SOME TRENDS IN THE LAW OF OCCUPIERS' LIABILITY*

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I. *A Confused Branch of Negligence Law.*

A business visitor to a warehouse slips on a spot of grease on the floor and injures himself; a paying guest in a motel is cut by flying glass from a defective window pane; a social guest in a friend's home falls through a broken stair and is hurt; a trespassing child is burned by coming into contact with exposed electric wires. In each case, if the injured person sues the occupier of the premises upon which his injury occurred, the plaintiff's claim is founded upon the law of negligence. Usually in issue here is the existence and content of a duty of care owed by the occupier of premises to different types of visitors with respect to the condition of the premises. For historical and policy reasons, the principles followed by our courts and the terminology they have adopted in resolving these questions appear to differ significantly from the principles followed and terminology adopted in other branches of the law of negligence, as, for example, in the area of automobile accidents or of products liability. The purpose of this article is to consider, in the light of recent judicial decisions, to what extent these differences are differences of principle and to what extent they are merely differences of terminology.

On the surface the law of occupiers' liability appears to be plagued with many uncertainties and complexities that are not found elsewhere in the law of negligence. Before considering whether this is inevitable, it may be helpful to illustrate what difficulties are encountered in analyzing a typical case, taking as an example the first situation referred to in the preceding paragraph—that of a person who makes a business call at a warehouse and slips on a

*This article is based on a paper presented to the Insurance Law Section of the Canadian Bar Association, in Halifax, N.S. on August 30th, 1962.
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spot of grease on the floor, falls, and injures himself. The kind of analysis of the case that will be made by the solicitors for each side and, if necessary, by the court, would involve seeking answers to the following questions.

(1) Who was in occupation, possession, or control of the warehouse, or at least of the part of the warehouse where the accident occurred?[1] The problem is one of occupiers' rather than owners' liability and, therefore, the proper defendant is the person who was in control of the area of the warehouse where the plaintiff fell.

(2) Is the question one of *occupancy duty* or *activity duty*? As a result of a comparatively recent development in the law, different rules are applied to determine the occupier's liability for injuries resulting from defects or dangers in the condition of the premises from those that determine his liability for injuries resulting from current operations he is carrying out there.[2] If the spot of grease fell on the floor in the course of some activity currently being carried out in the warehouse by the occupier while the plaintiff was there, the problem would be considerably simplified: the question would then be one of activity duty, which is apparently governed by the ordinary rules that apply in other branches of negligence law.[3] If, however—as is probable—the grease spot was on the floor before the plaintiff's arrival on the scene, the question would be one of occupancy duty, which is governed by the more complicated and apparently less satisfactory rules peculiar to occupiers' liability. The following questions assume that the issue is one of occupancy duty.

(3) Into which legal category of visitor did the plaintiff fit at the time he was in the warehouse? He might have entered pursuant to the terms of a contract between himself and the occupier; or he might have entered *as of right* for a public purpose, as would, for example, a fireman or a building inspector;[4] or he might have entered without permission, express or implied, from the occupier, in which case he would be classed as a trespasser. In most cases of a visit for business purposes, the question will be narrowed to whether the plaintiff was an invitee or a licensee. Counsel for the plaintiff will seek to establish that his client was an invitee, because the duty owed by the occupier to an invitee appears to be higher than that owed to a licensee: thus the duty to an invitee is, roughly,

[1] See *MacDonald* v. *Town of Goderich*, [1949] O.R. 619, [1949] 3 D.L.R. 788 (C.A.).

[2] See, *e.g.*, *Graham* v. *Eastern Woodworkers Ltd.* (1959), 42 M.P.R. 281, 18 D.L.R. (2d) 260 (N.S.C.A.), at pp. 267-272, *per* MacDonald J.

[3] See Fleming, Torts (2nd ed., 1961), p. 395.

[4] See materials cited in footnote 83 *infra*.

to prevent damage from danger of which the occupier ought to know, whether or not he in fact knows of it; whereas the only duty to a licensee is to warn him of dangers of which the occupier actually knows. In recent years the courts have interpreted the concept of *knowledge of danger* in such a broad way as to narrow the gap between the duties owed to these two kinds of visitor;[5] but the limits of this new approach are uncertain, and the invitee still enjoys a slightly more favoured position.

