination of whether there is in the particular case a duty of care owed to a trespasser is a matter of law to be decided by the court.

Of these alternatives, provisionally we prefer the first (paragraph 43).

(3) In regard to exemption clauses relating to occupiers' liability to all entrants, whether trespassers or not -

(a) There should be no absolute ban on exempting conditions in relation to occupiers' liability to entrants in all circumstances; but

(b) In relation to death or personal injury, there should be an absolute ban on exempting conditions contained in notices and in tickets, passes, programmes and similar documents of admission.

(c) In all other cases, a reasonableness test should be applied to terms purporting to exclude or restrict, or having the effect of excluding or

restricting, the occupier's duty of care or any liability for breach thereof.

(d) If the proposal in (b) lacks support or otherwise proves to be unacceptable, a reasonableness test as outlined in (c) should apply to all terms purporting to exclude liability (paragraph 63).

(4) The defence of assumption of risk should be abolished in relation to occupiers' liability (paragraph 65).

67. We indicated at the outset of this Paper that we welcome comment upon the provisional proposals summarised in the preceding paragraph, comment which the recipients of the Paper may wish to extend so far as to suggest alternative methods of dealing with the problems with which the Paper is concerned. We should, however, welcome comment upon the following matters in particular, some of which are embodied as elements of the proposals themselves and others which we have considered in the course of reaching our conclusions.

(1) Is it right that the distinction made in some of the speeches in Herrington's case between the concepts of "humanity" and "reasonableness" is one which is not likely to be satisfactory or workable in future legislation, particularly having regard to the differing standards which the House of Lords accorded to the concept of "humanity" (paragraphs 19, 21, 30 and 36)?

(2) Are we right in our view that the standard of care required of an occupier should not differ

according to his financial resources (paragraphs 30 and 36)?

(3) Are we right in the provisional view we have taken that persons exercising rights under the National Parks and Access to the Countryside Act 1949 and public or private rights of way should be included within the categories of non-visitors to which our proposals apply. And, if so, have we dealt satisfactorily with the question of occupancy in relation to public rights of way (paragraph 37-40)?

(4) Are we right to reject additional guidelines in relation to our proposal in paragraph 43 above which might be thought relevant in determining, upon the first alternative proposal set out in that paragraph, whether the conduct of a non-occupier has been reasonable in regard to injury or damage suffered by a trespasser (paragraph 43)?

(5) Should, as we propose, specific provision be made for damage to the non-visitor's property (paragraph 44)?

(6) Is it right that there should be, in relation to death or personal injury, an absolute ban on exempting conditions contained in notices and in tickets, passes, programmes and similar documents of admission, and a reasonableness test on other exempting conditions (paragraphs 57-62)?

(7) Should the defence of assumption of risk be abolished in relation to occupiers' liability (paragraph 65)?

APPENDIX 1

OCCUPIERS' LIABILITY ACT 1957 (c. 31)

Sections 1, 2 and 5

Liability in tort

Preliminary

1.—(1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

(a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and

(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

(4) A person entering any premises in exercise of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not, for the purposes of this Act, a visitor of the occupier of those premises.

Extent of occupier's ordinary duty

2.—(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

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

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

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

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps

(if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purposes in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

Liability in contract

Implied terms in contracts

5.—(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

(2) The foregoing subsection shall apply to fixed and moveable structures as it applies to premises.

(3) This section does not affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

(4) This section does not apply to contracts entered into before the commencement of this Act.

APPENDIX 2

Liability to trespassers: the law in other countries*

(i) Scotland

1. The basis of delictual liability for injury in Scotland is the generalised concept of culpa, which has been derived and developed from the Aquilian action in Roman Law.[1] And the Roman Law has been characterised by Buckland[2] as having:

> "..... had no such conception as 'duty to take care'. The principle was that not taking the care which a reasonable man would take in the circumstances, as they were or should have been present to his mind, was culpa, and if damage to property resulted there was liability, the only question being that of what we call Remoteness. The liability of an occupier for damage did not turn on the question of whether the person who suffered was a trespasser or not, but on the question whether a reasonable person would have contemplated the possibility that someone might be there. It did not turn on his right to be there. This seems the more rational doctrine..."

2. As in Roman law, mere trespass is not in itself a civil wrong in Scotland. This fact has affected the attitude of Scots law towards injured trespassers.[3] In the first

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* See para. 33 above.

