# OCCUPIERS' LIABILITY TO TRESPASSERS

Report of the Torts & General Law
Reform Committee of New Zealand

Presented to the Minister of Justice January 1970

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# REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE ON OCCUPIERS' LIABILITY TO TRESPASSERS

1. Introduction -

The question whether the law relating to an occupier's liability to trespassers should be reformed was referred by the Minister of Justice to the Torts and General Law Reform Committee in 1966. Several meetings of the Committee have been devoted wholly or principally to this topic. The Trespass Act 1968 has some relevance to our proposals. In paragraph 8 we refer to its effect. We were not asked to review the Occupiers' Liability Act 1962 and refrain from doing so but, as we explain in paragraph 16, our proposals necessarily involve a small consequential amendment to that Act.

We have not had the advantage of studying any recent reports emanating from law reform committees in the United Kingdom, Australia or elsewhere, but there is a sizeable literature on the problems associated with an occupier's liability to trespassers, i.e. those who come on his land or enter his home without his consent.(1) We have also considered the Occupiers' Liability (Scotland) Act 1960.

In 1952 the English Law Reform Committee was asked 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". The Committee's report was presented to Parliament in November 1954.(2) It recommended that the common law distinction between invitees and licensees should be abolished, and proposed (inter alia) that an occupier should owe the same duty to every person coming upon his

(1) See, e.g., Fleming, The Law of Torts (3rd ed., 1965), 432-443; Morison, "Trespassers in the Wilderness", (1965) 38 A.L.J.332.

(2) Cmd.9305

premises at his invitation or by his permission, express or implied. Only one short paragraph of its Report (para.80) was devoted to trespassers, and it was recommended that no change be made in the law.

The English Committee's recommendations were implemented in the Occupiers' Liability Act 1957 (U.K.) which imposed a "common duty of care" towards those who at common law would have been classified as invitees or licensees. It did not change the law regarding liability to trespassers. In 1962 the New Zealand Parliament enacted the Occupiers' Liability Act 1962 which followed the wording of the 1957 Act with only very minor modificiations, none of them relating to trespassers. The nature and extent of an occupier's liability to trespassers are accordingly still governed by the common law. In considering whether the common law is in need of reform we think it appropriate first to give a brief account of how it stands at present.

## 2. The Present Law

The leading authority is the decision of the Privy Council in Commissioner for Railways v. Quinlan [1964] A.C. 1054. A man drove a truck over a private level crossing over a railway line belonging to the Commissioner for Railways (N.S.W.). He was a trespasser as the evidence was insufficient to establish that the Commissioner by his employees had acquiesced in such use of the crossing, which was, however, quite frequent in the weeks before the accident. He was injured in a collision with a steam train operated by employees of the Commissioner and he sued in respect of their negligence, which was established. The jury found for the plaintiff and an appeal by the defendant was dismissed by the Full Court of the Supreme Court of New South Wales. The Privy Council, however, allowed a further appeal on the ground that the law remained what it had been stated by the House of Lords to be in Robert Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] A.C. 358, viz. that before there could be

liability to a trespasser there must be injury "due to some wilful act involving something more than the absence of reasonable care. There must be some act done with deliberate intention of doing harm, or at least some act done with reckless disregard of the presence of the trespasser."(3) As usually interpreted, the ratio decidendi of Quinlan's case is that an occupier is liable to a trespasser only if he injures him wilfully or by reckless conduct on his part, and then only if the trespasser's presence on his property was actually known to the occupier, or his presence could fairly be described as extremely likely or very probable. The Privy Council refused to accept the more liberal doctrine enunciated by the English Court of Appeal in Videan v. British Transport Commission [1963] 2 Q.B. 650, viz. that whether an occupier owes a duty to a trespasser may be determined by asking what the occupier ought reasonably to have foreseen, even a trespasser's presence being forseeable in some circumstances.(4)

3. Uncertainties of the Present Law

(i) The Privy Council's judgment in Quinlan's case leaves it uncertain what is meant by "recklessness". It said that the Addie v. Dumbreck formula "may embrace ... an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation": [1964] A.C.1054, 1084 (emphasis added). There has been a tendency to interpret recklessness as meaning really bad or "gross" negligence. Victorian Railway Commissioners v. Seal [1966] V.R.107 is a good example. In this case many would think that the Commissioner's servants were merely guilty of

(3) [1929] A.C.358,365.

