THE RULE IN INDERMAUR v. DAMES AND SOME OF ITS EXTENSIONS

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At the present time there is in prospect a great expansion of the building industry in Canada; many temporary structures erected during the war are of a flimsy character and there is much overcrowding. It may therefore be an opportune time to discuss briefly some of the principles governing the liability of occupiers for injuries suffered by persons who are on their premises with their express or implied consent.

Any discussion of these matters may well be begun by considering the leading case of *Indermaur* v. *Dames*.[1] Contractual obligations, of course, stand apart and are not therefore within the scope of this article.

The plaintiff in this case was a gas-fitter in the employ of a person who held a patent on a gas-regulator, which he had installed on the defendant's premises to be paid for if its use resulted in a lessening of the gas bill. The plaintiff at the orders of his employer entered the defendant's place of business to ascertain if the regulator had been a success. The premises were a sugar refinery and while there the plaintiff, without any negligence on his part, fell down a shaft, which it was alleged was neither properly fenced nor lighted, and was seriously injured. A successful action was brought against the defendant.

It was argued on behalf of the defendant that the plaintiff was only a bare licensee or guest, and as such had to take the premises as he found them. But the court would not yield to this view because it said that the plaintiff had entered the premises on the mutual business of his employer and the defendant, and consequently was not present with "bare permission"; neither did it make any difference that the plaintiff was an employee, Willes J. observing that "any duty to provide for the safety of the master workman seems equally owing to the servant workman whom he may lawfully send in his place".

Thus the court made a distinction between those who come on premises with "bare permission" and those who enter on business common to them and the occupier. As the law has developed names have been given to these two classes of persons. Willes J. himself referred in the *Indermaur* case to

[1] (1866), L.R. 1 C.P. 274.

those who enter with a "bare permission" as licensees and this designation apparently had appeared also in earlier cases. But it was not until later that the business visitor became known as an invitee. Towards what is now known as an invitee, Willes J. stated the measure of duty of the occupier as follows:

> that he (that is the invitee), using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

This definition of duty is known as the rule in *Indermaur* v. *Dames*. The distinction made between the two classes of persons broke new ground in the law of tort and the new furrow has been developing and expanding ever since. The rule itself still stands in full vigour at the present day.

There are exceptions of course to this rule as there are to all rules. Liability is not imposed on the occupier when the invitee goes where he is expressly or impliedly forbidden, as for instance, where adequate notices of danger have been placed prohibiting entry on a part of the premises where his business does not call him. Furthermore, if a use is made of the premises not necessary for the purpose of the business the invitee cannot recover. An example of this might be an invitee deliberately sliding on a polished floor and injuring himself as a result.

The rule is however clouded in some uncertainty because two interpretations have been placed on the extent of the occupier's duty under it. Must he make the premises "reasonably safe" or must he only "use care to ascertain the existence of dangers and either remove them or give the invitee due warning of their existence"? This difficulty was recognized in *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ltd.*,[2] where Lord Atkin said :

> The Plaintiff's claim against the Defendants is based upon the theory that they were invitees of the Defendants for business purposes and that the defendants consequently owed them a duty to take reasonable care to see that the barge was reasonably safe or *at least* to warn them against any hidden danger of which they were unaware but which was known or ought to have been known to the Defendants or their servants.

Thus Lord Atkin left the question open; other dicta have favored sometimes one and sometimes the other interpretation. No case, however, is reported in which a decision has been given on a straight consideration of the two interpretations,

[2] [1936] A.C. 65 at p. 69.

"pitted one against the other", and the matter still stands where Lord Atkin left it.

Turning to a consideration of the position of licensees, it has already been stated that *Indermaur* v. *Dames* first made the distinction between what are now known as licensees and invitees. That case did not, however, state the measure of the duty imposed on the occupier towards a licensee because the plaintiff there was not held to be a licensee.

The chief authority on the legal position of licensees is *Fairman* v. *Perpetual Investment Building Society*.[3] Here the plaintiff, a young woman, lodged in a flat with her sister whose husband was the tenant. The flat was on the fourth floor of the building and the common stairway remained in the possession and under the control of the owners of the building, who were made defendants in the action. The plaintiff fell in descending this stairway, when her heel caught in a depression on one of the steps, and she was severely injured. The difficulty the plaintiff could not overcome in the action was that the defect in the step was obvious and could have been seen by anyone, and the action was dismissed.

It was held, following the distinction first made in *Indermaur* v. *Dames*, that the plaintiff *vis-à-vis* the owners of the apartments was a licensee as she was not on the common staircase for any business of the defendants but only with their permission. Lord Atkinson remarked :

> The plaintiff, being only a licencee, was therefore bound to take the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or *ought to have known*. He owed a duty to her not to lay a trap for her.

