CASE NOTES

COMMISSIONER FOR RAILWAYS (N.S.W.) v. QUINLAN[1]

Occupier's liability—Trespasser—Whether over-riding duty of care entitling injured trespasser to sue in negligence.

On 5 January 1956, at 5.20 a.m., a motor truck driven by one Quinlan and a steam locomotive operated by the Commissioner for Railways for New South Wales came into collision on a *private* level crossing just north of the railway station at Telopea, an outer Sydney suburb.

On 9 March 1964, at a much more civilized hour, the judgment of the Privy Council in *Commissioner for Railways v. Quinlan*[1] put *'finis'* to a protracted course of litigation between the parties, in which Quinlan had twice been awarded damages only to eventually suffer a reversal on appeal in each instance.

He first claimed as a licensee but the Full Bench of the Supreme Court on appeal quashed the judgment on the ground that there had been no evidence capable of supporting the view that the respondent when injured had been the appellant's licensee.[2]

In the interim the High Court had delivered judgment in *Rich v. Commissioner for Railways,*[3] holding that occupier's liability rules related only to the static condition of the premises, and that where, as in the instant case, the plaintiff's injuries were caused by an act of a servant of the defendant, the proper remedy was in negligence.

Specific reference was made by the Full Court to this decision in *Quinlan No. 1,* suggesting that the plaintiff's proper remedy was in negligence. This judgment was handed down on 2 June 1960, and was followed on 25 July of that year by the decision of the High Court of Australia in *Commissioner for Railways (N.S.W.) v. Cardy*[4], in which Dixon C.J. held that in addition to the rule that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him, there can be an over-riding duty of care in respect of specific perils actively created by the occupier if the presence of strangers can be foreseen.

Fullagar J. repeated the opinions he had expressed in *Rich's* case, and more definitely pronounced that there could be cases where, besides the occupier-trespasser relationship, there could be the 'neighbour' relationship propounded by Lord Atkin in *Donoghue v. Stevenson.*[5]

Basing his case on *Rich* and *Cardy,* a further action was brought by Quinlan against the Commissioner for Railways, alleging negligence *simpliciter,* and on this ground he again succeeded at first instance. An appeal to the Full Court of the Supreme Court of New South Wales was dismissed,[6] whereupon the Commissioner appealed directly

[1] [1964] 2 W.L.R. 817; Privy Council; the advice of their Lordships was read by Viscount Radcliffe.
[2] *Commissioner for Railways v. Quinlan* [1960] S.R. (N.S.W.) 629.
[3] (1959) 101 C.L.R. 135. [4] (1960) 104 C.L.R. 274. [5] [1932] A.C. 562, 580.

to the Privy Council, thus bringing the decision in *Rich* and *Cardy* squarely into issue.

The Privy Council held that the duty of an occupier to a trespasser remained as set out by Lord Hailsham L.C. in *Robert Addie & Sons (Collieries) v. Dumbrick*[7] *viz:* 'Towards the trespasser the occupier has no duty to take reasonable care for his protection . . . an occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser.'

This formula, it was held,[8] is exclusive so long as the relationship of occupier or trespasser is or continues to be a relevant description of the relationship between the person who injures and the person who is injured. The significance of the expression 'a relevant description' is further considered *infra.*

Furthermore, it was held, the formula covers activities of the occupier, not only the static condition of the premises, and the trespasser must take the land, and also the occupier's activities, as he finds them. Thus, the extension of the rule in *Dunster v. Abbott*[9] and *Slade v. Battersea Hospital*[10] to occupier-trespasser situations is precluded.

The third comment made on the formula is that knowledge is an essential factor.[11] The occupier's duty to the trespasser depends on knowledge of the trespasser's presence, or on imputed knowledge thereof. The Board was emphatic that there must be more than mere knowledge of likelihood, and that the coming of the trespasser must be 'expected or foreseen', or 'extremely likely'.[12]

The occupier-trespasser distinction should not be regarded, it was held,[13] as being 'old law' and as having been recast by the rules in *Donoghue v. Stevenson,*[14] and in support of this assertion it quoted Lord Atkin himself as having said,[15] some four years after *Donoghue's* case, that he knew of no duty owed by an occupier to a trespasser other than that laid down in *Addie's* case.