(4) The law as so stated is repeated by Lord Denning M.R. in Kingzell v. British Railways Board, The Times, July 9, 1968, despite the intervening decision in Quinlan's case.

rather bad negligence. The Full Court held that the Privy Council had not thrown any doubt upon the authority of Commissioner for Railways v. Cardy (1960) 104 C.L.R.274. This view might not be adopted in New Zealand, where Cardy's case and Seal's case are both of merely persuasive authority, and neither might be followed.

(ii) Before the Occupiers' Liability Acts of 1957 and 1962 respectively were enacted, the courts, anxious to allow a remedy in hard cases, were prepared to impute licences where there was knowledge of a plaintiff's previous acts of trespass and evidence of the occupier's acquiescence in them. Cases where young children, technically trespassers, were lured on to property by something especially attractive to them merely afforded the most striking examples of implied licences. (See Reardon v. Attorney-General [1954] N.Z.L.R. 978 and Matheson v. Attorney-General [1956] N.Z.L.R. 849). The result was that trespassers were converted into licensees and an occupier's acts or omissions were measured against the duty appropriate towards a licensee. It was always difficult to be sure when the courts would or would not impute a licence. After Quinlan's case it is perhaps even more difficult: the Board speaks of the necessity to prove "acquiescence or permission, something that goes substantially further than mere knowledge and inaction": [1964] A.C. 1054, 1082. Furthermore, it is not clear whether the judicial practice of imputing a licence is sanctioned by the Occupiers' Liability Act 1962 or not. The common duty of care (which is substantially more onerous than that owed prior to the Act to licensees) is owed, since 1962, to those to whom the occupier gives invitation or permission to enter, or to whom he "is to be treated as giving" invitation or permission. This may simply refer to implied permission, as in the case of a tradesman or a collector for charity, both of whom enter property with implied but not express permission, and are not trespassers unless and until they are told to leave, and fail to leave within

a reasonable time. It is, however, also possible to read the Act as sanctioning the implied licence doctrine. On this interpretation it is speculative whether the courts will now imply a licence as readily as in the past, since the result would be to impose a duty to exercise all reasonable care towards such an entrant, and this may seem too onerous a burden.

(iii) The High Court of Australia had mitigated the harshness of the common law in three cases,(5) which may be read as deciding that sometimes a duty to take reasonable care arises out of a relationship independent of the relationship of occupier and trespasser existing between the parties, and taking precedence over the main occupier-trespasser rule. As a result of the Privy Council's decision it is uncertain whether there is now any scope for a doctrine of "overriding duties", as the decision is inconsistent on this point. As the Australian doctrine has never been applied in a reported New Zealand decision, its status here is particularly uncertain.

(iv) In many unfortunate cases it is a child trespasser who is the victim of an accident suffered on the land or premises of an occupier. It is not clear who ranks as a "child" for the purposes of the allurement doctrine. There are also some dicta about "small children" in Quinlan's case which are not easy to follow.

All these uncertainties make it very hard for a lawyer to advise a client with any confidence. Some claims which at law ought to succeed are probably settled for less than a typical settlement figure for the same injuries in a case involving no element of trespassing. The Committee also thinks that it must be difficult for a judge to direct a jury as to the law applicable in a case involving a trespasser.

(5) Thompson v. Bankstown Corporation (1953) 87 C.L.R. 619; Rich v. Commissioner for Railways (N.S.W.) (1959) 101 C.L.R. 135; Commissioner for Railways N.S.W. v. Cardy (1960) 104 C.L.R.274.