Despite the enormous number of judicial decisions in which—following the leading case of *Indermaur* v. *Dames*[6]—a court has determined whether or not a particular visitor was an invitee at the time and place of his injury, there remains considerable controversy over the definition of an *invitee*. Several dicta of English courts and, indeed, of the Supreme Court of Canada,[7] suggest that an invitee is a person who enters premises with the express or implied permission of the occupier for a purpose in which he and the occupier have a common material or business interest; yet there seems no justifiable basis for requiring a business interest on the part of the visitor,[8] and probably the simplest definition of an *invitee* is a lawful visitor from whose visit the occupier stands to derive an economic advantage.[9] To make this meaning clearer and to avoid confusion with the very different everyday meaning of the word "invitation", the American *Restatement*[10] has substituted the term "business visitor" for the traditional word "invitee". On the other hand, Prosser has vigorously challenged the appropriateness of these definitions and their accuracy as far as American law is concerned:[11] in his view a visitor is an invitee when he enters premises in circumstances that would lead him reasonably to anticipate that care has been taken by the occupier to prepare the premises and make them safe for such a visitor. As yet, courts in the Commonwealth have been unwilling to go this far and to make

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[5] See, *e.g.*, *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212, [1937] 3 All E.R. 454 (C.A.); *Pearson* v. *Lambeth Borough Council*, [1950] 2 K.B. 353, [1950] 1 All E.R. 682 (C.A.).

[6] (1866), L.R. 1 C.P. 274.

[7] See, *e.g.*, *Hambourg* v. *T. Eaton Co. Ltd.*, [1935] S.C.R. 430, [1935] 3 D.L.R. 305, at p. 309; *Hillman* v. *MacIntosh*, [1959] S.C.R. 384, 17 D.L.R. (2d) 705.

[8] See *Haseldine* v. *C.A. Daw & Son Ltd.*, [1941] 2 K.B. 343, at pp. 352-353, [1941] 3 All E.R. 156 (C.A.), *per* Scott L.J.

[9] See Fleming, *op. cit.*, footnote 3, p. 405.

[10] American Law Institute, Restatement of the Law of Torts (1934), s. 332.

[11] Prosser, Business Visitors and Invitees, (1942), 26 Minn. L. Rev. 573, reprinted in (1942), 20 Can. Bar Rev. 357 and in Selected Topics on the Law of Torts (1953), p. 243.

a wholesale departure from the "business interest" test;[12] so that, for example, visitors to public parks[13] and washrooms[14] are usually held to be licensees.[15] On the other hand, non-business visitors to public libraries,[16] railroad stations,[17] hospitals,[18] and even air-raid shelters[19] have been said to be invitees, as have children in a free public school.[20] These decisions indicate that the "business interest" test is being implicitly recognized as too narrow and that our courts, without admitting it, are fumbling toward the test so clearly set forth by Prosser.[21] In at least one respect, however, even the narrow "business interest" test has been interpreted very restrictively: the House of Lords has held that the invitee of a tenant of business premises is merely a licensee of the landlord in the parts of the property—such as stairways, elevators and halls—that remain in the landlord's occupation.[22]

In all probability a business visitor to a warehouse will be held to be an invitee, even if he was not actually transacting business at the time he was injured. If the plaintiff had arrived at the warehouse unannounced and uninvited and the occupier had nothing to do with him, the plaintiff would have been at best a licensee and perhaps even a trespasser.[23] However, if the occupier chose to discuss business with the plaintiff, even though no contracts were actually concluded, there would be established a sufficient business interest in the plaintiff's visit to the warehouse to make him an invitee.

[12] See Paton, Invitees (1942), 27 Minn. L. Rev. 75.

[13] *Ellis* v. *Fulham Borough Council, supra*, footnote 5. *Cf. McStravick* v. *City of Ottawa* (1929), 63 O.L.R. 626, [1929] 3 D.L.R. 317, aff'd, 64 O.L.R. 275, [1929] 4 D.L.R. 492 (C.A.)—child on municipal playground; ordinary rules of negligence applied.

[14] *Pearson* v. *Lambeth Borough Council, supra*, footnote 5. *Contra, Arder* v. *Winnipeg* (1914), 24 Man. R. 727, 7 W.W.R. 294 (C.A.); *Blair* v. *Toronto* (1927), 32 O.W.N. 167 (H.C.).

[15] See generally, Friedmann, Liability to Visitors of Premises (1943), 21 Can. Bar Rev. 79, at p. 88.

