public which Dixon, J. stated in *Aiken's Case*:[26]

> They are in charge of the structure provided for the use of people who must in using it rely upon its freedom from dangers which the use of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective; or if it does so to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. . . . The general grounds for regarding the situation as throwing a duty of care upon the public authority appear in the already well-known statement of Lord Atkin in *Donoghue* v. *Stevenson*.

One problem which confronts the lawyer in dealing with *Drive-Yourself Lessey's Pty. Ltd.* v. *Burnside* is the definite difference of opinion between Street, C.J. and Owen, J. on the one hand and Herron, J. on the other. It is possible to view Herron, J.'s judgment as inconsistent with the majority view that the rules relating to liability for negligence are excluded by the special rules governing the liabilities of the occupier of dangerous premises, although it is difficult to conceive a situation where the result would be affected by the categorization of the problem. The majority do attempt to formulate a principle of law with respect to occupier's liability for injury to property. A further decision from the full Supreme Court could well lead to the extension of the Willes, J. principle to a statement like this:

> An invitee using reasonable care for his own safety or the safety of chattels brought with him on to the occupier's premises at the invitation of the occupier is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which the occupier knows or ought to know.

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OCCUPIER'S LIABILITY TO VISITORS
RICH v. *COMMISSIONER FOR RAILWAYS (N.S.W.)* *COMMISSIONER FOR RAILWAYS (N.S.W.)* v. *CARDY*

Murmurs are increasing against the approach to occupier's liability to a visitor by the process of first assigning the visitor to a legal category, and then applying a "precisely" defined duty prescribed for the benefit of that class.[1] Though criticism generally proceeds on the wide level of logic and policy, many specific problems spring from the cases of trespassers.[2] In two such recent cases, *Rich* v. *Commissioner for Railways*[3] and *Commissioner for Railways* v. *Cardy*,[4] the High Court re-examined the problem of the occupier's liability.

By way of preface, it should be emphasized that there has been a judical tendency to distinguish between situations where damage results from the statically defective condition of the premises, and those where it arises from activity or operations carried on upon the premises.[5] *Rich's Case* shows that

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[26] *Aikin* v. *Kingborough Corpn.* (1939) 62 C.L.R. 179, 205-206.

[1] J. G. Fleming, *The Law of Torts* (1957) 428; J. Salmond, *Law of Torts* (11 ed.) 549; F. H. Bohlen, *Studies in the Law of Torts* (1926) 160.

[2] This is particularly so in recent times, for the distinction between invitee and licensee is disappearing, and some would say has been obliterated—see Denning, L.J. in *Slater* v. *Clay Cross Co. Ltd.* (1956) 2 Q.B. 264, 269. Indeed, in England this distinction has now been abolished by the Occupier's Liability Act, 1957.

[3] (1959) 33 A.L.J.R. 176.

[4] (1960) 34 A.L.J.R. 134.

[5] See *Dunster* v. *Abbott* (1954) 1 W.L.R. 58; *Slater* v. *Clay Cross Co.* (1956) 2 Q.B. 264; *Riden* v. *A. C. Billings and Sons Ltd.* (1957) 1 Q.B. 46; *Percival* v. *Hope Gibbons Ltd.* (1959) N.Z.L.R. 642, 671; *Spittal* v. *Wellington City Corpn.* (1959) N.Z.L.R. 1095. See also F. H. Newark on *Twine* v. *Bean's Express Ltd.* (1954) 17 *Mod. L.R.* 102, 109; J. L. Montrose, "Negligence and Liability for Dangerous Premises" (1954) 17 *Mod. L.R.* 265.

categorization as invitee, licensee or trespasser, generally has no application in activities cases; *Cardy's Case*, that even in the static condition cases, these categories may not be decisive.

Rich's Case was an action for negligence brought against the Commissioner for Railways (N.S.W.). The plaintiff had passed through a passengers' entrance to the platform on one side of the railway lines at North Wollongong Station, and instead of using the footbridge had proceeded to walk across the lines on a vehicular level crossing to go to the opposite platform. She tripped, fell and suffered injury when struck by a railway locomotive. In her declaration she alleged that she was lawfully passing across the lines and that her injuries had been caused by the negligence of the defendant's servants. The difficulty was that certain by-laws under the Government Railways Act, 1912-1952 (N.S.W.), prohibited a person crossing a railway line where a footbridge is provided, and, in fact, to cross the lines as she did, the plaintiff had to pass a large notice prohibiting the pedestrian public from using the level crossing. At the trial, the plaintiff's counsel argued that she was an invitee or licensee of the defendant and sought to adduce evidence that there was a long-standing practice for the public to cross the lines as she did, to the knowledge of the railway station staff. This evidence was disallowed and the learned trial judge held that there was no evidence that the plaintiff was on the railway lines as an invitee or licensee of the defendant and directed a verdict for the defendant. A subsequent appeal to the Full Supreme Court was dismissed.