4. The Harshness of the Common Law

The Committee believes that the existing legal rules limiting liability operate too harshly. Compensation is denied in many cases where compensation should be recoverable-where it is offensive to our ideas of justice that the loss should lie where it falls. At the root of the difficulty is the fact that the term "trespasser" embraces many different kinds of entrant. At one end of the scale is the armed burglar, at the other end a young child chasing a tennis ball on to a neighbour's property without first obtaining permission. Both are lumped together: see, for example, the tragic case of Adams v. Naylor. (6) There are also cases of technical trespass, e.g. where a person has a perfect right to be in the area where he was and only becomes a trespasser because he interferes with something on the land: see, for example, Buckland v. Guildford Gas Light and Coke Company [1949] 1 K.B.410. The measure of the legal duty to all who come within the category of trespassers is the same. Historically, the various devices used by the courts; "allurement", "implied licence", "overriding duty", and the distinction drawn in some English cases (7) between injuries caused by the static condition of the land and injuries caused by a positive activity carried on by the occupier, must be seen as attempts to soften the rigours of the common law in favour of deserving plaintiffs. They would presumably never have developed if the common law had discriminated between trespassers who enter land for an objectionable purpose on the one hand and unwitting or otherwise innocent trespassers on the other. In the Committee's opinion the time has come to change the law so that

(6) [1944] K.B.750. Affirmed on different grounds, [1946] A.C.543.

(7) E.g. Slater v. Clay Cross Co. Ltd. [1956] 2 Q.B.264 (cutting across the pre-1957 distinction between invitees and licensees); Videan v. British Transport Commission [1963] 2 Q.B.650, 667 per Lord Denning M.R. (as regards trespassers)

trespassers will not all be treated in the same way, and so that liability will be imposed for failure to exercise reasonable care towards some persons who happen to be trespassers. Of course, the plaintiff's interest is not the only interest worthy of consideration. The interest of the occupier in being able to use his land as he sees fit, without potential liability for injuries suffered by all and any comers as a result of that use, must also be considered, and balanced against it. Full weight must be given to the fact that a trespasser runs by no schedule: a trespasser's presence on land or premises at a particular time of the day or night will often be unforeseeable. Nor in proposing an extension of liability in respect of some trespassers do we forget that most occupiers of property in New Zealand are people with limited capital resources. As against this, however, there is the point that the owner or occupier of a small suburban property will, or should, be able to exercise control over dangerous parts of his property more easily than a large landowner or a company which owns a building site which contains hazards for the unwary entrant. Moreover, we have ascertained from the insurance companies that there would be no difficulty in arranging extensions of public liability policies to cover injuries caused to trespassers if a change is made in the law.

## 5. The Nature of the Reform Proposed.

We consider that a division should be made between those trespassers for whom little or no sympathy can be felt if they are injured, and other trespassers to whom a duty of care of limited scope should be owed. There seems to us no practicable alternative to the creation of two broad categories of trespasser. We call them "protected" and "unprotected" trespassers. Towards a protected trespasser an occupier should owe "a duty to take such care as in all the circumstances is reasonable

not to expose him to any danger existing on the premises." Some of the highly relevant circumstances are: whether the occupier actually knew that the person who is subsequently injured was present; whether he ought to have known; whether he had reason to anticipate, from past experience, that persons of the class into which a plaintiff trespasser falls would be likely to come on to his land; whether he did all that was reasonably practicable to avert the risk of injury; and whether the injury likely to be suffered by a trespasser is of such magnitude that a reasonable occupier would have taken greater pains than the defendant did to avoid the possibility. All these circumstances, and any others which are relevant, should be taken into account by the tribunal of fact - which in all cases of serious injury will probably be a jury.

An occupier should be obliged not to injure an unprotected trespasser by any wilful or reckless act or omission. We consider that the standard of care stated in Quinlan's case should be limited to unprotected trespassers.