1. T.B. Smith, Studies Critical and Comparative (1962), p. 154.
2. "The Duty to Take Care", (1935)51 L.Q.R. 637, 639-640.
3. Compare the importance which Lord Pearson in Herrington's case [1972] A.C. 877, 925 put on the fact that trespass was "a form of misbehaviour".

reported Scottish case where an occupier was held liable for a fatal accident on his dangerous premises[4] the deceased would have been a trespasser under English law. Before Addie v. Dumbreck[5] reached the House of Lords, Lord President Clyde[6], when the case was before the Court of Session, said:

> "The word 'trespasser' is apt, in Scotland, to be a question-begging term in connection with questions of this kind. It means with us nothing more than a person who intrudes on the lands of another without that other's permission[7], and it does not involve or imply the commission of any legal offence."

The effect, therefore, of the House of Lords' decision was to introduce into Scots law a hitherto unfamiliar categorization of entrants upon land into invitees, licensees and trespassers and to make liability towards them dependent on the category in which the entrant fell. There was, however, a return to the earlier simplicity of Scots law in the Occupiers' Liability (Scotland) Act 1960, section 2(1) of which provided as follows:

> "The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or

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4. Black v. Cadell (1804) Mor. 13905; (1812) 5 Pat. App. 567.
5. [1929] A.C. 358.
6. Dumbreck v. Addie & Sons Collieries 1928 S.C. 547, 554.
7. Lord Sands (ibid., 557) referred to intrusions of this kind in a memorable turn of phrase when he said that the laird should be aware that in spite of his precautions

> "....people will stroll up surreptitiously from time to time in search of white heather or cranberries, and boys will come guddling up the burn."

> to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger."

3. The author of a leading Scottish textbook on the law of delict[8] explains the effect of the Scottish Act as follows:

> "Each case must be treated wholly as a question of fact, the degree of entitlement the visitor had to come on the premises being no more than a factor to be considered in determining whether or not the occupier had taken reasonable care for his safety."

And in regard to "reasonable care" under the Act he says[9]:

> "The three strictly distinguished categories of visitors on premises have no longer any existence in Scots law, and there is no longer any need to categorise visitors. But the precise degree of care which 'in all the circumstances of the case is reasonable' will still, it is thought, depend in part on the extent of the legal right, if any, which the visitor had to come on the premises because that materially affects the occupier's foresight of possible harm, and it is thought that 'reasonable care' towards persons invited, expressly or impliedly, or permitted to come on the premises will still be materially higher than towards trespassers, who have neither invitation nor permission nor any other legal right to come on the premises, and whose presence, if known, would be objected to and not tolerated. They come, if at all, unasked and unwanted. In short the existence of some legal right for coming on the premises is a material factor among 'all the circumstances of the case'".

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8. Walker, The Law of Delict in Scotland (1966), vol. II, p. 589.
9. ibid., p. 596.

4. The only reported decision of the House of Lords on the Scottish Act of 1960, M'Glone v. British Railways Board[10] was against the trespasser, a 12 year old boy, who had climbed a structure supporting a transformer. The transformer was protected on three sides by a six to seven foot unclimbable wire-mesh fence and on the fourth side by a vertical eight-foot rock face, save for two gaps of four to five feet across which only five strands of barbed wire were stretched. On the three fenced sides there were also warning notices. From the sloping part of the railway cutting (used for many years as a playground by children without serious steps by the British Railways Board to exclude them) the boy easily got through one of the gaps and in climbing the structure suffered severe electric shock. On these facts the decision of the House of Lords hardly suggests that the Scottish Act imposes an impossibly high standard of care on the occupier; it is noteworthy that the same decision on the care required by section 2 of the Occupiers' Liability (Scotland) Act 1960 had in M'Glone v. British Railways Board already been reached by the First Division of the Court of Session.