The Board considered four earlier decisions of the High Court, and as a result the law has been put back at the very least to where it was in 1933. In that year, the rule in *Addie's* case was, in the Board's opinion,[16] accepted and applied without qualification in *Transport Commissioners of N.S.W. v. Barton,*[17] and the Board considered appropriate to the present case that part of the judgment of Evatt J. where he said[18]: 'The [Commission], conducting its own railway entirely on its own property, was not under any duty to forecast the probability of [trespassers] and

[6] (1962) 80 W.N. (N.S.W.) 820.
[7] [1929] A.C. 358, 365.
[8] [1964] 2 W.L.R. 817, 828.
[9] [1953] 2 All E.R. 1572.
[10] [1955] 1 W.L.R. 207.
[11] [1964] 2 W.L.R. 817, 830.
[12] *Ibid.* 831.
[13] *Ibid.* 832.
[14] [1932] A.C. 562.
[15] *Hillen & Pettigrew v. I.C.I. (Alkali) Ltd* [1936] A.C. 65, 70.
[16] [1964] 2 W.L.R. 817, 828.
[17] (1933) 49 C.L.R. 114.
[18] *Ibid.* 134.

to run its train so as to prevent, by all reasonable precautions, injury to such trespassers.'

The Board also expressed approval of the decisions of the High Court in *Thompson v. Bankstown Corporation*[19] and *Commissioner for Railways (N.S.W.) v. Cardy*.[20]

In considering the former[21] the Board distinguished it from the present case on two main grounds—*viz* that in Thompson's case the injured person was a child and the electric transmission system was in a defective condition, whereas Quinlan was an adult and the injury was caused in the course of the regular conduct of the railways.

The distinction between the modes of operation of the respective services is not as substantial as may be at first thought.

It would appear that there is no great difference in principle between transmitting electricity through a transmission line which has been negligently maintained so that a live wire is loosely hanging therefrom in the one instance, and in the other instance running a train unusually quietly, in reverse, around a blind corner, without sounding the whistle, onto a level crossing, albeit a private crossing but nevertheless one by which certain persons were entitled to cross the line, so that the lawful presence of some person thereon could not be excluded, conduct which the jury found to be negligent.

If this distinction is not substantial, the basic difference between the positions of Thompson and Quinlan depended on their ages, so that it was because Thompson was a child that the decision in his favour was supported.

This view is supported by the Board's discussion[22] of *Cardy's* case, which it considers to have been simply a case of an allurement or trap for children, and the portions of the judgment of Dixon C.J. which are expressly approved are those in which he refers to the occupier-trespasser characterisation as being virtually without meaning in such cases, and holds that the imputation of a fictitious licence is unreal and unnecessary.

The portion of the judgment of the Chief Justice in which he has been regarded as propounding an over-riding duty of care is construed by the Board[23] as being limited to cases where the occupier's conduct is 'so callous as to be capable of constituting wanton or intentional harm'.

The fourth of the High Court cases considered was *Rich v. Commissioner for Railways (N.S.W.)*[24] and the Board was prepared to accept[25] that there might have been sufficient acquiescence by the occupiers to the course of trespassing to transform the trespasser into a licensee. However, it was quite emphatic that mere knowledge of the trespassing was insufficient, and the introduction of the *Donoghue v. Stevenson* 'neighbour' relationship to the occupier-trespasser field is quite definitely disapproved.

[19] (1952) 87 C.L.R. 619. [20] (1961) 104 C.L.R. 274. [21] [1964] 2 W.L.R. 817, 834.
[22] *Ibid.* 836. [23] *Ibid.* 837.
[24] (1960) 101 C.L.R. 135. [25] [1964] 2 W.L.R. 817, 835.

Where then does this leave the law? It has been suggested[26] that the introduction into the rule of the requirement that the relationship of occupier and trespasser be a relevant description of the relationship between the parties leaves the matter in the hands of the judge who is in a position to deny a remedy by holding the relationship to be 'relevant' or to give a remedy by holding it to be 'not relevant'.

The Board stated[27] that this requirement of relevancy was an important qualification, and it proceeded to consider[28] instances of breach of the occupier's duty. It would appear that there must be such reckless disregard of the presence of trespassers as would amount to malicious injury, and if this is the correct interpretation of the qualification, there would not be any very great latitude in which the judge could manoeuvre.

To summarize the position, it may safely be said that towards an adult trespasser the occupier's liability is to do no more than refrain from doing some act, wilful or reckless, which results in injury to him. Towards a child trespasser the occupier owes a higher duty *viz* not to place on his land any structure nor to carry out thereon any activity, which is an 'allurement' to children unless reasonable precautions are taken to prevent injury to children.

