CASE NOTES

VICTORIAN RAILWAYS COMMISSIONERS v. SEAL[1]

Occupier's Liability—What is a trespasser?—Whether Occupier liable for omission to remedy conditions—Position of a child trespasser—What is a child?

The Mornington Railway Yards are situated within the township of Mornington itself. To the north they are bounded by residential areas and to the immediate south by the town's major shopping centre. Residents from the north had found it convenient to cross the railway yards to reach the shopping centre.

On the 21st April 1960, a turntable which was situated in the west of the yards was free to revolve as its locking device had been sawn through. Kevin Patrick Seal and two companions saw the turntable revolving in the wind; they slipped through the wire fence and rode on the turntable. In jumping off, Kevin Seal had his foot caught and crushed in the gap between the decking of the turntable and the surrounding embankment.

Seal and his father succeeded at first instance in proceedings against the Railways Commissioners. The Commissioners' appeal to the Full Court was dismissed.

At the trial the judge left a number of questions to the jury. (The questions relating to the Commissioners' liability are reproduced, others on damages and contributory negligence are omitted.)

"Q. 1: Did the defendant by its servants give the infant plaintiff permission—
(a) to play on the turntable? — A.: No.
(b) to play in the railway yards? — A.: No.
(c) to use the railway yards as a means of crossing from one boundary to another? — A.: Yes.

Q. 2: On 21 April 1960 was the turntable in a state in which it was free to turn or in which it could be turned by children? — A.: Yes.

Q. 3: On 21 April 1960 did the turntable constitute a concealed danger or trap for the infant plaintiff? — A.: Yes.

Q. 4: On 21 April 1960 did the defendant's servants know that the turntable was on that date in a state in which it was free to turn or in which it could be turned by children? — A.: Yes.

Q. 5: Did the defendant by its servants take reasonable care to prevent the infant plaintiff relying upon a deceptive appearance of safety of the turntable? — A.: No.

1. (1966) V.R. 107.

Q. 6: Prior to 21 April 1960 was the locking device on the lever of the turntable cut by some unauthorized person? — A.: It was cut prior to 21 April 1960 but the jury were unable to say by whom or in what circumstances.

Q. 7: On 21 April 1960 was the defendant by its servants guilty of wanton or reckless disregard of the infant plaintiff's safety? — A.: Yes.[2]"

The jury also had compelling evidence before them that the defendants' servants had knowledge that children frequently played on and around the turntable[3].

On appeal to the Full Court the jury's finding of fact in answer to Q. 7 (above) that the Commissioners' servants were reckless toward Seal was challenged by the defendants on the basis that it was unsupported by evidence. The defendants also challenged the judge's direction on recklessness in that it allowed recovery for a recklessly inflicted injury not caused by a reckless act of positive misfeasance. That is, that a trespasser could not recover for injury (1) caused by non feasance or (2) arising out of a dangerous condition of the premises.

The plaintiffs denied the validity of the defendants' submissions and in reply contended that the boy was a licensee at the time he was injured and was owed a commensurate duty[4]. They attacked the trial judge's conclusion of law on two bases. First, that the answer to 1(c) despite 1(a) and 1(b) meant that the boy had a wide area of licence and second, that taking the jury's findings of fact as correctly reached there was evidence capable of giving rise to certain legal strategems elevating Seal to a licensee on which he should have directed the jury.

The issues raised by these rival submissions meant the court had to discuss the following issues:

(1) Was the judge's finding that the boy was a trespasser correctly reached?

(2) If he was a trespasser what was the duty owed toward him by the Commissioners?

(3) Is this duty affected by Seal being injured
(1) by a dangerous condition of the premises and
(2) by what *prima facie* appears to be a non feasance.

Was Seal a licensee or a trespasser?