(ii) Australia

5. Courts in Australia have for some time showed a notable lack of enthusiasm for the test of liability towards trespassers laid down in Addie v. Dumbreck.[11] In Thompson v. Bankstown Corporation[12] in 1953 the High Court of Australia treated the case of a thirteen year old boy trespassing on the defendant's pole, which carried high tension cables, as one involving the liability of a dangerous operator rather than

10. 1966 S.C. (H.L.) 1.
11. [1929] A.C. 358.
12. (1953) 87 C.L.R. 619.

of an occupier.[13] In Rich v. Commissioner for Railways (N.S.W.)[14] in 1959, Windeyer J. generalized this approach in saying that "the duty to a trespasser is a duty to a person who may also be a neighbour in the sense in which Lord Atkin used the word in discussing the extent of the duty of care in Donoghue v. Stevenson". And in Commissioner for Railways (N.S.W.) v. Cardy[15] in 1960 Dixon C.J. asked:

> "Why should we here continue to explain the liability which [English] law appears to impose on terms which can no longer command an intellectual assent and refuse to refer it directly to basic principle?"

The latter he expressed as follows:

> "a duty of care should rest on a man", [independent of the issue of trespass,] "to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge."

6. These Australian developments were checked, but not in the event suppressed, by the decision of the Privy Council in Commissioner for Railways v. Quinlan[16] in 1964 in which the relationship of occupier and trespasser was again stated, as in Addie v. Dumbreck, to give rise to an exclusive and strictly limited liability, a standpoint which the Privy

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13. An approach similar to that of the English Court of Appeal in Videan v. British Transport Commission [1963] 2 Q.B. 650.

14. (1959) 101 C.L.R. 135, 159.

15. (1960) 104 C.L.R. 274, 285-86.

16. [1964] A.C. 1054.

Council reaffirmed in Commissioners for Railways v. McDermott[17] in 1967. These Privy Council decisions were, of course, binding on Australian courts, but in Munnings v. Hydro-Electric Commission[18] in 1971 the High Court of Australia succeeded in distinguishing them as far as the instant case was concerned. The eleven year old plaintiff climbed a metal and concrete pole owned by the defendant Commission. He came in contact with a wire carrying high-voltage electricity, and was seriously injured. The pole stood on unfenced vacant land, not owned by the defendant, on the outskirts of a suburb. The plaintiff was not a trespasser upon the land, but technically had trespassed on the defendant's pole. However, the High Court decided that the occupier-trespasser relationship was not appropriate to describe the relationship between the plaintiff and the defendant. Barwick C.J.[19] said:

> "The responsibility for the accident in this case was, in my opinion, that of a person who brings a dangerous substance into proximity of members of the public. The relevant relationship of the parties was that of an operator of a commercial undertaking involving the employment of electricity and a member of the public. The obligation of the respondent, in my opinion, was to take reasonable steps to deny to the public access to the uninsulated conductors."

Windeyer J.[20] said:

> "The Commission relied simply on the fact that [the plaintiff] was in law engaged in a trespass. That he was. But is that an end of his case? I think not, for three main reasons. One is that I gravely doubt whether the rules that deny a right of action for negligence to a trespasser on land are applicable to trespasses of other kinds.

17. [1967] 1 A.C. 169.
18. (1971) 45 A.L.J.R. 378.
19. ibid., 381-82.
20. ibid., 387-88.

> Another is that I think they are not applicable in the case of a negligent omission to deter, warning or impediments, unauthorised persons coming to a place where the defendant has a dangerous thing. The third is that, even in cases where the only relevant relationship is that of land occupier and intruder, the law distinguishes among intruders: and in cases of children who trespass the rigor of the law is tempered to them."

He accepted that:

> "..... an occupier's immunity from actions by trespassers covers the whole of his premises, including all buildings and other structures there. But to apply it to a pole owned by one person which is standing on another person's land, and call the owner of the pole an occupier seems to me to be a far-fetched and doctrinaire reliance upon a concept that is really alien to this situation. I do not mean to say that climbing the pole was not a trespass."

On the facts agreed by the jury, the Court found that the defendant had been negligent. However, Windeyer J. regretfully recognised that if he had been obliged to hold that the parties had been in an occupier-trespasser relationship, Quinlan's case was binding, and that the Australian courts

> "must not seek to subordinate the categorical rules of occupier's liability to the general and more generous doctrines of the law of negligence and of a common duty of care based on foreseeability of harm. For Australia as a whole that must now await the tardy action of seven Parliaments".

7. Another successful attempt to escape the legal straitjacket imposed by the Privy Council in Commissioner for Railways v. Quinlan[21] was made by the High Court of Australia in

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21. [1964] A.C. 1054.