[16] *Nickell* v. *City of Windsor* (1927), 59 O.L.R. 618, [1927] 1 D.L.R. 379 (C.A.).

[17] *Stowell* v. *Railway Executive*, [1949] 2 K.B. 519, [1949] 2 All E.R. 193 (K.B.D.). *Cf. Spencer* v. *G.T.R.* (1896), 27 O.R. 303 (Q.B.)—person on railway platform to mail a letter; held a licensee.

[18] *Slade* v. *Battersea Hospital*, [1955] 1 W.L.R. 207 (Q.B.D.); *Creighton* v. *Delisle Hospital Board* (1961), 38 W.W.R. (N.S.) 44, 34 D.L.R. (2d) 606 (Sask. Q.B.). See also *Jennings* v. *Cole*, [1949] 2 All E.R. 191 (K.B.D.).

[19] *Baker* v. *Bethnal Green*, [1945] 1 All E.R. 135 (C.A.).

[20] *Portelance* v. *Board of Trustees, Grantham*, [1962] O.R. 365, 32 D.L.R. (2d) 337 (C.A.).

[21] See Prosser, *op. cit.*, footnote 11, at pp. 377-379 (Can. Bar Rev.); Fleming, *op. cit.*, footnote 3, pp. 406-407, 408-409, 410-411; Wallis-Jones, Liability of Public Authorities as Occupiers of Dangerous Premises to Persons Entering as of Right (1949), 65 L.Q. Rev. 367.

[22] *Jacobs* v. *London County Council*, [1950] A.C. 361, [1950] 1 All E.R. 737 (H.L.). See generally, Fleming, *op. cit.*, *ibid.*, pp. 407-408.

[23] See *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572 (C.A.), *per* Denning L.J.

(4) If the plaintiff in the hypothetical example was an invitee, ought the occupier, or one or more of his responsible employees, to have known of the presence of the spot of grease on the floor? This would raise questions as to how likely it was that such a grease spot would be left on the floor; whether, in relation to that likelihood, the inspection system of the warehouse employees was a reasonable method of avoiding danger; and, if not,[24] whether a reasonably efficient inspection system would have enabled them to discover the danger. It seems that on this last point the burden of proof is on the defendant.[25]

(5) If the occupier or his employees ought to have discovered the grease spot, was it an "unusual danger"? Unless it was, the occupier was under no duty to protect the plaintiff from it. At this point the law becomes particularly confusing. Application of the concept of "unusual danger" is necessary in order to establish the occupier's liability in all invitee cases, yet the meaning of the term has never been entirely clarified. Courts (at least where there is no jury) generally try to reason by analogy from previous cases to determine what constitutes an "unusual danger", with little or no original thinking of their own, thereby treating decisions of fact as if they were decisions of law.[26] The approximate effect of the decisions, which will be considered in detail at a later point, seems to be that "unusual danger" is the kind of danger that the occupier could not reasonably expect an invitee of the type whose injury is in question to know of or discover for himself or else to protect himself against; unfortunately, however, no court has attempted this kind of comprehensive definition. As a result, legal practitioners and the courts encounter uncertainty in trying to apply this important aspect of the law of occupiers' liability.

(6) If the grease spot was an "unusual danger" of which the occupier ought to have known, did the occupier exercise reasonable care[27] to prevent damage from it?[28] In these situations there are two aspects to the occupier's duty—first, to inform himself of the existence of any "unusual dangers" and, second, to make reason-

[24] On the need for an inspection system that will promptly discover and remove dangerous objects, see *MacNeil* v. *Sobeys Stores Ltd.* (1961), 29 D.L.R. (2d) 761, at p. 765 (N.S. Sup. Ct.).

[25] *Cf. Edglie* v. *Woodward Stores Ltd.*, [1936] 1 W.W.R. 502, at p. 512 (B.C. Sup. Ct.); *Turner* v. *Arding & Hobbs Ltd.*, [1949] 2 All E.R. 911, at p. 912 (K.B.D.).

[26] See Hughes, Duties to Trespassers: A Comparative Survey and Revaluation (1959), 68 Yale L.J. 633, at p. 633.

[27] On the limits to what constitutes reasonable care, see, *e.g.*, *Witt* v. *David Spencer Ltd.*, [1935] 2 W.W.R. 644, at p. 645 (B.C. Sup. Ct.).