Hudson J. (with whom O'Bryan J. concurred) was of the opinion that the boy was a trespasser. His reasons for holding this are not

2. (1966) V.R. 107; 109.
3. (1966) V.R. 107; 109.
4. The duty owned by an occupier to a licensee is "to give warning of all known but concealed structural hazards regardless of when and how they originated": *Fleming Law of Torts,* 3rd Ed. 1965; 427. The duty owed a trespasser is less favourable from the point of view of the trespasser: *vide infra.*

explicitly stated but he took as law the view of Dixon C.J. and Fullagar J. in *Cardy v. Railway Commissioner (N.S.W.)*[5] that the enquiry of the court must be the extent of the actual licence given by the occupier. Hudson J. thus found that the court should not try to impute a licence where to do so is to run contrary to the occupier's real lack of permission for persons to enter his property. This meant that Hudson J. accepted the judge's conclusion of a narrow licence from Q. 1 (a), (b) and (c) as being correct and that the devices for elevating a trespasser to licensee were no longer good law. Another reason, on the facts as found by the jury, for saying the boy was a trespasser would be that the licence given by the Commissioners was to cross the yards not to play in them[6].

Gillard J. made a more detailed analysis. He identified three ways in which the generally limited duty owed by the occupier to a trespasser was overcome in children's cases.

Firstly the court would ignore the entry without permission and state the duty owed in rather limited Atkinian proximity terms[7]. Gillard J. disapproved this method as having little or no support in later cases.

Secondly, if the original entrance was made lawfully, an injury while trespassing in a manner which a reasonable occupier would foresee on some chattel or fixture incidental to the premises would be recovered for on the basis of the entrant's original status[8]. This approach has a Victorian Full Court authority against it. In *Slade v. Victorian Railway Commissioners*[9] a boy on the defendant's pier by permission was injured when he trespassed upon a machine on the pier. The Full Court held that the boy could not recover as he was a trespasser. *Slade's Case*[10] is also more in accord with the use of the doctrines of occupier's liability in relation to chattels to prevent recovery by persons injured while trespassing on chattels[11]. Moreover, on the basis of the facts of this case as found by the jury and the evidence as led Gillard J. to say that the permission given by the defendants did not extend over the whole yards so that when the children slipped into the yard's Western end they were trespassers from the outset.

5. (1960) 10 C.L.R. 274.

6. *Strang v. Russell* (1904) 24 N.Z.L.R. 916. The defendant had a licence to enter the land but entered under a presumed independent legal right. Held: defendant was a trespasser. But *cf. Gough v. National Coal Board* (1954) 1 Q.B. 191.

7. *Lynch v. Nurdin* (1841) 1 Q.B. 29; 113 E.R. 1041; *Sioux City and Pac. Rrd. Co. v. Stout* (1873) 21 L. Ed. U.S. 745 (U.S. Supreme Court); Lord Machaghten in *Cooke v. Midland Railway Co.* (1909) A.C. 229; 233 (Lord Atkinson in *Glasgow Corporation v. Taylor* (1922) A.C. 44 attributes this judgment to the "allurement" doctrine *infra.*)

8. *Gough v. National Coal Board* (1954) 1 Q.B. 191; 203-204 per Birkett L.J. *Holdman v. Hamlyn* (1943) 1 K.B. 664.

9. (1889) 15 V.L.R. 190.

10. *Ibid.*

11. *Twine v. Beans Express* (1946) 62 T.L.R. 458; *Conway v. George Wimpey* (1951) 2 K.B. 266.

Thirdly, the court would use the doctrine of "allurement"[12]. This approach suggested that children who come on to an occupier's land because of an attractive structure located on it were lured on by the occupier, who could not be heard to say he did not ask them. It seems Gillard J. said this did not apply where the jury had properly arrived at the conclusion there was no permission express or implied for the defendant to be in a particular area. This is hard to understand if the function of the doctrine of allurement is regarded as that of imputing a licence. However, Gillard J.'s explanation of the inapplicability of allurement is easily understood if analyzed as follows.