On appeal to the High Court it was held by all five judges[6] that the case did not turn on the character in which the plaintiff entered the Commissioner's premises. The Commissioner's duty was to be measured by all the circumstances, including, if it were a fact, his knowledge and tacit permission of the practice of pedestrians walking across the track, and the evidence tendered on behalf of the plaintiff was wrongly rejected. As Windeyer, J. aptly remarked[7] "the trial proceeded in the light of, or perhaps more correctly, in the shadow cast by *Indermaur* v. *Dames*".[8] All parties at the trial, including plaintiff's counsel, appeared to assume that the plaintiff, to succeed, would have to establish that she was an invitee, but the High Court would not agree. This was an "activities" case and, in its view, the process of determining liability by first classifying the plaintiff as invitee, licensee or trespasser did not apply. Activities cases were to be determined by the general principles of negligence.[9]

In thus confining the categories approach *Rich's Case* was, it may be argued, not breaking fresh ground. Indeed, as Fullagar, J. pointed out, "the authorities of which *Indermaur* v. *Dames*[10] and *Gautret* v. *Egerton*[11] are leading examples are concerned only with cases where a plaintiff who has entered upon premises occupied by a defendant suffers injury through some danger or defect in the premises themselves".[12] Yet the famous classification of invitee, licensee and trespasser has been applied more widely; the categories have also (at least in the case of trespassers) been applied to assessing an occupier's liability arising out of dangers created by active operations carried on upon the premises.[13] *Rich's Case* illustrates how such an approach could have disastrous consequences for the plaintiff.[14]

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[6] McTiernan, Fullagar, Taylor, Menzies and Windeyer, JJ.
[7] (1959) 33 A.L.J.R. 176, 184.
[8] (1866) L.R. 1 C.P. 274.
[9] (1959) 33 A.L.J.R. 176, 178 *per* Fullagar, J.; *id.* 184-85 *per* Windeyer, J.
[10] Cited *supra* n. 8.
[11] (1867) L.R. 2 C.P. 211.
[12] (1959) 33 A.L.J.R. 176, 178.
[13] See e.g. *Grand Trunk Railway Co.* v. *Barnett* (1911) A.C. 361. Furthermore, certain judgments would seem to suggest such an application; see e.g., Hailsham, L.C. in *Robert Addie and Son (Collieries) Ltd.* v. *Dumbreck* (1929) A.C. 358, 368 where his Lordship's forceful language may well lead to the idea that the only way to determine an occupier's liability in *any* situation is by first classifying the plaintiff and then applying the appropriate duty of care.
[14] (1959) 33 A.L.J.R. 176, 180 *per* Taylor, J.

However, *Rich* v. *Commissioner for Railways* not only stresses the static conditions-activities distinction, it also clarifies an important point regarding its application. Generally the textwriters[15] lay down the distinction in general terms as applicable to all cases including trespassers. Yet, on the other hand, Denning, L.J., when he made the static conditions-activities distinction, limited its application to situations where the plaintiff was *lawfully* upon the land:

> In this case, however, it does not matter whether the plaintiff was an invitee or licensee. That distinction is only material in regard to the static condition of the premises. . . . In regard to current operations the duty of the occupier — or of the person conducting the operations — is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons *lawfully* on the premises who may be affected by his activities: and it is the same whether the person injured is an invitee or licensee, a volunteer or a guest.[16]

The point thus in doubt, and which *Rich's Case* now has answered in the affirmative, was whether the static conditions-activities distinction can be applied where trespassers are concerned. Or to put it another way, the question raised was this: Having made the static conditions case-activities case distinction, and having stated that generally liability is determined in the former by way of the categories and in the latter by the general principles of negligence, do we then have to make a further distinction in activities cases between persons lawfully on the land and persons unlawfully upon the land. This further distinction would be necessary if we were to say that the general principles of negligence were not to be applied to trespassers. It will be apparent that if that were the case, then before applying the general principles of negligence in an activities case we would have to determine that the plaintiff was not a trespasser. This would have meant that we would be slipping back into the maze of labels and categories from which the courts are here presumably trying to escape. The High Court refused to take this course.