[28] See *London Graving Dock Co. Ltd.* v. *Horton*, [1951] A.C. 737, at p. 745, [1951] 2 All E.R. 1 (H.L.), *per* Lord Porter.

able use of this information to prevent damage to invitees such as the plaintiff. English and Canadian cases are in conflict as to how this second aspect of the occupier's duty can be discharged—whether in all cases it is sufficient that the invitee already has full knowledge of the danger, or is provided with full knowledge of it by an appropriate warning from the occupier,[29] or whether, in some cases at least, knowledge or warning is not sufficient and the occupier must take steps to remove or neutralize the danger.[30]

(7) If the occupier did not exercise reasonable care to prevent damage from unusual danger, was the plaintiff's injury a direct and foreseeable consequence of this failure on the occupier's part? This sort of question—to the extent that it is necessary at all[30A]—is common to all negligence cases.

(8) If the answer to question (7) is in the affirmative, did the plaintiff voluntarily assume the risk of suffering this kind of injury while on the premises? This sort of question also is common to all negligence cases, and the burden of proof is on the defendant.

(9) If there was no voluntary assumption of risk, which would preclude any recovery by the plaintiff, was there contributory negligence—that is, a failure by the plaintiff to take reasonable care for his own safety resulting, as a direct and foreseeable consequence, in his injury? Combined with an affirmative answer to question (7), a finding of contributory negligence would normally require an apportionment of damages under contributory negligence legislation. This question, too, is common to all negligence cases, and once again the burden of proof is on the defendant.[31]

If an intelligent layman is exposed to this kind of legal analysis, he will be struck by the roundabout way that lawyers have chosen to arrive at solutions to problems of minimum complexity, such as the grease-spot case. Very often, though not always, the layman will probably agree that the solution ultimately reached by the law in the invitee cases is a common-sense one, but this will hardly

[29] *London Graving Dock Co. Ltd.* v. *Horton, ibid.*

[30] *Létang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725, [1926] 3 W.W.R. 88, [1926] 3 D.L.R. 457 (P.C.).

[30A] It would seem preferable to ask simply whether the plaintiff's injury was, in a broad sense, within the risk created by the occupier's failure to exercise reasonable care.

[31] The possibility of an implied assurance of safety from the occupier is relevant in considering unusualness of danger, the reasonableness of preventive measures adopted by the occupier, voluntary assumption of risk, and contributory negligence. See. *e.g.*, *Rudlen* v. *Bridgeman*, [1930] 3 D.L.R. 224, at pp. 225-226 (Ont. C.A.); *Stowell* v. *Railway Executive, supra*, footnote 17, at p. 196 (All E.R.); *MacNeil* v. *Sobeys Stores Ltd., supra*, footnote 24, at p. 763; *Bennett* v. *Dominion Stores Ltd.* (1961), 30 D.L.R. (2d) 266, at pp. 271-272 (N.S. Sup. Ct.); *Heard* v. *N.Z. Forest Products Ltd.*, [1960] N.Z.L.R. 329 (N.Z.C.A.).

convince him of the virtues of the tortuous legal reasoning that lies behind the solution. Occasionally, as well—particularly where the visitor is a trespasser but also, to some extent, where he is a licensee—a court will go astray on one of the hazily demarcated bypaths of the law of occupiers' liability and arrive at a conclusion obviously opposed to common sense. In the grease-spot case, the layman can appreciate the need to show that the defendant was in control of the warehouse; that the warehouse employees should have known that a spot of grease on the floor would be dangerous to someone such as the plaintiff; that they reasonably could have taken more effective steps to protect visitors against such a danger, either by (a) preventing grease spots from being left there in the first place, (b) discovering and promptly removing them, or (c) at least warning the plaintiff that they might be there. He may also be able to appreciate the doctrines of proximate causation, voluntary assumption of risk and contributory negligence—which, as mentioned earlier, are not peculiar to the law of occupiers' liability. He is less likely, however, to be convinced of the virtues of categorizing visitors as invitees, licensees, or whatever, or, upon determining that the visitor was an invitee, of asking whether the grease spot was an "unusual danger". He will feel that when a visitor enters a warehouse in circumstances in which he may reasonably expect that the place is safe and when any reasonable person in the warehouse who knew that a spot of grease might be on the floor where he was walking would have known that he might be injured by it unless steps were taken to protect him, the visitor should be entitled to legal redress if he can show that he was injured because reasonable steps were not taken to protect him.