The duty owed to a normal licensee by an occupier is to take care to warn of or remove such concealed traps as he (the occupier) knows of or has reason to know of. The test of "concealed" trap is based in most cases upon whether or not a reasonable man would recognise the trap as a danger. If he would recognise it as dangerous it is not "concealed". When an occupier gives a licence to a user which might comprise children he should realize that unaccompanied children are likely to be "allured" on to dangerous, attractive installations on the land and that "concealed" traps will cover a much wider range of dangers in this case as they are not as likely to realize the danger of the attractive structure as a reasonable adult[13]. Thus allurement now only operates to extend the category of concealed dangers for children.

It is interesting to note that even when the devices above were all accepted in their original form they were not applied with any degree of consistency. For example, *Glasgow Corporation* v. *Taylor*[14] seems to embody all three in reaching a favourable result for the plaintiffs.

After dismissing the three devices as bad law or inapplicable to the evidence and the facts as properly found by the jury Gillard J. then agreed with Hudson J. in saying the question must always be the extent of the licence. The jury's answers to Q. 1 (a), (b) and (c) negative any licence apart from that for crossing the yards. Seal entered the yards far away from the paths leading to the shopping centre and so was a trespasser[15].

12. Lord Atkinson in *Cooke v. Midland Rlwy. Co.* (1909) A.C. 229; 238-239; *United Zinc Co. v. Britt* (1922) 258 U.S. 268.

13. Compare *Phipps v. Rochester Corp.* (1955) 1 Q.B. 450; 459 with Gillard J. in *Victorian Railways Commissioners v. Seal* (1966) V.R. 107; 122; 232.

14. (1922) A.C. 44.

15. An interesting question now that most of the devices for imputing licences have gone is when a licence will be implied by the court. In *Victorian Rlwys. Commissioners v. Seal* (1966) V.R. 107; 132 Gillard J. deals with this:

> "An intruder on premises should not be characterized as a licensee merely because the occupier (particularly where a statutory authority is the occupier) is inactive in preventing the intrusion. If however, to the knowledge of the occupier the public for a certain purpose continuously for a long period uses land of the occupier, and if with such knowledge the occupier takes no steps to prevent the intrusion, then such a continuous user, without objection, could lead to an implication of a grant of licence by the occupier in respect of the land so used for such purposes."

Duty of care owed a trespasser.

Once having determined the boy a trespasser the court had to consider the duty owed to him by the Commissioners. Hudson and Gillard JJ. both adopted the same general line of analysis but Gillard J. explored the requirements of the duty in more detail.

The starting point for both judges was *Cardy v. Commissioner of Railways (N.S.W.)*[16]. In that case a boy was injured by falling through the crust of firebox ashes when he strayed from a path on railway property. Several members of the High Court attempted to define the duty of care owed to trespassers.

Dixon C.J. said:

> ". . . a duty of care should rest on a man 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 averting the danger or of bringing it to their knowledge"[17].

Fullagar J. believed that the duty owed a trespasser could be based on a *Donoghue v. Stevenson*[18] proximity type relationship.

Windeyer J. would have been prepared to find a wider duty owed to a trespasser along Fullagar J.'s and Dixon C.J.'s lines although on the facts of the case he found the boy a licensee.

Their Honours (Hudson and Gillard JJ.) then considered whether this had been affected by the Privy Council's advice in *Quinlan v. Commissioner of Railways (N.S.W.)*[19], where the Board used the rule laid down in *Addie v. Dumbreck*[20] that in order to allow recovery:

> "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 trespassers"[21].

There is really an inherent conflict between these two cases as Dixon C.J.'s formulation represents the view that the rigid stratification of the type of duty owed to a particular type of entrant may be modified[22] for it contains a number of concepts which may be flexibly used. The "gravity of the danger" could be weighed against the "seriousness of the harm" which might result. The degree of knowledge could be applied flexibly right from the tiniest advertance to the fullest appreciation. The "likelihood" of trespassers being present could be