The criteria used to decide whether a person is a protected or an unprotected trespasser should be defined in language of the greatest possible precision. To avoid the risk of merely sympathetic jury verdicts which disregard the letter of the law we recommend that the question whether in any particular case a trespasser was a "protected" or an "unprotected" trespasser should be a question of law for the trial judge. This gives practical expression to our desire to recognise the opposing interest of the occupier. The judge will be entitled, if he so chooses, to frame an issue for the jury in order to ascertain any facts necessary to enable him to rule on the legal issue, but the decision as to the category into which the plaintiff falls should be his. If he decides that the plaintiff falls into the unprotected category he should direct the jury that before they can find in the plaintiff's favour

they must be satisfied that the plaintiff's injury was caused wilfully or recklessly, and that the plaintiff's presence was actually known to the occupier, or known to be likely.

The burden of establishing that he is a protected trespasser will rest on the plaintiff - a further safeguard against the unjustified imposition of liability on a defendant in a doubtful case.

6. In conjunction with the reform outlined in the previous paragraph we propose that, so far as possible, the subtleties and uncertainties of the present law should be eliminated. The imputation of fictitious licences should be ended. Trespassers should be called "trespassers". Whether there was, or was not, an allurement should become merely a circumstance to be considered. Whether the victim is an adult or a child should also be just a circumstance, though a highly relevant one, especially if the presence of children could be foreseen. "Overriding duties" should be eliminated: they merely confuse the exposition of the present law and will no longer serve any function in the context of the reformed law which we propose. We cannot, however, eliminate altogether the concept of recklessness. To do so would confer an immunity for reckless conduct where the occupier should not have an immunity, and to state the law in a way even less favourable to plaintiffs than the decision in Quinlan's case. One member of the Committee, however, while sharing the view expressed in the preceding two sentences, believes that any amending legislation should avoid using the words "reckless" or "recklessness". He would prefer a translation of the concept into terms which would make it perfectly clear that recklessness is not to be equated with "gross negligence" but involves a conscious advertence to the probable consequences of one's acts, coupled with indifference as to whether or not those consequences actually ensue.

## 7. The Distinction between Protected and Unprotected Trespassers

The criteria on which the distinction should be based are obviously of the utmost importance. Difficult value judgments are involved in drawing the line. We recommend that all trespassers should qualify as protected trespassers unless they fall into certain clearly-drawn categories. They should enjoy the enhanced right of recovery which we propose unless either:

(a) they are sixteen years old or over and

(i) enter premises or are present on premises when that entry or presence is itself an offence punishable by imprisonment (other than an offence under s.3 of the Trespass Act 1968);

or (ii) enter premises in the course of the commission of an offence punishable by imprisonment;

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

or (b) they have been adequately warned of a danger existing on the premises and suffer 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]:

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

8. We must briefly explain the reasons which have led us to draw the line in the way we have.

As regards (a)(i) it is open to Parliament to make it an offence merely to enter certain kinds of area: see, for example, the Official Secrets Act 1951, s.3(1) (the offence of entering any "prohibited place" for any purpose prejudicial to the safety or interests of the State). Similarly, by-laws (subject to the test of reasonableness) may make it an offence to go into particular places. If this is the wish of Parliament or the local body concerned, and the offence is viewed as serious enough to warrant punishment by imprisonment, we think it is in accordance with the policy expressed by the Act or the by-laws in question to deny any remedy for injuries suffered by a trespasser (unless of course his injuries were caused wilfully or recklessly by the occupier or his servants or agents). In view of this qualification of liability it is proper that the amending legislation we propose should, like the Occupiers' Liability Act 1962 itself, bind the Crown, and we so recommend.

If a person enters land or premises in breach of a statute or of statutory regulations which do not prescribe imprisonment as a penalty we consider he should be a protected trespasser. Such a person will render himself liable to prosecution, but he may, depending on the circumstances, have a remedy if (say) he falls into a hole which an occupier has negligently left unguarded.

Section 3 of the Trespass Act 1968 (the successor of s.6A of the Police Offences Act 1927) 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. We think that offenders under s.3 should remain protected trespassers while they are making their way off a property, unless they have been adequately warned or actually know of a hazard likely to be encountered on the property.

As regards (a)(ii) and (a)(iii) these are designed to catch burglars and others who suffer injury before, during, or after the commission of an offence punishable by imprisonment. We consider that anyone who commits an act not so punishable, e.g. a minor statutory offence punishable only by fine, should not be treated in the same way as a burglar or a rapist. We recommend that this category should not include boys and girls who enter premises with the intention of committing an offence. They should, we think, be classed as protected trespassers unless they are adequately warned of the danger, or actually know of it.