The only reply that a lawyer can make to this sort of criticism is that the law has managed to do a better job in other branches of negligence, where for the most part, the simplified and straightforward kind of analysis proposed by the layman for the law of occupiers' liability is already in effect. Many legal writers who have considered this problem have come to much the same conclusion—that the ordinary principles of negligence law should be applied in occupiers' liability cases.[32] As yet the courts have not gone this far,[33] even though the consequence would be greatly to simplify the tasks of lawyers and courts alike in occupiers' liability cases

[32] See, *e.g.*, Wright, Cases on the Law of Torts 549 (2nd ed., 1958); Wright, The Law of Torts: 1923-1947 (1948), 26 Can. Bar Rev. 46, at p. 89; Hughes, *op. cit.*, footnote 26, at p. 634.

[33] See, *e.g.*, *White* v. *Imperial Optical Co. Ltd.* (1957), 7 D.L.R. (2d) 471, at p. 472 (Ont. C.A.).

as well as to increase the likelihood of arriving at sensible solutions in these cases.

II. *Survey of the Law of Occupiers' Liability.*[34]

In the foregoing paragraphs, I have considered how the law is applied in a not untypical set of factual circumstances and have indicated the complexity of legal reasoning that is required in even the simplest problem of occupiers' liability. I have also reviewed many of the settled rules *and* unsettled issues in this area of the law. With this background, I shall consider in further detail some of the leading problems that still remain to be resolved.

Occupancy and activity duties

The distinction between misfeasance and nonfeasance—between doing something badly and not doing anything at all—is well established in the law of torts, though it continues to give rise to some of the most troublesome problems in this branch of the law.[35] If a person undertakes to perform an act, whether or not he was legally bound to do it, and does it in a negligent manner so as to cause legally recognizable injury to another, he will normally be held liable; on the other hand, if he fails to do anything at all, he will not be liable for any loss suffered by another as a result of his failure to act unless the law can be found to impose upon him a positive duty to act: such a duty is not usually found unless there is a controlling statute, or a contractual relationship between the parties, or at least some prospective material benefit to the defendant, or, perhaps, unless the defendant has misled the plaintiff into relying upon the defendant to act. Many misfeasance-nonfeasance problems raise questions of timing: when does failure by a defendant to prevent injury to the plaintiff from a state of

[34] The text that follows does not purport to be a complete review of the law. See generally, Fleming, *op. cit.*, footnote 3, pp. 394-441; Salmond, Torts, (12th ed., Heuston, 1957), pp. 485-528, (13th ed., Heuston, 1961), pp. 504-549; Winfield, Tort (6th ed., Lewis, 1954), pp. 667-717; Prosser, Torts (2nd ed., 1955), pp. 432-464. For summaries of the Canadian cases, see generally, V. C. MacDonald, Duties of Occupiers and Owners of Dangerous Premises (1924), 2 Can. Bar Rev. 24, 92; A. L. MacDonald, Liability of Possessors of Premises (1929), 7 Can. Bar Rev. 665; A. L. MacDonald, Child Trespassers (1930), 8 Can. Bar Rev. 8; A. L. MacDonald, Licensees (1930), 8 Can. Bar Rev. 184; A. L. MacDonald, Invitees (1930), 8 Can. Bar Rev. 344; Wright, *op. cit.*, footnote 32, at pp. 81-89; Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers (1953), 69 L.Q. Rev. 359, at pp. 375-376; Hughes, *op. cit.*, footnote 26, at pp. 663-669 and 684, note 251.

[35] See generally, Wright, Negligent "Acts or Omissions" (1941), 19 Can. Bar Rev. 465; Fleming, *op. cit.*, *ibid.*, pp. 148-157.

affairs created by the defendant some time in the past constitute misfeasance, and when is it mere nonfeasance?[36]

Many of the most intractable problems in the law of occupiers' liability can be traced to the fact that this aspect of the law of torts involves a basic misfeasance-nonfeasance distinction. Although its full implications appear to have been demonstrated only recently, the distinction seems now to be firmly established. Thus, the classification of visitors and the duties said to be owed to each class are relevant questions only where the condition of the premises is the source of the visitor's injury: this involves mere nonfeasance on the occupier's part, and the traditional common law would impose on him a positive duty to act only in proportion to the likely material benefit that he stood to derive from the visitor's presence on his land. On the other hand, where a visitor is injured by "current operations" being carried out by the occupier on the land, the courts have treated the issue as one of misfeasance and —largely ignoring the status of the visitor—have imposed on the occupier the ordinary duty of care that is applied in other areas of the law of negligence.[37]