16. (1960) 104 C.L.R. 274.
17. (1960) 104 C.L.R. 274; 286.
18. (1932) A.C. 562.
19. (1964) A.C. 1054; noted in (1964) M.U.L.R. 583.
20. (1929) A.C. 358.
21. (1929) A.C. 358; 365.
22. For other adherents to this view *vide* Goodhart in 79 *Law Quarterly Review* 586 and Lord Macnaghren's judgment in *Cooke v. Midland Rlwy Co.* (1909) A.C. 229; 233.

balanced with the "gravity of the danger" and the "seriousness of the harm". On the other hand the Board's advice is quite rigid in tone, containing very little basis for flexibility. This is demonstrated by the adoption of *Addie v. Dumbreck*[23] where even for 1929 an extremely harsh view of the law was adopted against an easily detectable child who was injured by a machine. The House of Lords in that case and the Privy Council in *Quinlan's Case*[24] had failed to recognize that there had been a steady mitigation of the attitude of the law and the community towards the rights of plaintiffs since the days of nineteenth century Industrial Revolution Britain; a community which placed an aura amounting to sanctity around the rights of property holders.

The Board in *Quinlan's Case*[25] adopted Dixon C.J.'s duty statement as representing on the facts of *Cardy's Case*[26] an explanation of the reckless climb of the duty owed to a trespasser under the *Addie v. Dumbreck*[27] formulation. However, in this and in other indefinite statements the Board laid a basis for the destruction of their own advice[28].

Hudson and Gillard JJ. accepted, as they had to, the Board's interpretation of *Cardy's Case*[29] but they use Dixon C.J.'s formulation to explain what "reckless" is. This means that subject to a limitation discussed below pre *Quinlan's Case*[30] flexibility has been restored to the law.

Hudson J. attempted to separate the pre-requisites for the duty and the duty itself. He said the duty "only arises when the presence of the trespasser is actually or highly likely and his presence may be expected or foreseen"[31]. This attempted separation is invalid as the pre-requisite is an inseparable part of the duty itself. One cannot be said to act recklessly unless one has knowledge of the danger of one's conduct and has related this danger to someone who will probably be present. It is impossible to be reckless unless you are reckless toward someone.

Gillard J. explored the limits of the duty. It appears the occupier must have knowledge of the facts comprising the danger, a subjective realisation of the danger and a knowledge that persons are either present or very likely to be present. This delineation represents a slight reduction in the broad duty laid down by Dixon C.J. in *Cardy's Case*[32]

23. (1929) A.C. 358.
24. (1964) A.C. 1054.
25. (1964) A.C. 1054.
26. (1960) 104 C.L.R. 274.
27. (1929) A.C. 358; 365.
28. *vide* (1966) 40 *Australian Law Journal* 1.
29. (1960) 104 C.L.R. 274.
30. (1964) A.C. 1054.
31. (1966) V.R. 107; 119.
32. (1960) 104 C.L.R. 274.

as a result of the need to adjust to *Quinlan's Case*[33] where the "likelihood" of trespassers being present seems to have been set at a much higher level.

If the duty laid down above were applied to the facts there is no doubt that the jury could have reasonably found for the plaintiffs as there was evidence against the Commissioners saying that they knew of the broken locking device, realized that it was dangerous, had knowledge that children frequently played on the turntable and yet had failed to fix the turntable when they could quite easily have done so.

Does the duty of care owed a trespasser extend to injury caused by (a) a dangerous condition or (b) non feasance?

Before the favourable result for Seal above could be unimpeachable the Full Court had to consider (a) whether a trespasser could recover for recklessly inflicted[34] injury arising from a dangerous condition[35] and not caused by an activity carried out on the premises and (b) whether a trespasser was limited to recovery for injuries caused by the occupier acting badly[36] (misfeasance).

(a) *Dangerous Condition.*

There have been judicial pronouncements refusing recovery for recklessly inflicting injury caused by a dangerous condition:

> "In reference to the person and property of a trespasser an occupier is under no obligation of care to prevent injury arising from a dangerous condition of the premises"[37].