We consider that it is proper to treat lawful visitors and trespassers differently so far as the legal consequences of a warning or warning notice are concerned. If damage is caused to a lawful visitor by a danger of which he has been warned by the occupier the warning does not absolve the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe: see Occupiers' Liability Act 1962, s.4(5). Such a warning discharges the occupier's duty, but it is a question for the jury whether the warning was adequate. As far as trespassers are concerned the result of an adequate warning (adequacy being defined in terms comparatively more favourable to the occupier) would be that the case would go to the jury on the basis that the plaintiff was an unprotected trespasser.

9. One of the difficulties of reforming the law in this area is that we are obliged to deal not only with many distinguishable kinds of trespasser but also with

several different kinds of occupier. By way of example, it is much harder to give adequate warning to all entrants on a large tract of land who may enter the land at any point than it is when entrance is physically possible by one route only. There is a limit to the number of warning notices that can be erected without disfiguring the countryside; and high fences are not practicable except where the area in question is comparatively small. Similarly, special problems arise regarding the position of farmers whose land adjoins, say, an institute for handicapped children or the blind. In all such cases we think it must be decided, on the facts of each case but as a question of law, what persons were likely to enter the premises. It must then be decided whether the notice was so positioned and worded as to give reasonable warning to such persons. In some cases one warning notice will not constitute a reasonable attempt to warn trespassers; in others it will. The court must be entitled to have regard to the age and understanding of the injured trespasser. If an adequate warning notice is displayed, but the trespasser does not bother to read it, it is in line with the common law relating to licensees as it was immediately before the passage of the Occupiers' Liability Act 1957 (U.K.)(8) to make it immaterial whether he actually read it.

10. Sometimes an injured trespasser will know of the existence and nature of a danger which materialises and

(8) See Ashdown v. Samuel Williams & Sons Ltd. [1957] 1 Q.B. 409, 428, per Parker L.J.

injures him. Thus he may live in the immediate vicinity and the dangerous condition of certain land or premises may be a matter of notoriety. Towards such a person an express warning or a warning notice will be a superfluous precaution. Accordingly (c) excludes liability for mere negligence in such cases. Usually, it is true, full knowledge of a danger by a plaintiff is not enough to exonerate a defendant. As far as lawful visitors are concerned it was felt necessary to insist on the distinction between knowledge and consent in the Occupiers' Liability Acts 1957 and 1962. Section 4(5) of the 1962 Act, previously mentioned, altered the rule laid down by the House of Lords in a much criticised case(9) that knowledge by an invitee of a risk was sufficient to exonerate an invitor, provided the invitee recognised the full significance of the risk. We consider, however, that the interests of occupier and trespasser are properly balanced by retaining the House of Lords' rule in respect of trespassers. A plaintiff should have to establish on the balance of probabilities that he was unaware of the existence and nature of the danger. He will presumably give evidence that he did not know. While a defendant will usually be unable to adduce direct evidence that the plaintiff did know, the circumstances will often be such as to justify a strong inference of knowledge, and our category (c) will accordingly have more than theoretical application.

11. Consideration of Scottish Law -

Two members of the Committee take the view that there is considerable merit in the Scottish approach and it is appropriate therefore that we should refer to the law of Scotland at this point. Under the Occupiers Liability (Scotland) Act 1960 the duty of an occupier towards all persons entering on his premises, that is, towards trespassers as well as towards invitees and

(9) London Graving Dock Co. Ltd. v. Horton [1951] A.C.737.

licensees, is expressed in the same terms, namely as a duty to take "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 dangers on the premises. The fact that an entrant is a trespasser therefore does not necessarily mean that he may not recover damages for negligence; his trespassing presumably merely affects what was or should have been reasonably foreseeable by the occupier. In Scotland, unlike England but as in New Zealand, actions for personal injuries are normally tried with a jury.