As might be expected, it is frequently difficult to draw the line between "activity duty" and "occupancy duty", as they have been called; often, as already suggested, this raises a question of timing. If the occupier were subject to an activity duty as to every danger created on his land by human agency—whether before or after the entrance of the visitor in question—the occupancy duty would apply only in the case of injuries to visitors from "natural", as opposed to "artificial", conditions on the land; but this is not the way our law has developed.[38] What, then, *is* the test—is it whether the activity that creates the danger occurs before or after the visitor enters upon the land or, perhaps, whether it occurs before or after he enters the *portion* of the land where he is likely to be exposed to the danger?[39] Since the general rules of the law of negli-

[36] Cardozo C.J. considered the test to be "whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good", *H. R. Moch Co. Inc.* v. *Rensselaer Water Co.* (1928), 247 N.Y. 160, 159 N.E. 896, at p. 898 (N.Y.C.A.).

[37] See Fleming, *op. cit.*, footnote 3, pp. 395-396. The same distinction has been made between the defective condition of a chattel, such as an automobile or airplane, and its negligent operation. *Ibid.*, pp. 397-398. The misfeasance-nonfeasance distinction in the law of occupiers' liability is that between the state of the premises and active conduct that subjects the visitor to a new risk, not—as has sometimes been said—between static and dynamic conditions on the land. *Ibid.*, p. 418, note 50.

[38] See *Perkowski* v. *Wellington Corporation*, [1959] A.C. 53, at pp. 67-68, [1958] 3 All E.R. 368 (P.C.—N.Z.).

[39] See the discussion in James, Tort Liability of Occupiers of Land:

gence are invoked to establish the content of the occupier's activity duty, it would seem fitting to employ those rules to draw the line between dangers giving rise respectively to activity duties and occupancy duties. If this suggestion is followed, the question will become: ought the occupier, while carrying out the activity that causes injury to a visitor, reasonably to have foreseen that such a visitor would be subjected to an unreasonable risk of injury *at that time*?[40] Visitors who might be subjected to risk of injury at a later time are owed only an occupancy duty. There appears to be some merit in distinguishing the spheres of occupancy and activity duty in this way: as to visitors who are in the area of a dangerous activity that is carried out on the land without precautions first having been taken for their safety, there is not time to exclude, warn or otherwise protect them; whereas, if the activity merely leaves a dangerous condition on the land into which a visitor may subsequently stumble, there is yet time to take precautions to prevent such injury. Thus, a distinction between occupancy and activity duties along the lines suggested seems to be socially reasonable, as does the content of the *activity* duty; if the occupier chooses to carry out a dangerous activity without taking reasonable precautions to protect visitors, he will be held liable for injuries to any visitors who he knows or ought to know are within the area of danger. Presently we shall consider to what extent the content of the *occupancy* duty is also socially reasonable.

From what has just been said, it would follow that the occupier owes an activity duty not merely to persons he has invited or permitted to come on his land or to persons he actually knows to be there: the duty would be owed to all persons—whether invitees, licensees or trespassers—that the occupier knows or ought to know are likely to be in the area of danger. In fact, this is what the decided cases seem to say, with the exception of some dicta as to the duty owed to trespassers. Many courts[41] have suggested that in order to be in breach of his activity duty to a trespasser, the

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Duties Owed to Trespassers (1953), 63 Yale L.J. 144, at pp. 174-175; and in Hughes, *op. cit.*, footnote 26, at p. 659; ". . . at what point does an incident in an activity become a static condition? If construction workers leave a wall in an unsafe state over the weekend, is this an activity or a condition? . . . Is the determination of this question the best way to inquire into the reasonableness of their behavior?" *Ibid.*, at p. 698.

[40] If the last three words were omitted from this test, the occupier would be under the same duty of care to visitors with respect to all artificial conditions on his land, whenever created; see text accompanying footnote 38, *supra*.