The distinction sought to be made between condition and activity has been analysed (although with little clarity) by Denning L.J. (as he then was) in *Dunster v. Abbott*[38]. He said a dangerous static condition was:

> "concerned with dangers which have been present for some time in the physical structure of the premises"[39],

33. (1964) A.C. 1054; 1076-1077.
34. The discussion is confined to the "reckless" limb of the "reckless-intentional" duty as no-one would deny that an occupier intentionally inflicted injury caused to a trespasser. For example, a spring gun causing injury to a trespasser which has been knowingly maintained by an occupier who did not set it.
35. The only dangerous condition for which it is possible for a trespasser to recover for is the dangerous state of artificially constructed premises. Injury caused by natural dangers is not compensable *vide Bagby v. Kansas City* (1936) 92 S.W. 2d. 142; trespasser injured by loose rock in cliff.
36. *vide* footnote 34.
37. *Transport Commissioners of N.S.W. v. Barton* (1933) 49 C.L.R. 114; 127 per Dixon J.
38. (1954) 1 W.L.R. 58 noted in 17 *Modern Law Review* 265 by J. L. Montrose *"Negligence and Liability for Dangerous Premises"*.
39. (1954) 1 W.L.R. 58; 21.

and that dangerous operations or activities are:

> ". . . things being done in the premises . . . dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else"[40].

In *Videan v. British Transport Commission*[41] Pearson L.J. said of the distinction:

> "I do not think there is any sound basis of principle for differentiating sharply between liability for the static condition of the land and liability for current operations on the land"[42].

This criticism is valid because in our case and in any other case the conduct of the occupier is either reckless or it is not. It does not matter whether the resultant injury arises out of a condition or an activity, although it is generally far easier to make out a case when the injury is caused by an activity. Gillard J. adopts this view[43].

Pearson L.J. in *Videan's Case* also criticized the difficulty of distinguishing between a condition and an activity:

> ". . . does a moving stairway at an underground railway station and does a bull grazing in a field belong to static condition or current operation? If a hole is dug on Monday and on Tuesday someone falls in is the accident due to the static condition prevailing on Tuesday or to the operations which took place on Monday"[44].

This is a justified attack on Denning L.J.'s distinction for two reasons. Firstly no firm judicial distinction has ever been made between the two concepts[45] to prevent Pearson L.J. showing the vagueness of the formulations relating to condition and activity. Secondly, the reason he is able to demolish any attempt to define is because there is no real distinction of principle between the two. The difference between a condition and an activity is only one of degree and thus in the penumbra area decision as to whether a particular danger is a condition or an activity is impossible as conditions shade off into activities.

Hudson and Gillard JJ. also found there was no support for such a distinction in the recent authorities. Dixon C.J.'s duty statement in *Cardy's Case*[46] would appear to allow recovery for injury caused by a condition. *Quinlan's Case*[47] also rejected the distinction largely to foil Lord Denning's attempt in *Videan v. British Transport Commission*[48] to allow a trespasser to recover on a *Donoghue v. Stevenson*[49] duty where he is injured by an activity carried out on the land.

40. (1954) 1 W.L.R. 58; 61.
41. (1963) 2 Q.B. 650.
42. (1963) 2 Q.B. 650; 678.
43. (1966) V.R. 107; 128.
44. (1963) 2 Q.B. 650; 678.
45. Montrose in 17 *Modern Law Review* 265 makes no effort to distinguish.
46. (1960) 104 C.L.R. 278; 286.
47. (1964) A.C. 1054.
48. (1963) 2 Q.B. 650.
49. (1932) A.C. 562.

(b) *Non Feasance.*

An injury arising from a condition may be caused by misfeasance or non feasance on the occupier's part[50]. In 1912 an Irish court was of the opinion:

> ". . . there is no obligation on a landlord to repair his premises and . . . mere omission gives no cause of action to a trespasser"[51].

