RECENT DEVELOPMENTS IN THE LAW OF OCCUPIERS' LIABILITY TO TRESPASSERS

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That branch of tort law dealing with the liability of occupiers to persons injured on their premises has long been regarded as one of the least satisfactory areas of the common law. Nowhere is this more glaring than in the titular justice which the law has afforded injured trespassers. Until 1972, the definitive formulation of the law was that laid down by Lord Hailsham, L.C., in *Addie* v. *Dumbreck*[1] where liability was limited to "some act done with a deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of [his] presence." No lesser personage than Lord Diplock has termed this doctrine "draconian."[2]

Professor Fleming has attributed this development to the great importance attached to proprietary rights during the formative period of the common law.[3] He goes on to suggest that social change has so far out-stepped the law's preoccupation with property as to render the existing state of the law painfully obsolete. On the one hand we have the 1932 Atkinian formulation of a general tortious duty based on proximity and forseeability; on the other, a 1929 decision of the House of Lords which entrenched the concept that landholding could be a ground for immunity in tort. Professor Fleming has called for "radical reform" to resolve the tension between these two "warring social philosophies".[4]

Addie's[5] case gave definition and authority to earlier jurisprudence restricting the relief available to an injured trespasser. In the face of a particularly gruesome accident where a small boy was crushed to death, the House denied recovery to the child's parents and re-stated the orthodox formulation of the law. This

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1 [1929] A.C. 358, 356.

2 *B.R.B.* v. *Herrington*, [1972] 1 All E.R. 749, 787-f.

3 Fleming, The Law of Torts, 4th Ed. p. 400, see also the as yet unreported judgment of Dickson J. in *Venoit* v. *Kerr-Addison Mines* pp. 1-2 (S.C.C.)

4 *Id.*

5 [1929] A.C. 358.

dampened widespread hopes that the law might be humanized,[6] fostered "smouldering resentment"[7] in Scotland where the case originated, and has provoked academic outrage ever since. The rule enunciated required actual knowledge of presence of the trespasser in the case of "reckless disregard" and operated irrespective of the age or capacity of the entrant: "it is hard to see how infantile temptations can give rights, however much they may excuse peccadiloes."[8]

This was hard law and has given rise to a good deal of involved jurisprudence aimed at ameliorating its obvious severity. The major judicial constructs in this area have been imputed license,[9] the "allurement" doctrine,[10] the distinction between active and static conditions of land,[11] the distinction between the liability of occupiers and contractors not in occupation of the land,[12] and finally the distinction between trespass to land and trespass to vehicles or installations on land.[13] The greatest challenge to the authority of *Addie* came from Lord Denning M.R. in *Videan* v. *BTC*[14] and a series of three judgments in the High Court of Australia: *Thompson* v. *Bankstown Corp.*,[15] *Rich* v. *Comr. for Rys.*;[16] and *Comr. for Rys.* v. *Cardy*.[17] In essence, these cases were attempts to out-flank *Addie* and leave it subject to an overriding test of reasonable care. The jurisprudential machinations involved are now of only academic interest as the Privy Council in *Comr. for Rys.* v. *Quintin*[18] quashed any suggestion that the *Addie* case could be subject to a *Donoghue* v. *Stevenson*[19] gloss. Although *The Occupiers' Liability Act (Scotland) 1960* extended a common duty of care to all entrants, divided opinion in the

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6 *Herrington*, [1972] 1 All E.R. 749, 787-e *per* Lord Diplock.

7 Fleming, *loc. cit.* n. 4.

8 *Lotham* v. *Johnson and Nephew Ltd.* [1913] 1 K.B. 398, 415 *per* Hamilton, L.J. cited in North, *Occupiers' Liability*, London, Butterworths, 1971, at page 169.

9 North, *op. cit.* p. 165 *et seq.*

10 *Glasgow Corpn.* v. *Taylor*, [1922] A.C. 44.

11 *Mourton* v. *Poulton*, [1930] 2 K.B. 183.

12 Fleming, *op. cit.* p. 407.

13 Street, *The Law of Torts*, 5th Ed. p. 193.

14 [1963] 2 All. E.R. 860.

15 (1952), 87 C.L.R. 619.

16 (1959), 101 C.L.R. 135.

17 (1960), 104 C.L.R. 274.

18 [1964] A.C. 1054.

19 [1932] A.C. 562.

Law Reform Committee Report of 1954 left the English law regarding occupiers' liability for trespassers unchanged.

