INVITEES AND RELATED PROBLEMS.

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THE general principles relating to the liability of an occupier towards those resorting to his premises are well settled, but there is a surprising number of points on which authority is either lacking or confused. This paper is an attempt to discuss some of these difficulties. The unfortunate tendency in the law of tort to increase the number of pigeon-holes leads frequently to doubts as to the category into which an entrant should be placed, and as to the detailed rules of law that should be applied. There is authority for the view that there are five standards of liability: public utilities, contractual right, invitees, licensees, and trespassers. This paper is an attempt to discuss some of the rules relating to the first three classes mentioned, but it must be pointed out that within the limits of space available it is not possible to make the citation of authority exhaustive.

(A) Liability Under Contract.

Where there is a contractual relationship (e.g., between an innkeeper and a guest) McCardie J. states that there is an implied warranty that the premises are, for the purpose of personal use by the guest, as safe as reasonable care and skill on the part of *anyone* can make them, but the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of *any person* concerned with the construction, alteration repair or maintenance of the premises.[1] In a recent case, Scrutton L.J. states the rule thus:—"There is not an absolute warranty of safety, but a promise to use reasonable care to ensure safety."[2] Thus it must be regarded as established that there is liability under contract at least in some cases for the negligence of an independent contractor.[3]

There is authority for the view that if the premises were defective when the defendant became occupier he is not responsible—the argument being that it is unfair to charge an occupier with responsibility for the acts of contractors over whom he had no control, unless the defect was such that it should have been discovered by reasonable care.[4] This view, however, must be rejected: the public rely on the building itself, and this liability should not depend on the accidents of the dates of contracts with which they have nothing to do.[5]

Does this liability for the negligence of an independent contractor extend beyond responsibility for the structure and maintenance of

1. *Maclenan v. Segar* [1917] 2 K.B. 325. This rule is cited with approval by Greer L.J., in *Hall v. Brooklands Auto-Racing Club* [1933] 1 K.B. 205.
2. *Hall v. Brooklands Auto-Racing Club* [1933] 1 K.B. 205.
3. *Francis v. Cockrell* (1870) L.R., 5 Q.B., 501.
4. Kelly C.B.—*Francis v. Cockrell* (supra) at 507.
5. Per Montagu Smith J. and Cleasby B. in *Francis v. Cockrell* at 513, 514, and per McCardie J., *Maclenan v. Segar* (supra).

the building? *Cox v. Coulson*[6] is a case in point, but the judgments of the Court of Appeal are rather confused because the occupier's liability towards invitees and those entering under contract were treated as one and the same. As we shall see this is not the correct view. The decision was that the theatre manager warranted the building to be as safe as reasonable care on the part of anyone could make it, but that where the injury was caused by the negligence of an actor who was not a servant of the manager, liability arose only if it could be proved that there was personal negligence on the part of the manager in failing to use reasonable care to supervise any parts of the play which were intrinsically dangerous unless carefully performed. If this decision be correct, where an action is brought for injury not resulting from the actual state of the premises, it must be caused by negligence which the occupier should have foreseen and supervised. This would mean that an occupier was not responsible for most types of "collateral negligence" (subject to what has been said concerning the building itself), for there would frequently be nothing to cause the occupier to expect danger.

Is a warning sufficient? The judgment of the Court of Appeal in *Hall v. Brooklands Auto-Racing Club*[7] suggests that in certain circumstances it may be. Where dangers are reasonably incident to the spectacle and could be foreseen by any reasonable spectator, there is no obligation even to warn, e.g., a spectator at Lord's could not recover if he were hit by a cricket ball, a spectator at a flying meet runs the risk of performing aeroplanes falling on his head. But there is an undertaking that due care has been used in the structure of the buildings and the racing track—it is doubtful if a warning that a grand stand was unsafe would be sufficient.