Cooper v. Southern Portland Cement Ltd.[22] in 1972, when the High Court was able to take into consideration the decision of the House of Lords in Herrington's case. Barwick C.J.[23] considered that Quinlan's case only dealt with the bare relationship of occupier and trespasser; on it could be superimposed another and displacing relationship "in line with the traditional use of a sense of humanity". That relationship arose when the occupier (i) has introduced or maintained on his land a thing, or substance, or a situation highly dangerous to life or climb and (ii) has expected or ought to have expected the presence of persons likely to be injured thereby. Where that relationship existed there was a duty on the occupier to take reasonable steps to protect the plaintiff from harm by, for example, adequate fencing or warnings. In this insistence on a special relationship as necessary to displace the bare relationship of occupier and trespasser with its minimal duty to a trespasser, Barwick C.J.'s approach is close to, and in some respects develops, the view expressed by Lord Wilberforce in Herrington's case. A judgment in somewhat similar terms was delivered by Menzies J. who said[24] :

> "The law as stated in Addie's case has been modified or at least developed. The development is, I think, that an occupier of land, who is responsible for creating or maintaining thereon something which is very dangerous, is bound to act in a humane way towards trespassers who he knows will, or will probably, come upon his land, and who, unless reasonable precautions are taken for their protection, are likely there to suffer serious harm. Whether, in a particular case, it is probable that strangers will trespass and the extent of the precautions to be taken for the protection of trespassers depends upon a comprehensive examination of all the relevant circumstances."

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22. (1972) 46 A.L.J.R. 302.
23. ibid., 304-12.
24. 46 A.L.J.R. 302, 318.

Barwick C.J. and Menzies J. were supported in allowing the appeal by McTiernan J., although by different and more traditional reasoning, namely that Commissioner for Railways v. Quinlan did not apply where a child is attracted on to land by a dangerous "allurement"; and Walsh J. dissented, taking the view that, in so far as Herrington's case was inconsistent with Quinlan's case, he was not at liberty to follow it.[25]

8. A preliminary step in the "tardy action of seven Parliaments", referred to by Windeyer J. in Munnings v. Hydro-Electric Commission[26] in 1971, had already been taken in 1969 by the New South Wales Law Reform Commission when it published a Working Paper on Occupiers' Liability. Although primarily concerned with the law in New South Wales as it affects lawful visitors (the State not yet having adopted a statute similar to the English Occupiers' Liability Act 1957) the Working Party also dealt with an occupier's liability to trespassers. The Paper proposed[27] that legislation

> "..... should in effect (a) require the judge to determine whether a duty of care by the occupier to the visitor [which would include a trespasser] arose in the circumstances of the case on modern common law principles, (b) provide where such a duty is determined to exist it shall be an ordinary duty of care."

And in explaining the particular application of these proposals to the liability of an occupier towards a trespasser the

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25. ibid., 323.
26. (1971) 45 A.L.J.R. 378; see para. 6 above.
27. Para. 48 of the Working Paper.

Commission said[28]:

> "Since recent history demonstrates that the confining of the duty of an occupier to a trespasser to intentional harm is unacceptable alike to the judiciary and the general community, we are disposed to think that the proper course is to provide for an ordinary duty of reasonable care to be imposed in appropriate circumstances. The question then becomes whether an attempt should be made to define these circumstances or to leave them largely to judicial development, but a judicial development untrammelled by rules relating to trespassers surviving from an earlier period and distorted in an unsuccessful attempt to make them meet the present needs of the community. It is the latter course..... which we are presently inclined to prefer. For the fate of rigid rules in this area of the law has been sad and the fate of litigants caught in their toils more so."

The Commission emphasised[29] that they were not recommending that a common duty of care should be imposed ipso facto on occupiers in relation to lawful visitors (as under the English Occupiers' Liability Act 1957) or in relation to trespassers. The appropriateness of a duty of care would have to be considered by the judge as a question of law in each case. Envisaging the trial of a trespasser's action by jury, they did not think the judge could exercise enough control over the case if this was limited merely to his finding that there was insufficient evidence of lack of reasonable care for the question of liability to be put to the jury. The occupier-entrant relationship would not therefore automatically give rise to a duty of care; the imposition of a

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28. ibid., para. 50.
29. ibid., paras. 46-7.