When *B.R.B.* v. *Herrington*[20] came before the House of Lords they found the law torn between academic outcry, a confused legislative posture, and decades of gloss and invention stemming from the *Addie* decision and earlier case law. Taking full advantage of the flexibility allowed by the 1966 Practice Direction,[21] the House made a major alteration in the state of the law. Acting on the basis of this decision in *Veinot* v. *Kerr-Addison Mines Limited*,[22] the Supreme Court of Canada appears to have worked the radical reform which Professor Fleming called for.

I. The *HERRINGTON* Decision

The defendant corporation operated an electrified railway track separating two park areas frequented by children. The track was fenced, and at one spot there was a footbridge leading over the track. At one location the fence had fallen to within a few inches of the ground. The evidence showed that this condition had existed for some time and had been in use as a short-cut by members of the public. The six year old plaintiff who had been playing with his brothers, wandered off, went through the gap in the fence and was severely injured by the electrified rail. There was evidence that the defendant Board had knowledge both of the presence of children along the line in that area before, and of the defective condition of the fence at points in that stretch of railway. The defendant chose to adduce no evidence and relied strictly on the *Addie* decision.

The Court of Appeal[23] concluded, in a very involved decision, that the conduct of the defendant Board had been such as to amount to recklessness in law. It thus upheld a trial award which seemed to have been based on a finding of simple negligence. The House rejected both of these tacts, and dealt with the case on the footing that this is a clear case of a child trespasser unable to rely on either licence or allurement. The stage was thus set for a direct confrontation with the *Addie* decision, with the exception that the plaintiff in *Addie* had had a stronger case on the facts.

Lord Reid examined the facts and the state of the law in the wake of *Addie*. If that decision were to stand, he concluded, the

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20 [1972] 1 All E.R. 749.

21 See A.L. Goodhart's *Note*, 88 Law Q. Rev., 310, 314.

22 (Oct. 9, 1974 – as yet unreported).

23 [1971] 1 All E.R. 897.

only duty of the defendant Board: "was a humanitarian duty not to act recklessly with regard to children whom they knew to be there."[24] He then turned to squarely face the growing social concern for the welfare of child trespassers: "Legal principles cannot solve the problem. How far occupiers are to be required by law to safeguard such children must be a matter of public policy."[25] The term "reckless" from *Addie* was useful in that it recognized that duty must vary with the knowledge, skill or resources of the occupier, but the term "culpable" was preferable.[26] Since the relationship between trespasser and occupier was imposed by the former and not voluntarily assumed, the resulting duty must be less than a common duty of care. Lord Reid described it as a duty to act in a "humane manner".[27] "So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it."[28]

Lord Morris of Borth-y-Gest stated that on the facts adduced any normal person would conclude that the defendants were "grievously at fault".[29] "It must at any time be a matter of regret and of concern if the answer of the law does not accord with the answer that common sense would suggest."[30] He then examined the early cases which laid down the rule that an occupier who deliberately sets traps for trespassers (e.g., spring guns) will be liable for injuries caused to such trespassers. One basis for that rule was that the placing of such traps was "contrary to the principles of humanity".[31] *Addie* had lost sight of that premise.[32] In the instant case there was: "a duty, which while not amounting to the 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."[33]

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24 [1972] 1 All E.R. 749, 757-a.

25 *Ibid.*, p. 756-j.

26 *Ibid.*, p. 758-c.

27 *Ibid.*, p. 758-e.

28 *Ibid.*, 758-f.

29 *Ibid.*, 760-h.

30 *Id.*

31 *Ibid.*, 763-c.

32 *Ibid.*, 765-a.

33 *Ibid.*, 767-h.

Lord Wilberforce found that the case was one of an infant trespasser, pure and simple, faced with the "formidable authority"[34] of the *Addie* case. Rather than discard that authority, he first attempted to: "see whether we can move on from the position taken in 1929 by classical methods of experience, analogy and logic."[35] The rules in the *Addie* case, he concluded, were not exhaustive but "were expressive of certain consequences as regards proximity and forseeability which flow from the given relationship (occupier and invitee-licensee-trespasser)."[36] He spoke of the "narcotic preoccupation with the occupier-trespasser relationship."[37] He concluded that the *Addie* rule expresses the narrow duty recognized when the only relevant circumstances are the occupier-trespasser distinction; once other relevant circumstances arise, this must give way to the general tortious theory of duty based on proximity and forseeability. To give rise to a greater duty, the presence of trespassers must be "extremely likely".[38] "What is reasonable depends on the nature and degree of the danger. It also depends on the difficulty and expense of guarding against it".[39] In most cases, the test of "recklessness" should give way to an analysis of the appropriate duty of care. He concluded: "I am not prepared, especially in view of the judge's finding, to differ from your Lordships' view that in relation to the special duty of care incumbent on the appellants in the relevant place, there was a breach of that duty amounting to legal negligence, but I am left with the feeling that cases such as these would be more satisfactorily dealt with by a modern system of public enterprise liability devised by Parliament."[40]