However, Hudson and Gillard JJ. thought there was no reason why a trespasser should not recover for the occupier's failure to remedy a condition and appeared to believe the Commissioners' failure to repair the locking device is a clear example of non feasance. This belief was supported by the trial judge who based his direction of recklessness on whether the Commissioners' servants had failed to act with knowledge of the danger[52]. It is possible to argue to the contrary that there was some measure of misfeasance on the Commissioners' part in that they erected a turntable which could easily be turned into a dangerous trap. This could also be argued in *Cardy's Case*[53] where it could be said the Commissioners acted badly in dumping the ashes in an easily accessible area.

The situation where it would be impossible to allege any misfeasance would be when an occupier other than the constructing occupier held the land. Even in this case liability should be imposed if in all other respects there is a breach of the duty owed a trespasser. There are no logical or policy considerations for not doing so and as Hudson and Gillard JJ. pointed out Dixon C.J.'s statement of duty includes liability for an occupier who "is responsible for its (the danger's) continued existence"[54].

Miscellaneous.

There are several other matters incidental to the case but of some importance to the law.

The court regarded the one general duty statement of the occupier's liability toward a trespasser as covering both adults and children[55]. In doing this they rejected the notion of a separate more lenient duty owed to child trespassers. Gillard J. noted that a breach of the duty owed to

50. It is hard to imagine a situation in which a dangerous activity inflicts an injury that is caused by failure to act rather than acting badly; *vide Kelly v. Metropolitan Railway Co.* (1898) 1 Q.B. 994. Apart from authority an accident might be said to be attributable to non feasance in the course of acting: *vide* Lucke (1960) 2 M.U.L.R. 472.

51. *Coffey v. McVey* (1912) 2 I.R. 290; 307.

52. (1966) V.R. 107; 111.

53. (1960) 104 C.L.R. 274.

54. *Ibid;* 286.

55. *The Restatement 2d Torts* 339 identifies a separate duty owed to child trespassers by occupiers. The case note written in (1964) 4 M.U.L.R. 583 purported to find a separate duty owed trespassers in *Quinlan's Case* (1964) A.C. 1054. This was understandable in view of Quinlan's Case's vague language: *vide* Gillard J. in *Seal's Case* (1966) V.R. 107; 131.

trespassers may be more easily made out in the case of children because it is generally extremely likely that children will resort to attractive objects accessible to them[56]. The duty owed to trespassers is thus delineated by enquiring whether the injured trespasser is a "child" or an adult[57]. A "child" for this purpose is a person the occupier foresees as extremely likely to be on the dangerous structure because it is attractive, in fact is on the dangerous structure for this reason and has no adequate grasp of the concept of trespassing[58]. Thus "child" includes mental defectives. For those entrants who have a limited knowledge that trespassing is wrong it may be possible to reduce their damages by reference to the concept of contributory negligence in that they have failed to take reasonable care for their own safety by unlawfully entering another's property[59].

Conclusion.

The tone of *Seal's Case* is liberal and in accord with the trend to compensate the injured person with damages from the party best able to spread the cost, but it does not alter the fact that there is still a useless body of rules on occupier's liability which stratify the duty owed according to the type of entrant on quite artificial lines.

As Denning L.J. has said:

> ". . . a canvasser who comes on your premises without your consent is a trespasser[60]. Once he has your consent he is a licensee. Not until you do business with him is he an invitee"[61].

The area of the law now covered by the doctrines of occupier's liability could quite easily be assimilated into the general concept of negligence.

J. McI. WALTER.

56. (1966) V.R. 107; 132.
57. 50 *Kentucky Law Journal* 100 contains a discussion of the age rules applied to child trespassers in the U.S.A.
58. This would include children attracted to the dangerous installations after they have strayed on to the land. This overcomes *United Zinc Co. v. Britt* (1922) 258 U.S. 268 where because children did not trespass originally as a result of the attraction they were not allowed to recover.
59. *Twist v. Winona* (1888) 39 N.W. 402.
60. This is probably not true now as he would be a licensee; *Robson v. Hallett* (1967) 3 W.L.R. 28.
61. *Dunster v. Abbott* (1954) 1 W.L.R. 58; 61-62.