Whether this elevates the children, once 'lured' onto the property, into the category of licensees, or whether, in effect, there is created, as there is in the United States, a special category of 'child-visitors' is not clear, but in either event the result is the same, and the way is left open to the courts to give sympathetic relief to children who stray onto other people's property and there suffer injury, while maintaining towards adult trespassers the very limited duty as laid down in *Addie's* case.

It is of interest to note that in *Hedley Byrne & Co. v. Heller & Partners*[29] Lord Reid refused to regard the *Donoghue v. Stevenson* rules as the basis of liability for negligent statements, and his approach was somewhat similar to that of the Board in the present case. He specifically stated[30] that in his opinion *Donoghue v. Stevenson* 'may encourage us to develop existing lines of authority but it cannot entitle us to disregard them'.

Also worthy of mention as arising out of *Quinlan's* case is the subject of costs. This case emphasizes the need for some different provision for costs in such cases. Quinlan brought his first action by claiming to be a licensee, and had he failed to establish this fact it is reasonable that he should bear the costs. But, in upholding the appeal by the Commissioner for Railways, the Full Court of the Supreme Court of New South Wales[31] specifically pointed out that since his action commenced, the High Court in *Rich's* case had indicated that there was an overriding duty of care even to a trespasser.

Thus, relying on that decision of the High Court, together with the further decision in *Cardy's* case, and on the advice so to speak of the

[26] 37 *Australian Law Journal*, 369, 370. [27] [1964] 2 W.L.R. 817, 829.
[28] *Ibid.* 830, 831. [29] [1963] 2 All E.R. 575. [30] *Ibid.* 580.
[31] [1960] S.R. (N.S.W.) 629.

Full Court of the Supreme Court, Quinlan brought his further action as a trespasser alleging negligence only to be eventually defeated by the ultimate tribunal, and be required to bear the costs of the trial at first instance and the two appeals. When a decision is reversed in such circumstances it would not be unreasonable to expect the state to contribute materially to the costs.

T. F. CHETTLE

ROOKES v. BARNARD[1]

Intimidation—Conspiracy—Threat by members of union to strike unless plaintiff fellow-worker removed from employment—Whether actionable at suit of plaintiff.

Mr Rookes, employed by the British Overseas Airways Corporation as a draughtsman, left the trade union of which he had been a member. On his refusal to re-join the union, the other draughtsmen had, in order to maintain 100 *per cent* union membership, demanded his removal from the office. In the end they threatened to strike if this was not done, the threat being organized and conveyed by the three defendants in the action—Barnard and Fistal, draughtsmen employed by B.O.A.C., and Silverthorne, a union organizer, all officials of the union. The strike would have been in breach of the men's employment, not only because they had not given one week's notice of termination of employment, but because in this case an agreement between the union and the employers (conceded to be implied into those contracts) agreed that there should be no strikes at all.[2] The union also had 'an understanding or informal agreement with the employers for "100 *per cent* membership", which had been fulfilled'.[3] B.O.A.C. having reason to believe that other unionists might strike in sympathy, suspended Rookes from his work and two months later dismissed him, giving him a week's salary in lieu of notice.

At the trial, the jury found that each of the defendants was a party to a conspiracy to threaten strike action by the members of the union against B.O.A.C. to secure the plaintiff's dismissal; that each made a threat of strike action against B.O.A.C. to secure that dismissal; and that these threats of strike action caused Rookes to be dismissed.

The main argument in the case was whether, in these circumstances, the three defendants had committed the tort of intimidation.[4] Counsel for the defendants argued that there was no such tort, but all of the nine judges involved in the case rejected this contention. The authorities

[1] [1964] 2 W.L.R. 269. House of Lords; Lord Reid, Lord Evershed, Lord Hodson, Lord Devlin and Lord Pearce.

[2] The agreement had been made between representatives of a number of unions and representatives of a number of employers.

[3] *Per* Sellers L.J. in the Court of Appeal: [1962] 2 All E.R. 579, 582.

[4] [1964] 2 W.L.R. 269, 310 *per* Lord Devlin. Such an argument was necessary in order to support the jury's finding of conspiracy. It had to be shown that there was a 'conspiracy by unlawful means', as a 'conspiracy by lawful means' was non-actionable by s. 1 of the Trade Disputes Act, 1906 (U.K.). See *infra* n. 7.