duty of care would depend on

> ".....whether the entrant in all the existing circumstances was reasonably entitled to expect that the defendant occupier would as a reasonable man regulate or modify his conduct in respect of the protection of the entrant from the damage which he suffered."[30]

But once a duty of care had been held to govern the relationship of the particular occupier and the entrant, the test which the Commission proposed to determine whether the duty had been fulfilled was:

> "whether the occupier had exercised such care as in all the circumstances of the case could be reasonably expected of him in respect of the protection of the entrant from the damage complained of."[31]

(iii) New Zealand

9. Following the Occupiers' Liability Act 1962, New Zealand law in regard to the obligations of occupiers towards lawful visitors is practically identical with English law. As far as occupiers' liability towards trespassers is concerned, New Zealand law is governed by the decisions of the Privy Council in Commissioner for Railways v. Quinlan[32] and

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30. ibid., para. 54. They preferred this approach to one which makes the test dependent on the defendant's foresight as a reasonable man of danger to the plaintiff, pointing out that "particularly in relation to trespassers, there may be cases where it would be proper to hold that a reasonable man would consider himself entitled to subject the entrant to whatever risk there was in order to carry on an activity free from interruption."

31. ibid., para. 76. The Commission explain that they wish to make it clear that full knowledge of the danger by the plaintiff is not necessarily a good defence and that an obligation to exercise reasonable care does not always involve doing all in one's power to make an entrant safe.

32. [1964] A.C. 1054.

Commissioner for Railways v. McDermott.[33] In 1970, however, proposals for a change in the law governing such liability to trespassers were made in the Report presented to the Minister of Justice by the New Zealand Torts and General Law Committee. A minority of the Committee[34] favoured the adoption of the Scottish law as regards liability to trespassers. New Zealand resembles Scotland in normally trying personal injury actions by jury, and the majority feared that the plaintiff would always succeed once he had enlisted the sympathy of the jury and that it would be almost impossible for a defendant to win an appeal on the ground that there was no evidence of negligence to go to the jury.[35] The majority therefore attempted to divide trespassers into two categories, "protected" and "unprotected", according to a classification and with consequences which are summarized in the succeeding paragraph.

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33. [1967] 1 A.C. 169.

34. Report, para. 11.

35. But perhaps a little inconsistently the Report admits that enquiries of the Scottish Law Commission did not suggest that trespassers had in fact been unduly favoured, some weight being attached to the power of a Scottish judge (not applicable, it would seem, in New Zealand) to withhold a case from a jury where the pursuer's pleadings were "of doubtful relevance", as, for example, where it was doubtful whether a jury would be entitled on the facts to find that the occupier would reasonably have foreseen the pursuer's presence and injury. Furthermore, as Mr. North points out in Occupiers' Liability (p. 193) in two cases where the English Court of Appeal in effect applied a Scottish "reasonable care" test rather than the strict Addie v. Dumbreck formula (i.e. Videan v. British Transport Transport Commission [1963] 2 Q.B. 650 and Kingzett v. British Railways Board (1968) 112 Sol. J. 625) it did not hold that the defendants were in breach of their duty.

10. The Committee recommended that all unlawful entrants should qualify as "protected" trespassers unless:

(a) They were 16 years old or more, and

1) entered the premises or were present on the premises when that entry or presence was itself an offence punishable by imprisonment (other than an offence under section 3 of the Trespass Act 1968); [36]

or ii) they entered the premises in the course of committing an offence punishable by imprisonment;

or iii) they suffered injury on the premises in the course of committing such an offence, or while leaving or attempting to leave after its commission;

or (b) they were adequately warned of the danger existing on the premises, and suffered injury caused by that very danger. A person should be deemed to be adequately warned if he was personally told of the existence and nature of the danger or if a notice was erected outside, or affixed to, the premises and so positioned and worded as to give reasonable warning of the danger to persons likely to enter the premises, and intelligible to persons likely to read it (whether or not the plaintiff actually read it). The court should be required to have regard to the age and understanding of the trespasser when deciding whether or not the warning was adequate in all the circumstances;

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36. This Act makes it an offence punishable by a $200 fine or up to three months' imprisonment if a person wilfully trespasses on any place and neglects or refuses to leave that place after being warned to do so by the owner or occupier. The Committee thought that offenders under section 3 should remain protected trespassers while they are making their way off the property, unless they have been adequately warned or actually know of a hazard to be encountered on the property.

or (c) they knew of the existence and nature of a danger existing on the premises and suffered injury caused by that very danger.