Why should not a tenant[8] fall within the rule of *Maclenan v. Segar* when he sues the landlord for injury caused by the defective state of a common staircase which is retained within the landlord's control? The rights of the tenant arises from the contract itself, rather than from any supposed invitation. Lord Buckmaster[9] and Greer J.[10] approve of it, and Bankes L.J. remarks, "There is much to be said for that view."[11] *Dunster v. Hollis*[12] suggests that the lessor is under an obligation to take reasonable care to keep the steps reasonably safe, and that unless there is contributory negligence, visibility of danger is no defence.

(B) Invitees.

This, then, being the liability of an innkeeper to his guest, is the duty owned to an invitee less onerous? The classic passage is the

6. [1916] 2 K.B. 177. See American Restatement S. 344, Vol. II, p. 944. A case that might have thrown interesting light on this question was *Humphreys v. Dreamland Ltd.* [1930] 74 Sol. J. 862. But it was decided that neither the relationship of invitor and invitee, nor of contract arose.
7. [1933] 1 K.B. 205.
8. The question here discussed is not as to visitors to the tenant. It is now settled that so far as the landlord is concerned these are at most licensees.
9. [1923] A.C. at 81.
10. *Cockburn v. Smith* [1924] 2 K.B. at 123.
11. *Ibid* at 130.
12. [1918] 2 K.B. 795.

judgment of Willes J. in *Indermaur v. Dames*[13]: "With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier should on his part use reasonable care to prevent damage from unusual dangers which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer must be determined by a jury as a matter of fact."

The tendency to paraphrase this judgment by saying that the occupier must make the premises reasonably safe for the invitee has naturally led to an assumption that the liability in contract and in tort is exactly the same.[14] Charlesworth argues that it seems difficult to suggest any rational distinction between the case of a customer in a shop and a guest in a hotel, and that this distinction has only the authority of McCardie J.[15] On this theory it follows that an occupier does not discharge his duty to an invitee by employing an independent contractor to do it for him. Pollock[16] cites no authority for this proposition and those cited by Charlesworth[17] are not very conclusive. *Marney v. Scott*[18] was rejected by McCardie J. in *Maclenan v. Segar*[19]. *Pickard v. Smith*[20] is a highway case, and three others deal with liability under contract. *Kimber v. Gas Light and Coke Co.*[21] is not really a decision on the point at all, for the suit was against the contractors who made the dangerous hole in the floor—not the occupier. There are, however, many dicta in favour of this view, e.g., in *Cox v. Coulson*,[22] Swinfen Eady, Pickford and Bankes LL.J. so identify the two cases that the rule in *Indermaur v. Dames* dealing with invitees is treated as an implied term in the contract. The weight of authority, however, since the date of the publication of Charlesworth's book (1922) seems to be in favour of making the distinction approved by McCardie J. Slesser L.J. remarks: "In spite of certain *obiter dicta* to the contrary, I believe it is the better opinion that even in cases where there are no higher terms expressly imported, where for reward persons are invited to use premises, the duty upon the invitors is higher than in the case where the action is merely founded in tort."[23] Scrutton L.J. distinctly states that the duty owed to one entering under a contract is higher than that owed towards an invitee.[24] It is submitted that the difference is twofold: (a) the rule as to the effect of a warning of danger is slightly different

13. L.R. 1 C.P. 274 at 288.
14. Bigham J. *Marney v. Scott* [1899] 1 Q.B. 986.
15. Liability for dangerous things 251.
16. Pollock, Torts 530.
17. Charlesworth, Liability for Dangerous Things, p. 245.
18. [1899] 1 Q.B. 986.
19. [1917] 2 K.B. at 330.
20. (1861) 10 C.B. N.S. 470.
21. [1918] 1 K.B. 439.
22. [1916] 2 K.B. 177.
23. *Hall v. Brooklands Auto-Racing Club* [1933] 1 K.B. 205. This of course means that *Norman v. G. W. Rly.* is of dubious authority at least so far as the dicta go. [1915] 1 K.B. 584.
24. *Hayward v. Drury Lane Theatre*, etc. [1917] 2 K.B. at 914.

in each case, and (b) a hotelkeeper is liable for the negligence of an independent contractor as pointed out above, whereas an occupier is liable to an invitee for the negligence of an independent contractor only if it has created an unusual danger which the occupier should have discovered by reasonable care.[25] This latter rule seems to be implicit in the treatment of the subject in the American Restatement,[26] and it is submitted that it is correct.