There is no reason why the *Donoghue* v. *Stevenson*[17] approach to activities cases should not include trespassers. Of course, the fact that a person is a trespasser will affect the way in which the general principles of negligence are applied. As Dixon, J. (as he then was) said in *Barton's Case*:[18]

> With reference to positive acts likely to cause hardship to others, I think the occupier's duty depends upon knowledge of the presence of the trespassers on his property, and is measured by the care which a reasonable man would take in all the circumstances, including the gravity and likelihood of the probable injury, the character of the intrusion, the nature of the activities causing the danger and the consequences to the occupier of attempting to avoid all injury.

In view of *Rich's Case* the distinction between "activities" situations and "static conditions" situations becomes of increased importance. Many cases, of course, fall neatly into one or the other of these categories. For example, where a customer leaving a grocery store falls and is injured on a faulty step at the entrance, that is clearly a "static conditions" case; and if an occupier is driving a car down his private drive and runs over a friend coming to dinner, that is clearly an "activities" case. However, one can readily imagine cases not quite so clearly defined, on either side of the line. One test the courts have adopted is to ask whether the danger would have arisen if the conditions of the premises had been adjusted to the activities from which the injury arose. Thus in *Spittal*

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[15] Salmond, *op. cit.* (12 ed.) 479; Fleming, *op. cit.* 429; Newark, *op. cit.* 109-110. See also J. L. Montrose, "Negligence as the Basis of Liability to Trespassers" (1954) 17 *Mod. L.R.* 368 where the distinction is criticised.

[16] *Dunster* v. *Abbott* (1954) 1 W.L.R. 58, 62.

[17] (1932) A.C. 562.

[18] *Transport Commissioner for N.S.W.* v. *Barton* (1933) 49 C.L.R. 114 at 131.

v. *Wellington Corporation*[19] the plaintiff, while walking on a path bordering an oval, was hit by a cricket ball from the playing area. It was held by McGregor, J. that the danger arose not from the activity in which the players were indulging but from the failure to provide a protective barrier of some kind in a particular locality, and so this was held to be a "static conditions" case to be determined by way of the categories. Even if this were not rather strained, it would not cover dangers which cannot be said to arise specifically (or even mainly) from either activities creating risks of harm or from the failure to take affirmative action to prevent harm.

Commissioner for Railways v. *Cardy*,[20] like *Rich's Case*, concerned the liability towards a trespasser, in what, however, would generally be regarded as a "static conditions" not an "activities" situation. A boy of about fourteen roamed with his younger brother over part of a large area of land belonging to the Commissioner for Railways, who had used the material portion of it as a tip for, amongst other things, the deposit of hot ashes. The dump had banked up considerably but below the surface the ashes often remained hot and went on smouldering for long periods. At one side of the land was a path which was open for pedestrians and led from certain streets on one side to homes and streets on the other. The boy in making his way barefooted over part of the area and down the bank to regain the path put his feet through the surface crust into the hot ashes beneath, suffering severe burns of his ankles and feet. Cardy recovered damages in the New South Wales Supreme Court on the basis that there had been a breach of duty owed to him as a licensee, not as a trespasser. The Commissioner's appeal to the Full Supreme Court failed as did also a further appeal to the High Court.

In the High Court, McTiernan, J. agreed with the Supreme Court that Cardy was not a trespasser but a licensee, and held further that the heap of ashes and rubbish on the land was an allurement to a boy of his age.[21] But the other four judges[22] clearly regarded the boy as a trespasser. Indeed, they roundly condemned the tendency to treat trespassers as licensees, as often happened where children were concerned,[23] a practice "which can no longer command an intellectual assent".[24] Menzies, J., however, did not believe that, in view of the judge's direction to the jury, it was possible for an appeal court to sustain the jury's verdict and the judgment based upon it by deciding for itself that the defendant failed in his duty to the plaintiff as a trespasser upon his land. In his opinion, the proper course was to allow the appeal and direct a new trial upon pleadings amended to raise the issue of liability owed to a trespasser, not a licensee.[25] But Dixon, C.J., Fullagar and Windeyer, JJ. held, though on differing grounds, that notwithstanding that the boy was a trespasser, he was entitled to succeed. According to Dixon, C.J.,