Lord Wrenbury stated the obligation of the occupier to be as follows:

> If there is some danger of which the owner has knowledge, or *ought to have* knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it.

Here then are dicta by two eminent judges that the licensor is liable for dangers not only of which he knows but of which he "ought to know".

But there are other cases which hold that the duty of the licensor does not go so far; that he is not liable for dangers merely of which he "ought to know".

[3] [1923] A.C. 74.

Lord Hailsham held in *Robert Addie & Sons (Colleries)* v. *Dumbreck*[4] that the licensor was liable for dangers which "ought to be known" to him. But in *Ellis* v. *Fulham Borough Council*[5] Greer L.J. said that this holding was *per incuriam* and treated the judgment as if the quoted words were eliminated.

In the case of *Baker* v. *Borough of Bethnal Green*[6] Lord Greene M.R. gives what might be a possible explanation of the divergence of judicial opinion as to whether the licensor is responsible for concealed dangers of which he ought to know. Here the plaintiff was injured by falling down an air-raid shelter, which was not equipped properly with steps, hand-rails or lighting.

Faced with the difficulty of knowing whether the liability of the occupier went as far as "ought to know", Lord Greene was impressed by a suggestion of counsel that the authorities could be reconciled. In the words of Lord Greene, what counsel said was that "if a licensor knows of the existence of what in fact is a trap or a hidden danger, that is sufficient, because he cannot be heard to say that although he knew the physical facts which constituted the danger from a purely objective point of view, the fact that it was a danger did not occur to his mind". In other words, "ought to know" refers "to the circumstances that those facts constitute a danger", to quote Lord Greene. But the Master of the Rolls was of the opinion that it was not necessary to consider whether this view, which was so ingeniously put forward, was correct or not. He held in words that can hardly be construed as a slip that "in order to fix a licensor with liability it is necessary to bring home to him not merely knowledge of the facts which constitute the danger, but his own knowledge that those facts *do* constitute a danger".

There the matter must be left, with the problem at least up to the time of the *Baker* decision still not definitely settled, but with a general judicial concession that "ought to know" is not part of the obligation placed upon licensors.

It would seem that both reason and justice would require that the duty owed to one who comes on the occupier's premises on mutual business should be greater than that owed to one who only comes for social or other reasons with bare permission. If "ought to know" were part of the obligation placed upon

[4] [1929] A.C. 358.
[5] [1938] 1 K.B. 212.
[6] [1945] 1 All E.R. 135 at p. 140.

the licensor, any distinction between the extent of the liability of the invitor and of the licensor would be eliminated.

Professor W. Friedmann is of the opinion "that the difference between the duty owed to invitees and to licensees has no significance and that the only substantial distinction is between the position of those who come on the premises by permission of the occupier, and trespassers".[7] For this conclusion he relied heavily on the case of *Ellis* v. *Fulham Borough Council*, to which some reference has been made. It is a little difficult to accept such a sweeping statement although, undoubtedly, there are signs that the future may eventually see no difference between the legal position of the licensor and invitor.

However, it would be previous to say that the distinction has already been eliminated. Lord Greene in *Baker* v. *Borough of Bethnal Green* showed no indication of thinking that the distinction was terminated and Lord Hailsham in *Addie* v. *Dumbreck* said that there were three categories of people who enter on premises (and therefore three degrees of liability) and gave no countenance to the suggestion that there were any more or, impliedly, any less. In the case of *Adams* v. *Naylor*,[8] Scott L.J. said "The division of plaintiffs in actions against occupiers of premises for damages for negligence into three classes of invitees, licensees and trespassers, with the fundamental distinctions in the legal position of each class, is now part of our substantive law". In so far as the case of *Ellis* v. *Fulham Borough Council* is concerned, it is submitted that there was no intention in that case to make a fundamental change in the rules, but there was a desire to make law and justice synchronize.

It will be seen therefore that the obligation which has been placed on occupiers is certainly a heavier one than the law generally imposes in other cases of negligence. This is no doubt done because of the necessity of compensating people for the injuries that are so frequently met with in building structures.

It is most probable that in the future many cases of this type will occur; insurance companies are also finding that people are becoming increasingly accident and insurance conscious. It would be in the interest of all concerned if the principles of liability could be simplified and more generally understood.

[7] (1943), 21 Can. Bar Rev. 79 at p. 90.
[8] [1944] 1 K.B. 750 at p. 756.