Whether the placing of those who enter under contractual right in a separate category is justifiable is a rather more open question. The ascending scale of liability concerning trespassers, licensees and invitees is clearly founded on common sense. But there is a dangerous tendency to increase the number of pigeonholes in the law of tort, with the result that the rules become so fine that confusion is inevitable. Rules of law are made to be applied, and it is submitted that no injustice would result from making identical the rules relating to invitees and those entering under contract. However, a possible justification of the distinction is mentioned below.

It is still regarded as a vexed question by many authorities as to whether the occupier must make the premises reasonably safe for the invitee, or whether it is enough to give warning of the danger.[27] As phrased the question is unanswerable, because it results in a false dichotomy. The problem can only be faced by analysing the exact words of Willes J. (supra), for subsequent cases have established it as the foundation of this branch of the law. Griffith well remarks, "Perhaps only those who have leisure to ponder over such matters can appreciate the exact accuracy of the definition. It may be said with truth that he who alters one word of it does so at his peril."[28] The occupier, states Willes J., is "to use reasonable care to prevent damage from unusual dangers which he knows or ought to know." A little thought will show that this statement is perfectly plain. In many cases a warning of the danger will make the premises reasonably safe, and Willes J. lays the emphasis on reasonable care on the part of the occupier. Griffith C.J. points out that the obligation arises from the invitation, and is co-extensive with it, and therefore if the invitation is qualified by a warning, the obligation is accordingly qualified.[29] "It is clear, I think, that this case does not come within the principle of *Indermaur v. Dames* . . . because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action."[30] Charlesworth after a detailed examination of the authorities reaches the same conclusion.[31] Isaacs J. asks was the damage caused by "unusual danger which the

25. Clerk & Lindsell, Torts [1929], p. 441-2.
26. S. 343, Vol. II, pp. 938-939.
27. Salmond, Torts, p. 513. In 1934 the C.A. treated it as an open question, but it was not necessary to decide the issue: *Hillen v. I.C.I. Ltd.* [1934] 1 K.B. 465, 470.
28. 32 L.Q.R. at 256.
29. 20 C.L.R. at 186; Cf. Lord Cave [1923] A.C. at 260.
30. Per Lord Atkinson, *Cavalier v. Pope* [1906] A.C. at 432.
31. Liability for Dangerous Things, p. 245.

defendants knew or ought to have known, and which they neglected to prevent or give notice of."[32] As Atkin J. phrases it: "If (a landlord) lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character."[33]

It is not suggested that mere warning is enough in all cases.[34] Some (using the method of *reductio ad absurdum*) have suggested that if there is no obligation to make the premises reasonably safe, it would be possible for an occupier to escape by putting up a notice: "Visitors are warned against any dangers that may be." But in this case there would be no appreciation of any specific danger on the part of the invitee, and as he could not shape his conduct so as to guard against it, the warning would be totally illusory. "There may be perception of the danger without comprehension of the risk."[35] Hence it is dangerous to say (as some do) that with regard to invitees the maxim is *scienti non fit iniuria.* It may be easier to prove comprehension of the risk than in the case of master and servant, but the attempt to express the law too epigrammatically always has its dangers.

There are two matters that bear directly on this question. In the first place there is no standard of reasonable safety in the abstract—the duty will vary according to the capacity and knowledge of the particular invitee.[36] "If I invite a man who has no knowledge of the locality to walk along a dangerous cliff which is my property, I owe a duty different to that which I owe to a man who has all his life bird-nested on the rocks."[37] Bowen L.J. makes the same point. "The duty of an occupier of premises which have an element of danger in them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger and voluntarily run the risk. *Volenti non fit iniuria.*"[38] If I employ a builder to mend the slates on my roof I have no need first to put a parapet around the roof; but if a child were an invitee to the roof I would not fulfil my duty of care by a solemn warning of the dangers of sliding down the tiles. "Concealed dangers . . . are relative to the knowledge and capacity of the person who suffers by them."[39] Secondly, an invitee does not enter as of right. I may tell the baker that my private road is dangerous because of floods, and if he wishes to deliver bread he does so at his own risk. If the danger is clearly brought home to him and there is an appreciation of the risk involved, surely I have taken