Lord Pearson began his judgment by pointing out that to say that an occupier does not owe to a trespasser the same duty of care as he does to a lawful entrant is not to say that he owes no duty at all. "If the presence of the trespasser is known or reasonably to be anticipated . . ."[41] then there exists "a duty to treat the trespasser with ordinary humanity."[42] The formulation in the *Addie* case was far too narrow. In particular it is wrong in only

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34 *Ibid.*, 769-e.

35 *Ibid.*, 770-b.

36 *Ibid.*, 771-a.

37 *Ibid.*, 772-c.

38 *Ibid.*, 776-f.

39 *Ibid.*, 777-g.

40 *Ibid.*, 779-c.

41 *Ibid.*, 779-f.

42 *Ibid.*, 779-g.

imposing liability for positive acts, as opposed to omissions,[43] in requiring actual knowledge of the presence of trespassers,[44] and in requiring "recklessness" rather than simple negligence.[45] The truth was that *Addie's* case had been "rendered obsolete by changes in physical and social conditions and has become an encumbrance impeding the proper development of the law. With the increase of the population and the larger proportion living in cities and towns and the exhaustive substitution of blocks of flats for rows of houses with gardens or backyards and quiet streets, there is less playing space for children and so a greater temptation to trespass. Also with the progress of technology there are more and greater dangers for them to encounter by reason of the increased use of, for instance, electricity, gas, fast-moving vehicles, heavy machinery and poisonous chemicals."[46]

Lord Diplock criticized the railway for declining to call witnesses. "This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."[47] The existing state of danger would be recognized by "anyone of common sense."[48] In a surprising comment: "all nine judges who have been concerned with the instant case in its various stages are convinced that the plaintiff's claim ought to succeed; and, if I may be permitted to be candid, are determined that it shall."[49] The authority of *Addie's* case must be discarded, and a new analysis formulated based on a general tortious concept of duty. There must be actual knowledge of the presence of a trespasser, or facts which make the presence of trespassers likely.[50] There must be actual knowledge of the condition of the land which gives rise to the danger. [51]

Lord Diplock concludes: "The degree of likelihood needed to give rise to the duty cannot, I think, be more closely defined than as being such as would impel a man of ordinary humane feelings to take some steps to mitigate the risk of injury to the trespasser

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43 *Ibid.*, 784-c.

44 *Ibid.*, 784-d.

45 *Ibid.*, 784-e.

46 *Ibid.*, 785-g to 786-a.

47 *Ibid.*, 786-j.

48 *Ibid.*, 787-a.

49 *Ibid.*, 787-g.

50 *Ibid.*, 796-b.

51 *Ibid.*, 747-b.

to which the particular danger exposes him. It will thus depend on all the circumstances of the case: the permanent or intermittent character of the danger; the severity of the injuries which it is likely to cause; in the case of children, the attractiveness to them of that which constitutes the dangerous object or condition of the land; the expense involved in giving effective warning of it to the kind of trespasser likely to be injured, in relation to the occupier's resources in money or in labour."[52]

II. THE IMPACT OF *HERRINGTON*

Upon concluding an analysis of *Herrington* one is faced with the problem of determining whether that case outlines the relevant considerations peculiar to the case of unlawful entrants in ascertaining the existence and extent of an Atkinian duty of care; or has the House of Lords, while mitigating the severity of the existing law, left this field separate and apart from the general application of principles of negligence. In other words, does the test of common sense or humanity equate with that of reasonable care? There are two major impediments to this proposition. The first lies in the extreme complexity of the Law Lords' speeches. There can be no answer to this objection except that one must look to what other courts extract from the case as a practicable test. The second difficulty is that while most of the particularities found throughout these judgments can be categorized as *dicta*, there seems some basis for the requirement of a high probability of the presence of trespassers, independent of the other circumstances, before the question of the existence of a duty will be entertained. Both of these problems have already been the subject of judicial scrutiny.