The majority of the Committee cannot accept that all trespassers should be owed a broadly-worded duty of care. Apart from the fact that persons entering land with criminal intent may be entitled to claim for injuries suffered, the Scottish solution creates too much of a risk that in marginal cases the plaintiff will always succeed once he has enlisted the sympathy of the jury. Moreover, it would be almost impossible for a defendant to win an appeal on the ground that there was no evidence of negligence fit to go to the jury. Under the majority's proposal there would still be some risk that juries instructed in accordance with the unprotected trespasser formula would give the plaintiff a sympathy verdict. This risk is inherent in the jury system. A defendant would, however, often be able to argue, with some expectation of success, that there was no evidence of wilfulness or recklessness fit to go to the jury, and (on appeal) that no reasonable jury could find wilfulness or recklessness established.

The arguments in favour of the Scottish solution are first, that it would complete the process, begun in 1962, of simplifying the law by removing all distinctions between different types of entrants onto premises and second, that it would avoid the anomalies and injustices inherent in any legal rule under which a rigid line of demarcation is drawn between one class of case and another.

It is of interest to note that on this particular aspect the Scottish Act in substance restored the Scottish common law position prior to 1929, when the English common law was imposed on Scotland by the House of Lords decision in Addie v. Dumbreck[10]. Until 1929 it was accepted in Scotland that the liability of occupiers of premises was only one aspect of the law of culpa or negligence and in relation to the English law it is suggested in Salmond on Torts[11] that it "may be that if it had been earlier and more generally recognised that the topic was only one branch of the law of negligence it might have been seen that the occupier's duties could not conveniently be put into straitjackets to fit the character in which the plaintiff came on the premises." The 1957 English Act and the 1962 New Zealand Act went some way towards assimilating the subject into its true category, but there is good reason to suggest that it should have gone further and that the completion of the process now would be the most satisfactory way for the law to develop.

Clearly any attempt to divide trespassers into categories will produce its own anomalies. Under the provisions suggested in paragraph 7 of this report, for instance, a mushroom picker would be classed with a person stealing stock or even an intending murderer. While no-one is likely to harbour tender feelings towards the stock thief or the murderer the difference between either of these and the mushroom picker is much greater than between the latter and, say, one of a party of picnickers, and it is difficult to justify the drawing of a strict line between the last two.

(10) Walker, Delict (1966) 586 et seq.; First Report of the Law Reform Committee for Scotland (1957), Cmnd 88.

(11) 14th ed. (1965), 374.

There is no question but that the purpose of a person's entry on to land is relevant. However under the Scottish formula it is a factor properly to be taken into account as one of the "circumstances of the case" and the same would apply to the existence or otherwise of a warning notice, the need for which is closely related to the degree of probability of a person coming on to the land.

It has already been noted that in Scotland as in New Zealand actions for personal injury are normally tried with a jury, and it is true that five of the twelve members signing the Scottish Law Reform Committee's report took the view that the category of trespassers should not be abolished, at least so long as actions of reparation against occupiers were left open to trial by jury.(11a) Nevertheless the fact remains that the majority recommendation was accepted. We asked the Secretary of the Scottish Law Commission whether the fears of the minority had in fact been realised and he replied that informal inquiries among members of the legal profession indicated that this was not a class of case in which juries seemed specially prone to favour pursuers (i.e. plaintiffs). He made the point, however, that not all cases involving claims by trespassers were tried by juries in Scotland, since according to Scottish practice a Judge might withhold a case from trial by jury and order proof before a Judge if he was of the opinion that the pursuer's pleadings were "of doubtful relevance". This would be so, for instance, where the Judge was doubtful whether a properly instructed jury would be entitled, on the facts disclosed, to find that an occupier could reasonably have expected that the pursuer might have been present upon the premises and injured in the manner alleged.

(11a) For a pungent comment on this attitude towards the jury system, see Hughes, in (1959) 68 Yale L.J.633,700.