> (T)he rule remains 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

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[19] (1959) N.Z.L.R. 1095.
[20] (1960) 34 A.L.J.R. 134.
[21] *Id.* at 139.
[22] Dixon, C.J., Fullagar, Menzies and Windeyer, JJ.
[23] (1960) 34 A.L.J.R. 134, 137 *per* Dixon, C.J.; *id.* at 140 *per* Fullagar, J.; *id.* at 146 *per* Menzies, J.; *id.* at 154 *per* Windeyer, J.
[24] *Id.* at 137 *per* Dixon, C.J. To treat a trespasser as a licensee by imputing consent to the occupier must involve a strain on language and this is seen clearly in *Lowery* v. *Walker* (1911) A.C. 10. The unreality of lifting a trespasser into the class of licensee led to the suggestion made by Lord Dunedin in *Excelsior Wire Rope Works Ltd.* v. *Callan* (1930) A.C. 404 that a person who was not a true trespasser might be called a "permittee". It is to be noted also that in the United States where it seems the "reclassifying" of the plaintiff technique is more common *(Commr. for Railways (N.S.W.)* v. *Cardy* (1960) 34 A.L.J.R. 134, 153, Windeyer J.'s discussion of Fleming James, "Tort Liabilities of Land: Duties Owed to Trespassers" (1953) 63 *Yale L. J.* 144, 180), the *Restatement* has sought to formulate a special duty. And see J. Fleming, *op. cit.* at 463.
[25] (1960) 34 A.L.J.R. 134, 146.

> him. But it recognises that . . . a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people, and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence. The duty may be limited to perils of which the persons so using the premises are unaware and which they are unlikely to expect and guard against. The duty is measured by the nature of the danger or peril but it may, according to circumstances, be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder or by removal or reduction of the danger.[26]

Fullagar and Windeyer, JJ., however, approached the problem on rather wider grounds. "No duty of care, whatever," said Fullagar, J., "is imposed upon an occupier by the relationship of occupier and trespasser . . . . There is no special duty, but circumstances over and above the character of the visitor as a trespasser may give rise to a general duty of care (to the trespasser) . . . so that the latter is not only a trespasser but . . . also the occupier's neighbour within the familiar principle expounded by Lord Atkin."[27] Much the same line was taken by Windeyer, J.

> The trespasser in his relation to the occupier . . . stands outside the law of negligence, for to him, considered simply as an entrant upon the land, the occupier has no duty of care. Such a duty may, however, arise from some circumstances beyond the mere fact of entry, as for example, from the occupier's knowledge of the trespasser's presence and of his proximity to dangerous operations. It arises then not as a duty to him as a trespasser, but to him as an individual whose relation to the occupier has become that of a "neighbour".[28]

Cardy's Case indicates that the categories approach may not be decisive even in "static condition" situations, for at least two of the five judges[29] were prepared to abandon such an approach in favour of a general duty of care. This, of course, blurs any distinction between "static conditions" and "activities" situations, the apparent basis of *Rich's Case*. It also appears to substitute one set of unpredictables for another,[30] for, according to Windeyer, J., the occupier's liability will depend upon all the circumstances in which the plaintiff enters on to and remains upon the land.[31] Clearly, the judges have left themselves plenty of room to manoeuvre at this stage.

It may well be, however, that *Cardy's Case*, taken in conjunction with *Rich's Case*, marks a move by the High Court to abandon completely the categories approach in favour of that through a general duty of care, a development which would generally be welcomed. Historically, the categories are much older than the tort of negligence as formulated in *Donoghue* v. *Stevenson*,[32] and their continued use has become increasingly out of touch with social and economic reality. If, however, occupiers' liability is to be determined on the general duty of care basis, this may remove artificial and illogical distinctions. Of course, however, it will not mean that the courts will apply a uniform yardstick in all cases, for the evidence and nature of the duty will still have to be determined by all the circumstances in which the plaintiff comes on to and remains on the land.[33]

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[26] *Id.* at 137. Perhaps this could be regarded as an extension of the liability for intentional or wanton harm.

[27] *Id.* at 142, citing Salmond, *op. cit.* (12 ed.) at 516. This is also true in relation to the other categories, see *Mummery* v. *Irvings Pty. Ltd.* (1956) 96 C.L.R. 99.

[28] (1960) 34 A.L.J.R. at 151.

[29] Fullagar and Windeyer, JJ.

[30] See the discussion of indeterminate standards and other uncertain elements involved in J. Stone, *The Province and Function of Law* (1950) 181ff.

[31] (1960) 34 A.L.J.R. at 151.

[32] (1932) A.C. 562. See (1960) 34 A.L.J.R. at 150, *per* Windeyer, J.

[33] See J. Stone, *op. cit.* at 185-86.