Pannett v. *McGuinness & Co.*[53] was the first reported case in the English Court of Appeal to consider *Herrington*. Previous authority was dismissed without discussion, and the Court found no difficulty approving a damage award on the authority of that case. While the rest of the Court was content to use the words of *Herrington*, Lord Denning, M.R., reduced them to a simple formula: "The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did."[54]

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52 *Ibid.*, 796-d to e.

53 [1972] 3 W.L.R. 386.

54 *Ibid.*, 390-g.

The second problem appears to have been quite decisively resolved by the Privy Council in *Southern Portland Cement Ltd.* v. *Cooper*:[55] "The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts that show a substantial chance that they may come there." It must be remembered that three of the five judges in this case were present on the *Herrington* appeal: Lords Reid, Wilberforce, and Morris of Borth-y-Gest.

In *Mitchell* v. *C.N.R.*,[56] the Supreme Court considered both *Herrington* and *Pannett.* The precise ratio of this case is difficult to determine, but as the court found the plaintiff to be a licensee, the discussion of the trespasser question must be termed *obiter.* Laskin, J., (as he then was) wrote in the majority opinion with reference to these cases: "I am less reluctant to find an actionable breach of a duty of care in the present case when I consider how broadly other courts in sister jurisdictions have viewed the duty owing by an occupier to children, even where they are classified as trespassers."[57] Ritchie, J., in his dissent felt that *Herrington* could not be treated as changing the law of Canada. In a recent decision of Killeen, Co. Ct. J., in *Lynch* v. *Brewers Warehousing Co. Ltd.*,[58] he wrote: "As I consider the *Mitchell* case, it goes beyond the parameters of the celebrated English case of *British Railways Board* v. *Herrington*, and adopts the "foreseeability" test as propounded by Lord Denning, M.R., in *Videan et al.* v. *B.T.C.*'[59] It is submitted that the learned judge erred in over-estimating the strength of the *Mitchell* decision, although in point of fact his conclusion as to the state of the law was probably correct.

It is in the as yet unreported decision of the Supreme Court in *Peter Veniot* v. *Kerr-Addison Mines Limited* (Oct. 9, 1974), that the law of Canada emerged, so to speak, from the judicial crucible. The adult plaintiff in this case was injured when driving his snowmobile in the dark (with necessary lights) along a private road owned by the defendant corporation. He struck a rusty pipe stretched across the road at face level; this pipe was supported by unpainted posts located off the road and was intended to block access to the company's powder magazine. There was

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55 [1974] 2 W.L.R. 152, 163-h, *per* Lord Reid.

56 (1972), 6 N.S.R. (2d) 440.

57 *Ibid.*, 450.

58 (1974), 44 D.L.R. (3d) 677.

59 *Ibis.*, 681.

evidence that the road, to the company's knowledge, was in use by snowmobilers, and also that such traffic was most common at night. There was evidence of a warning sign (though not a warning of the precise danger) at an entrance to the road. The plaintiff was going at a very moderate speed (15-20 m.p.h.). The jury found that he was present with the implicit permission of the defendant corporation, that the pipe constituted a concealed or hidden danger or trap, and finally that the accident resulted from a lack of reasonable care on the part of the defendant. On this basis they awarded damages to the plaintiff. The Ontario Court of Appeal[60] reversed the trial decision, holding that there was no implicit licence. Further they found that there was not a sufficient probability of the presence of trespassers to allow recovery under the *Herrington* rule.

In a mixed decision, the Supreme Court restored the trial award. Dickson, J., Laskin, C.J., and Spence, J., concurring) reviewed all the recent case law. At page 4 of his judgment he cites the statement of Lord Denning, M.R., in *Pannett* which was cited *supra* as "aptly express[ing]" the correct judicial approach. He further cites the *Cooper* case as authority for abandoning the "extreme likelihood" test. He concluded that the Ontario Court of Appeal should not have interfered with the jury's finding of license, as there were sufficient facts before them to allow them to reach that conclusion. He went on, however, to conclude that Mr. Veinot was entitled, even as a trespasser, to succeed: "Although as a general rule a person is not bound to anticipate the presence of intruders on private property or to guard them from injury, a duty may arise if the owner of the land knew of, or from all the surrounding circumstances ought reasonably to have foreseen, the presence of a trespasser."[61] Pigeon, J., with whom Beetz, J., concurred, preferred to decide the matter in favour of the plaintiff on the basis of licence, without expressing an opinion as to the other point.