Although this rule is not applicable in New Zealand it suggests one way in which the possibility of sympathetic verdicts could be minimised despite the adoption of a formula such as the Scottish one - the reservation of such questions as foreseeability as matters of mixed fact and law for the Judge. It might also be thought advisable to refer expressly to the purpose for which a person has entered the premises (and its legality or otherwise) as one of the circumstances to be taken into account in deciding what was reasonable care.

The majority of this Committee, while recognising the advantages of the Scottish law, consider that these are outweighed by its disadvantages.

12. Incidental Recommendations -

We now turn to some additional recommendations incidental to the main proposal.

Lawful visitors who establish a breach of the common duty of care may be met by the defences of contributory negligence and volenti non fit injuria, which are expressly preserved by the Occupiers' Liability Act 1962: see s.4(7) and (8). These defences should also be preserved in relation to trespassers. We would observe that the degree of care or want of care which would ordinarily be looked for in the protected trespasser to whom damage is caused is a factor which is often relevant in determining the scope of an occupier's duty, apart from the defence of contributory negligence. This circumstance is expressly stated to be relevant in s.4(3) of the 1962 Act and should, in our opinion, be expressly mentioned as a relevant circumstance as regards trespassers also.

13. A difficulty arises in regard to reducing the law in Quinlan's case to statutory form as regards unprotected trespassers. Lord Radcliffe said that before liability

could arise the trespasser's presence must be known, or else it must be "very" or "extremely" likely. These qualifying words hardly lend themselves to embodiment in a statutory formulation of the duty, and we propose "likely". Lord Radcliffe seems to have had in mind cases such as Excelsior Wire Rope Co. v. Callan[12] where the defendant "as good as knows" - in the Excelsior case if the appellant's servant who started the machinery had turned his head without moving from the position where he was he could have seen that the children were still present. The word "likely" could be construed as extending the duty as stated in Quinlan's case. On the other hand the degree of likelihood that someone will be present after, perhaps, he has been warned off will have a direct bearing on the question whether the occupier acted recklessly, and a finding of either wilfulness or recklessness will remain an essential condition of liability.

14. One method, not so far mentioned, by which the harshness of the common law rule about liability to trespassers was mitigated was by the courts' insistence that the defendant must be an occupier. If he was a contractor working on the land, and not in occupancy of it, he would owe an ordinary duty of care to persons on the land, for they would not be trespassers vis-a-vis him, even if he was there for the occupier's purposes: see, for example, Davis v. St Mary's Demolition Co. [1954] 1 W.L.R. 592.

Although the question - who is an occupier? - is not always easy to answer we think it inadvisable to attempt a precise definition of the term "occupier", and better to leave the question to the courts, so that a

(12) [1930] A.C. 404 (not strictly a case of occupiers' liability).

person who is an occupier at common law will owe the duties imposed by the amendment we propose. This was the approach thought suitable as far as lawful visitors were concerned by the framers of the U.K. Act in 1957. At the same time a section will be needed declaring that nothing in the amending Act shall be construed as abridging or extending the duty owed by non-occupiers to persons entering the premises. The connotation of the word "occupier" has become clearer with the House of Lords' decision in Wheat v. E. Lacon & Co.[13] which decides that two persons may be occupiers of the same premises at the same time, and, probably, that a person who has "any degree of control over the state of the premises"[14] is an occupier.

15. Section 4(6) of the Occupiers' Liability Act 1962 exonerates an occupier from liability if he has acted reasonably in engaging an independent contractor and damage is caused to a visitor by a danger "due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation" by the independent contractor, provided that the occupier has taken such steps as he reasonably ought in order to satisfy himself that the contractor was competent and that the work has been properly done.[15] We recommend that an occupier should similarly be exonerated as regards trespassers who are injured by faulty execution of work on the part of independent contractors.

(13) [1966] A.C.552. See also Fisher v. C.H.T. Ltd. (No. 2) [1966] 2 Q.B. 475, and Willis v. Association of Universities of the British Commonwealth [1965] 1 Q.B. 140.

(14) [1966] A.C. 552, 579, per Lord Denning. Viscount Dilhorne and Lords Morris, Pearce and Pearson appear to take the same view.