[41] See, *e.g.*, *Grand Trunk Ry.* v. *Barnett*, [1911] A.C. 361 (P.C.—Ont.); *C.P.R.* v. *Anderson*, [1936] S.C.R. 200, [1936] 3 D.L.R. 145, at p. 160; *Edwards* v. *Railway Executive*, [1952] A.C. 737, at p. 749 (H.L.).

occupier must have been guilty of "wilful or reckless" conduct toward him. In fact, the courts have applied the ordinary principles of negligence law in these trespasser cases, at least where the trespasser's presence is known to the occupier;[42] the "wilful or reckless" terminology is thus obsolete and should be speedily discarded. As to trespassers whose presence is not known, the law is less certain, though in my proposed formula an activity duty would be owed to them as well, if their presence was reasonably to be anticipated by the occupier, and it seems clearly open to our courts to recognize this duty.[43] In many cases, of course, as Fleming says,[44] "the standard of reasonable conduct must be measured with due regard to the absence of any obligation to anticipate the presence of trespassers". Also, the occupier can be required only to take reasonable care in the circumstances for the safety of known or expected trespassers; if adequate precautions are impossible or prohibitively expensive, the occupier will not be held liable for failing to take them.[45]

It is now well established that a person who creates a dangerous condition on land that he does not occupy cannot plead the rules of occupancy duty but must meet the general requirements of negligence law.[46] To the extent that this imposes a higher duty on no-noccupiers than on occupiers the disparity is anomalous and can be explained only on historical grounds.[47] A non-occupier who carries electrified transmission lines across land without taking

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[42] See A. L. MacDonald, Liability of Possessors of Premises, *op. cit.*, footnote 34, at pp. 675-677; *Mourton* v. *Poulter*, [1930] 2 K.B. 183 (K.B.D.); *Graham* v. *Eastern Woodworkers Ltd.*, *supra*, footnote 2, at p. 271 (D.L.R.); Fleming, *op. cit.*, footnote 3, p. 433.

[43] This is supported by Davis J. in *C.P.R.* v. *Kizlyk*, [1944] S.C.R. 98, [1944] 2 D.L.R. 81. See also Hughes, *op. cit.*, footnote 26, at pp. 662-663. However, MacDonald J. expressed his doubts in *Graham* v. *Eastern Woodworkers Ltd.*, *ibid.*, at pp. 271-272 (D.L.R.). In any event, in view of some licensee cases—see text accompanying footnote 114, *infra*—the distinction between actual and constructive knowledge is largely disappearing. One possible explanation of the much discussed case of *Excelsior Wire Rope Co. Ltd.* v. *Callan*, [1930] A.C. 404 (H.L.), is that the defendant was in breach of its activity duty to the plaintiff, since its employees knew that trespassers were present; but the employees only knew that trespassers were in the vicinity and did not actually *know* that one was then playing with the rope; in other words, it would be more accurate to say that the employees *ought to have known* that a trespasser might be playing with the rope.

[44] Fleming, *op. cit.*, footnote 3, p. 433, citing Dixon J. in *Transport Comrs.* v. *Barton* (1933), 49 C.L.R. 114 (Aust. H.C.).

[45] *Ibid.* See generally, Fleming, *op. cit.*, *ibid.*, pp. 433-434; Wright, Note, (1939), 17 Can. Bar Rev. 445.

[46] See Fleming, *op. cit.*, *ibid.*, p. 431. See also *A. C. Billings & Sons Ltd.* v. *Riden*, [1958] A.C. 240, [1957] 3 All E.R. 1 (H.L.); *LeBlanc* v. *City of Moncton* (1962), 33 D.L.R. (2d) 395 (N.B.C.A.).

[47] See generally, Marsh, *op. cit.*, footnote 34.

reasonable precautions to keep them beyond the reach of trespassing children whose presence is to be anticipated will be liable for resulting injuries.[48]

One aspect of this area of the law defies ready analysis—the *occupier's* liability for injuries caused to visitors by a non-occupier, as distinguished from the non-occupier's own liability. In this discussion, I am excluding from consideration, when referring to "non-occupiers", anyone—whether employee, agent, or, in some cases, independent contractor[49] for whom the occupier is vicariously responsible. If the non-occupier's activities leave a dangerous condition on the land, the *occupier's* liability to any visitor who is subsequently injured as a result of this condition depends on his occupancy duty to that visitor and, in appropriate circumstances, would raise such questions as whether he knew or ought to have known of the danger in time to be able to protect such a visitor. If a visitor is injured as a result of current operations carried out by a non-occupier (with or without the occupier's permission or knowledge), is the *occupier's* liability to the visitor then based on an activity duty or an occupancy duty?[50] Many judgments are confused because this distinction has been glossed over.