(iv) Canada

11. Canadian courts follow the common law, as it existed in England and New Zealand before their respective Occupiers' Liability Acts. The liability of an occupier towards entrants upon his property has depended on whether he was an invitee, a licensee or a trespasser and, although there has been criticism to some extent from the Bench[37], and more noticeably from academic lawyers[38], regarding the rigidity of these categories, there has on the whole been less tendency than in some other common law jurisdictions to seek to evade them. As far as liability towards trespassers is concerned, it was held as long ago as 1911 by the Privy Council in an appeal from Canada[39] that "a man trespasses at his own risk" and that the occupier will be liable only if:

> "the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care..... In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care."

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37. Bryan M.E.M. McMahon in a forthcoming article (in the July 1973 issue of the I.C.L.Q.) on "Occupiers Liability in Canada" draws attention to a number of decisions of O'Halloran J.A. in British Columbia: Power v. Hughes [1938] 4 D.L.R. 136; Kennedy v. Union Estates Ltd. [1940] 1 D.L.R. 662; Crewe v. North American Life Assurance Co. and Stair Publishing Co. Ltd.; Ingle v. Mason (1946-47) 63 B.C. 481.

38. See e.g. Harris, "Occupiers' Liability in Canada", in Studies in Canadian Tort Law (1968), pp. 250-302. The most recent study is by McMahon (see n. 37 above) to which this part of the Appendix is much indebted.

39. Grand Trunk Railway Co. v. Barnett [1911] A.C. 361, 370.

Some later cases appear to have made even less concession to the claims of the injured trespasser.[40] It is true that the courts have from time to time employed one or other of the devices familiar to English law - implied licence, a higher standard in respect of activities than for static conditions, the application of Donoghue v. Stevenson principles in favour of a trespasser against a non-occupier and a generous interpretation of "recklessness" - as ways of improving the protection given to the trespasser. But it seems that the courts have generally speaking been slow to resort to them even when the opportunity offered.[41]

12. As far as reform by legislation is concerned, the most recent development is the Report on Occupiers' Liability of the Ontario Law Reform Commission in 1972. The Commission, reporting before the decision of the House of Lords in Herrington's case[42], and being "impressed with the logic of the judgments [in Herrington's case before the Court of Appeal[43]] and the decided preference of the three judges..... for the approach taken in the Scottish Act", recommended that

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40. See e.g. Knight v. Martelle (1966) 53 D.L.R. (2d) 390 - (Ont. C.A.), a case of an unguarded fire left burning in a yard. A four year old trespasser spilt inflammable liquid also left there and was burned. In refusing relief the Court said: "The unfortunate plaintiff who has been so seriously injured deserves the greatest sympathy, but the courts cannot permit humane sentiments to deter them from observing legal landmarks and giving effect to well-settled grounds of legal liability even if it be said that they are putting property above humanity".

41. e.g. Graham v. Eastern Woodworkers (1959) 18 D.L.R. (2d) 260 where a nine year old plaintiff climbed on to a railway box-car and was severely injured when his head came in contact with an uninsulated cable. Children had been frequently warned off the site but no licence was implied; the car had been moved to a position nearer the power line a few days before but the case was treated as one of a static condition not an activity; and the conduct of the defendant was not treated as reckless.

42. [1972] A.C. 877.

43. [1971] 2 Q.B. 107.

occupiers should be subject to a common duty of care as regards all entrants, including trespassers. The duty would be "to take such care as in all the circumstances of the case is reasonable to see that the person [entering on the premises] and his property will be reasonably safe in using the premises for the purposes contemplated by the occupier". The duty would specifically cover dangers caused by the condition of premises as well as by operations on the premises. Furthermore, unlike the proposals of the New Zealand Torts and General Law Reform Committee, the recommendation of the Ontario Law Reform Commission would not in principle exclude the occupiers' liability for any particular category of entrant whose claim might be thought undeserving. But there would for example "in normal circumstances" be no liability to a burglar because an occupier, on principles of foreseeability used by the courts in ordinary negligence cases, would not reasonably be expected to foresee the presence of a burglar on his premises at night.