(15) See A.M.F. International Ltd. v. Magnet Bowling Ltd. [1968] 2 All E.R. 789, holding that s.4(6) includes omissions.

16. In order to bring trespassers to whom a licence to enter would be implied by the common law within the category of "protected trespassers" rather than the category of implied licensees (and hence visitors under the principal Act) some amendment to s.3 of the Occupiers' Liability Act 1962 will be needed. The difficulty stems mainly from the words "or is to be treated as giving" in s.3(2). We propose that these words should be deleted, and the words "expressly or impliedly" substituted. This would, incidentally, accord with the actual recommendations of the English Committee.(16) It will then become clear that the principal Act applies only to guests, other persons expressly permitted to enter, and persons such as tradesmen and canvassers who are impliedly permitted to enter in the absence of express prohibition communicated to them.(17) The principal Act will no longer have any application to "implied licensees" who are in reality trespassers. This reform is in line with Dixon C.J's exhortation that liability should not be explained in terms which can no longer command an intellectual assent, but rather referred directly to "basal principle".(18)

To ensure that the change will be watertight we also recommend the insertion of a proviso after s.3(2) along the following lines -

> "Provided however that sections 4 and 5 of this Act shall not regulate the duty owed by an occupier to a person who was treated by the rules of the common law which applied before the passing of this Act as having an implied licence to enter the premises."

(16) Cmd 9305, para. 95 (2).
(17) See Robson v. Hallett [1967] 2 All E.R. 407, 414
(18) Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 C.L.R. 274, 285.

Correspondingly, "trespasser" should be defined in such a way in the amending Act as to include persons who were treated as implied licensees at common law. It is unnecessary and would be undesirable to specify who were so treated. Any deficiency in the list might result in the courts holding that some trespassers were not within the definition of "trespassers" provided by the Act; we wish to avoid perpetuating any uncertainties of this kind.

17. We have prepared a draft bill incorporating all our recommendations. It is not part of our report. In preparing our recommendations we have contemplated that they would be effected by way of an amendment to the Occupiers' Liability Act 1962. Consequently the definitions in s.2 of that Act will apply. Thus "premises" includes land; and "structure" includes any vessel, vehicle, or aircraft. When the 1962 Act was drafted the draftsman was instructed to follow the 1957 Act closely. Perhaps in consequence the Act uses the word "damage" as applying both to personal injuries and damage to visitors' property. In our draft bill we also use the word "damage" to cover both, although this usage is awkward, and claims will normally be made in respect of personal injuries, with any damage to property being incidental.

The wording of the 1957 and 1962 Acts raises a number of other difficulties which it is not within our terms of reference to discuss. We simply draw attention to the fact that there are some puzzles in the 1962 Act, e.g. it is unclear whether the Act regulates injury caused in consequence of "current operations"; it is unclear whether it regulates the kind of situation dealt with by the Court of Appeal before its enactment in Heard v. N.Z. Forest Products Ltd. [1960] N.Z.L.R. 329; and it is uncertain whether New Zealand law accepts the principle that an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any

special risks ordinarly incident to it, so far as the occupier leaves him free to do so.(19) If it is considered preferable to re-enact the Occupiers' Liability Act incorporating our new proposals for trespassers rather than to pass an amending Act, then in our view care should be taken to remove, as far as possible, these and other difficulties raised by the Occupiers' Liability Act as it stands. It may be helpful to indicate the Committee's view that while much can be said in favour of repealing the Occupiers' Liability Act 1962 and the enactment of a new statute dealing with lawful visitors, protected trespassers and unprotected trespassers alike, it would be better to pass amending legislation affecting trespassers only, if it seemed likely that a review of the provisions of the principal Act would appreciably delay the implementation of the reform which we propose.

(19) 1957 Act, s.2, omitted in the 1962 Act. For the position in England see General Cleaning Contractors v. Christmas [1953] A.C. 180 and Roles v. Nathan [1963] 1 W.L.R. 1117.

J.C. White, Chairman
R.K. Davison
B. McClelland
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Miss P.M. Webb

R. Ward, Secretary

January, 1970