32. *Gorman v. Wills* (1906) 4 C.L.R. at 777. See also judgment of Isaacs J. in *S. Australia v Richardson* (1915) 20 C.L.R. at 190 *et seq.*
33. Per Atkin J., *Lucy v. Bawden* [1914] 2 K.B. at 325.
34. See per Bowen L.J., *Thomas v. Quartermaine,* 18 Q.B.D. at 696.
35. *Ibid.*
36. Phillimore L.J., *Norman v. G. W. Rly.* [1915] 1 K.B. at 596.
37. Fry L.J., *Thomas v. Quartermaine* 18 Q.B.D. at 701.
38. *Ibid* at 695.
39. Per Lord Sumner, *Mersey Docks and Harbour Bd. v. Proctor* [1923] A.C. at 276.

reasonable care for his safety. In these circumstances it may be argued that there is either contributory negligence or at least that the maxim *volenti non fit iniuria* applies. Where a person is allowed to enter on payment of a fee, it may be said that I have no right to demand the fee unless the premises are reasonably safe.

The American Restatement states the rule thus: "A possessor of land is not subject to liability to his licensees, whether business visitors[40] or gratuitous licensees for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."[41] In the Comment the reasonable principle is stated, that if the business visitor (invitee) knows the actual conditions, he has an opportunity to exercise an intelligent choice as to whether the advantage to be gained from the entry is sufficient to justify him in incurring the risk which he knows is inescapable from it.[42]

(C) Public Utilities.

The American Restatement places the duty applicable to Public Utilities in a special section. "A public utility is subject to liability to the members of the public entitled to and seeking its services for bodily harm caused to them by any natural or artificial condition thereon which it is reasonably necessary for the public to encounter in order to secure its services, if the utility knows or should know of the condition and the unreasonable risk involved therein and could make the condition reasonably safe by the exercise of reasonable care."[43] The reason for this is simple—a private occupier may refuse to allow any particular person to enter or may invite him only on certain conditions; but the public have a right to demand access to railway stations and a correlative right to demand that such access be made reasonably safe.

Norman v. G. W. Rly.[44] must be considered in this connection. Here it is laid down that it is the duty of a railway company to see that the premises are reasonably safe. So far this accords with the doctrine as laid down in the Restatement, but the Court proceeds to complicate the issue by ruling that the duty of a railway company towards persons resorting to their premises is not higher than that owed by an occupier toward invitees. The latter part of the decision has been severely criticised[45] and has been rejected in the High Court. In the words of Isaacs J.,[46] "Where the visitor has an absolute right to come, independent of invitation, his rights cannot be measured by any supposed invitation. He has a right to come to a place free from unusual danger. Mere notice not to come, or warning that it is dangerous to come cannot absolve the occupier. He has in such a case

40. This phrase is defined elsewhere in the Restatement in substantially the same terms as invitee would be defined in English law.
41. S. 340, Vol. II, page 927.
42. *Op cit.* at 929.
43. Vol. II, S. 347 and Comment.
44. [1915] 1 K.B. 584.
45. E.g., Griffith 32 L.Q.R. 255.
46. *S. Australia v. Richardson* 20 C.L.R., at 193.

as *Norman's*[47] undertaken the duty of having a railway to which the law gives a right of public access and he has accepted the obligation . . . of maintaining it for that purpose in a reasonably safe manner."

It is then submitted that there is a higher obligation on those who conduct public utilities than is owed by an occupier to normal invitees. But what, it may be asked, is the precise difference between the duties of an hotelkeeper and the Victorian Railways Commissioners? In both cases the duty seems to be to make the property reasonably safe. In the absence of authority it is difficult to be dogmatic; but surely no injustice would be caused by treating these two subjects under the one head. For the purpose of argument, we have separated them; but, other things being equal, it is better to reduce the number of categories, rather than increase them.

47. [1915] 1 K.B. 584.