In a strong dissent, Martland, J., (Judson, Ritchie and de Grandpré, J.J., concurring) would have dismissed the appeal. He agreed with the Court of Appeal that the finding of license was perverse. He then went on to examine the recent case law to determine whether the plaintiff could succeed as a trespasser. After a thorough review of the cases, he concluded that the *Herrington* decision must not be seen as basing the duty of an occupier on the *Donoghue* v. *Stevenson* principle. He cites passages in *Cooper* indicating that the law must not allow the duty towards a tres-

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60 [1973] 1 O.R. 411.

61 Judgment of Dickson J., p. 9-10.

passer to exceed that towards a licensee. He seems however to accept the decision of Lord Reid to discard the test of "extreme likelihood". He concludes: "The effect of these cases might be summarized as being that an occupier who knows of the existence of a danger upon his land which he has created, or for whose continued existence he is responsible, may owe a duty to persons coming on his land, of whose presence he is not aware, if he knows facts which show a substantial chance that they might come there. This is, in essence, the duty stated by Dixon C.J. in the *Cardy* case. Such duty, when it exists, is limited in the case of adults, to a duty to warn. In the case of children something more may be required. The existence of a duty will depend on the special circumstances of each case." In the instant case there had been no breach of a duty amounting to legal negligence.

Thus, one can safely conclude that, in one form or another, *Herrington's* case is now the law of Canada. One must then return to the problem of exactly what that case decides.

III. CONCLUSION

One might be tempted to conclude, as have some writers,[62] that while *Herrington* may well have largely mitigated the severity of the law, it has by no means put an end to the confusion surrounding it. The case law seems full of alternate tests: common sense and humanity or reasonable care; substantial probability of the presence of trespassers or foreseeable presence; as regards adult trespassers, the use of warning devices, or precautions reasonable in the circumstances. It is submitted that this complexity is illusory, that ultimately this is a question of distinction without difference. To reach the conclusion, one must turn to consider the policy problem these difficulties reflect.

In Canada, the courts are still saddled with the cumbersome common law rules of occupiers' liability. To allow trespassers a greater protection than lawful entrants would be absurd, not only because of the theoretical inconsistency, but also because common sense militates against this conclusion. This is because the reasonable man would be expected to take greater precautions to safeguard those expected to be on his land than those not expected. Thus the category of entrant bears on proximity and the corresponding tort duty; the more improbable the entrant, the less the duty. The common law of occupiers' liability recognizes this concept, but in a very primitive fashion. Decades of judicial legislation have served to sever these rules from the perceptions which gave rise to them.

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62 See: 88Law Q. Rev. *310 and 456*, U.B.C. Law Rev. *138*, *35* Mod. Law Rev. *409*.

Nowhere has this been more apparent than in the trespasser category. The two higher categories allowed for some degree of flexibility in the face of social change. The judicial tendency has been to attempt to minimize, if not eliminate, the distinction between the two as a considerable degree of judicial discretion has evolved behind the façades of the various classical formulae. The rule in *Addie's* case left virtually no room for recovery at all, much less for flexibility. The problem did not arise from the fact that society had grown to expect occupiers to make their land trespass-proof. On the contrary, common sense required that a man be entitled to presume his neighbours would normally obey the law. The obvious problem is that while one may normally presume others will obey the law, one may not always presume so. No reasonable person would suggest that he is entitled to assume that children will always obey the law. Yet that precise assumption is inherent in *Addie's* case.

In *Herrington* the House considered almost exclusively the problem of the innocent child trespasser. It is submitted that they did no more than verbalize the consequences as regards proximity and a corresponding duty of care entailed in an innocent act of trespass by a child; in other words, they determined what a reasonable man would consider in ascertaining what he should or should not do. Their emphasis on the fact that they were not equating the position of lawful and unlawful entrants is perfectly rational. What is important in their decision is that the category of occupant is no longer the only relevant factor, that it may often be of minimal importance where other factors are compelling enough. Similarly, it is submitted that the test of "substantial probability" is, if anything, a relative test, dependant upon the circumstances of the case. It might be suggested that the 'substantial probability' of trespass need be just as high where a child stumbles into a pit filled with sulfuric acid, as where the same child enters upon land and stubs his toe. It is submitted, however, that such a suggestion would meet with little practical acceptance in our courts.

In Canada today when an injured trespasser comes before a court, that court is bound to determine what the occupier ought or ought not to have done to avoid that injury. Whatever words are used to document the analysis, there is only one method of determination and this is by asking what would be reasonable under the circumstances. The qualifications seen in some of the case law can serve no theoretical or practical purpose other than to indicate that that judge would normally consider the imposition of a higher standard of care to be unreasonable.