13. A somewhat similar draft Bill (although less detailed) to that proposed by the Ontario Law Reform Commission in implementation of its proposals has been put forward by the Commissioners on Uniformity of Legislation in Canada[44], but the earlier recommendations in 1969 of the Institute of Law Research and Reform of the University of Alberta[45] were much less far-reaching. Subject to special provision for child

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44. Printed as Appendix D of the Ontario Law Reform Commission's Report.

45. Report No. 3 on "Occupiers' Liability" of the Institute of Law Research and Reform of the University of Alberta. The Report departed from the recommendation of Mr. D.C. Macdonald who, in respect of trespassers, recommended either that the trespasser should be included within the protection of a "common duty of care" covering invitees and licensees or that he should be protected by the more complex structure of duties owed to trespassers according to the American Restatement of the Law of Torts. As to the latter, see paras. 14 and 15 of this Appendix.

trespassers, the Institute envisages liability of occupiers towards trespassers only in respect of wilful or reckless conduct. Even as regards child trespassers, the Institute expressly declined extending to them a general duty of care under the principle of Donoghue v. Stevenson. The recommendation made in respect of child trespassers was as follows:

> "That where an occupier knows or has reason to know that there are trespassing children on his premises and that conditions or activities on the premises create a danger of death or serious bodily harm to those children, the occupier should be under the common duty of care towards them; in determining whether the duty has been discharged consideration should be given to the youth of the children and their inability to appreciate the risk and also to the burden of eliminating the danger or protecting the children as compared to the risk to them."

This recommendation was based on section 339 of the American Law Institute's Restatement of the Law of Torts (2d), which, together with other sections dealing with liability to trespassers, is discussed in the succeeding paragraphs.

(v) United States of America

14. Although the general rule in the different United States jurisdictions regarding occupiers' liability to trespassers is that the occupier is under no duty to exercise reasonable care in respect of the condition of the land or activities there carried on[46], in most States a series of factual situations have been specified in which the occupier

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46. See Restatement of the Law of Torts (2d), section 333: "Except as stated in sections 334-39, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care: (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them".

is under a duty to exercise reasonable care[47] towards a trespasser. As summarised in the Restatement of the Law of Torts (2d)[48] these situations cover such a wide variety of circumstances that in total effect they come very close to establishing a general duty of reasonable care towards trespassers. They fall short of such a duty, however, in two important respects. First, there are situations which do not fall within any of the specified ones. For example, an occupier will owe no duty of reasonable care to an adult trespasser in respect of the condition of his land if (a) he does not know or should not know from facts within his knowledge that trespassers constantly intrude upon a limited area of the land or (b) the condition is (i) not one which he has created or maintained[49] or (ii) not, to his knowledge, likely to cause death or serious bodily harm to such trespassers or (iii) is of such a nature that he has reasonable grounds for believing that such trespassers will discover it or (c) the occupier has exercised reasonable care in warning such trespassers of the condition and the risk involved. The question, however, thus arises whether such an elaborate preliminary legal framework is necessary to prevent recovery by a trespasser in situations where he would in any event be

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47. It is noteworthy that use is not made of the concept of "humanity" as did the House of Lords in Herrington's case.

48. Prosser (Torts, 4th ed. 1971, p. 366) assumes that the relevant sections in the second edition of the Restatement (1965) will be generally accepted by the courts, as were the slightly different corresponding sections of the first edition (1939).

49. i.e. a natural condition of land. As appears from para. 15 below, the Restatement liability is, in respect of liability for conditions, limited to artificial ones. As Prosser, op. cit., (n. 48 above), says, it is difficult to see why there should not in some circumstances be liability even for a natural condition when the cost or effort of giving a warning against it is very slight and the risk and the potential harm very great.

unlikely to recover, even if the occupier owed him an ordinary duty of reasonable care, with the normal limitation on the plaintiff's right of recovery to the extent of his contributory negligence. Secondly, the categorized situations involve the use of a variety of legal concepts, of imprecise meaning and with very fine distinctions between them[50], which would seem likely to invite somewhat sterile verbal dispute in borderline cases, whereas the duty to behave reasonably, although necessarily flexible, is referable to the experience and values of the reasonable man - an abstract, but not in any particular case unknowable, standard.

15. According to the Restatement there is liability of an occupier to a trespasser in the following situations:

> s.334 Activities Highly Dangerous to Constant Trespassers on Limited Area
>
> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.
>
> s.335 Artificial Conditions Highly Dangerous to Constant Trespassers on Limited Area
>
> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability

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50. Thus "constant intrusion upon a limited area" has to be distinguished from "presence" on the land of the occupier; "activities" from "conditions" (on the difficulty of distinguishing them see e.g. Cross L.J. in Herrington's case [1971] 2 Q.B. 107, 140: "I cannot think that anyone would have thought of drawing [the distinction] but for the hope of thereby circumventing Addie's case"); and "a force..... in the immediate control" of an occupier from other situations.

for bodily harm caused to them by an artificial condition on the land, if

(a) the condition

(i) is one which the possessor has created or maintains and

(ii) is, to his knowledge, likely cause death or serious bodily harm to such trespassers and

(iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and

(b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

s.336 Activities Dangerous to Known Trespassers

A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.

s.337 Artificial Conditions Highly Dangerous to Known Trespassers

A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if

(a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and

(b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved.

s.338 Controllable Forces Dangerous to Known Trespassers

A possessor of land who is in immediate control of a force, and knows or has reason to know of the presence of trespassers in dangerous proximity to it, is subject to liability for physical harm thereby caused to them by his failure to exercise reasonable care

(a) so to control the force as to prevent it from doing harm to them, or

(b) to give a warning which is reasonably adequate to enable them to protect themselves.

s.339 Artificial Conditions Highly Dangerous to Trespassing Children

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve a reasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

(vi) South Africa

16. A duty on the part of the occupier of premises to trespassers exists in the law of South Africa because :

> "The duty [to take reasonable care for the safety of those coming on the premises] is owed not only to persons entering with the permission, express or implied, of the occupier, but to any person whose presence on the premises might reasonably be foreseen. As a general rule no duty of care is owed to a trespasser... [because] the ordinary reasonable man would not normally anticipate the presence of trespassers on his property. If the presence of trespassers could reasonably be foreseen, then in our law a duty to use reasonable care to prevent injury to persons trespassing on the property is imposed."[51]

Whether the presence of a trespasser should have been foreseen is a question of fact in each case.[52] Once it has been established that the presence of the trespasser should have been foreseen, the nature and extent of the duty are considered separately, and the measure of the care to be exercised towards the trespasser will depend upon all the circumstances "among them being the probability of the exercise of greater circumspection by the trespasser than by the person using his accustomed rights".[53]

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51. R.G. McKerron, The Law of Delict (6th ed. 1965) p. 227.
52. MacIntosh and Scott, Negligence in Delict (5th ed. 1970) p. 199.
53. Ibid, p. 199.

APPENDIX 3*

Casualties to Trespassers on Railway Property

Year	Movement Accidents			Non-Movement Accidents					
	Fatal	Injured	Total	Fatal		Injured		Total	Total
				Electrical	Other Causes	Electrical	Other Causes		
1928	131	43	174	5(4)	6	6(5)	64	83	257
1929	121	38	159	2(2)	7	8(8)	69	86	245
1930	119	30	149	11(10)	16	9(8)	60	96	245
1968	71(13)	23(9)	94(22)	9(7)	5(0)	18(12)	29(16)	61(35)	155(57)
1969	83(13)	31(5)	114(18)	10(7)	5(3)	31(25)	28(20)	74(55)	188(73)
1970	88(15)	34(11)	122(26)	18(16)	4(3)	29(27)	26(20)	77(66)	199(92)
1971	76(15)	29(16)	105(31)	9(8)	7(6)	29(25)	30(17)	75(56)	180(87)

* Information obtained from 1928 Cmd. 3379; 1929 Cmd. 3682; 1930 Cmd. 3939; "Returns of Accidents and Casualties as reported by the several Railway Companies in Great Britain", 1928 and 1929 (the returns for 1930 are printed with 1930 Cmd. 3939); "Railway Accidents: Report to the Secretary of State for the Environment [for 1968, Ministry of Transport] on the Safety Record of the Railways of Great Britain" for 1968, 1969, 1970 and 1971.

The figures in brackets show the number of children included in the totals which they follow, where this is known.

Complete comparison between the two sets of years is not possible, as in the earlier three years the figures were not broken down to the same extent as in 1968 to 1971.

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