I submit that in such circumstances the occupier's liability is determined by the rules of occupancy duty. Since by definition the occupier is not vicariously responsible for the non-occupier's activity, it is not an activity of the occupier; therefore, from the occupier's point of view, permitting a non-occupier to carry out activity on his land merely affects its condition.[51] The occupier's liability to visitors who are injured by the non-occupier's activity will then depend on the status of the visitor and on such facts as whether the occupier knew or ought to have known of the danger to that kind of visitor and whether he permitted the non-occupier's activity or whether, if he did not permit it, he knew or ought to have known of it.

On the whole, the cases support this interpretation. In *Cox* v. *Coulson*,[52] the defendant occupied a theatre in which a company of players performed; during the performance the plaintiff, a spectator, was injured by a cartridge negligently fired from a pistol

[48] *Buckland* v. *Guildford Gas Light & Coke Co.*, [1949] 1 K.B. 410, [1948] 2 All E.R. 1086 (K.B.D.); *Nixon* v. *Manitoba Power Commission* (1959), 29 W.W.R. (N.S.) 241, 21 D.L.R. (2d) 68 (Man. Q.B.). *Cf. Moule* v. *N.B. Electric Power Commission* (1960), 24 D.L.R. (2d) 305 (S.C.C.).

[49] See footnote 100, *infra*.

[50] See Fleming, *op. cit.*, footnote 3, p. 396, note 10.

[51] *A fortiori*, where the non-occupier acts without the occupier's permission, and perhaps even without his knowledge.

[52] [1916] 2 K.B. 177 (C.A.).

by one of the players. The English Court of Appeal dismissed the action. Having found that the relationship between the defendant and the plaintiff was that of invitor and invitee, Bankes L.J. proceeded as follows:

> It seems to me obvious that the duty of the invitor in a case like the present is not only confined to the state of the premises, using that expression as extending to the structure merely. The duty must to some extent extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on, or it may be of such a kind as to render the structure unsafe unless some obvious precaution is taken.[53]

In the well-known case of *Glasgow Corporation* v. *Muir*,[54] a municipality ran a teahouse in its park, under the management of a Mrs. Alexander. She gave permission to members of a picnic party that had been caught in the rain to bring their lunch, including a large urn full of hot tea, into the teahouse. The urn was carried by two men, who had to pass with it through a narrow space beside a candy counter at which several children were gathered. For some unexplained reason, one of the men dropped his handle of the tea urn, and hot tea escaped and injured one of the children, who brought action against the municipality, alleging negligence on Mrs. Alexander's part. The House of Lords allowed the municipality's appeal and dismissed the action, on the ground that negligence by Mrs. Alexander had not been established. It was conceded that the plaintiff was an invitee of the defendant, but most of the law lords discussed the problem as if it fell under the general law of negligence. The only reasonable explanation of this approach is that, while an occupancy rather than an activity duty was being considered here, the House of Lords was recognizing in effect that the occupancy duty to an invitee is (like the activity duty) determined by the general principles of the law of negligence. I shall return to this point later. Both Lord Wright and Lord Romer, without objection or comment by their three colleagues, used language historically associated with the occupancy duty,[55] while still applying the broad principles of *Donoghue* v. *Stevenson*.[56] Thus Lord Wright says that:

> The act or omission to be avoided was *creating a new danger* in the

[53] *Ibid.*, at p. 191. Pickford L.J. agreed, *ibid.*, at p. 187. Accord, *Fraser-Wallas* v. *Waters*, [1939] 4 All E.R. 609 (K.B.D.).

[54] [1943] A.C. 448, [1943] 2 All E.R. 44 (H.L.).

[55] Unfortunately, Lord Wright at points confuses the issue by appearing to be dealing with activity duty. However, his language in the passage hereinafter quoted seems quite conclusively to the contrary.

[56] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

premises by allowing the church party to transport the urn;[57] . . . in cases of "invitation" the duty has most commonly reference to the structural condition of the premises, but it may clearly apply to the use which the occupier . . . of the premises permits a third party to make of the premises. Thus, the occupier of a theatre may permit an independent company to give performances, or the person holding a fair may grant concessions to others to conduct side shows or subsidiary entertainments, which may, in fact, involve damage to persons attending the theatre or fair, and in such and similar cases the same test of reasonable foreseeability of danger may operate to impose liability on the person authorizing what is done. The immediate cause of damage in such cases is generally the action of third parties who are neither servants nor agents of the defendant, but are mere licensees or concessionaires for whose acts as such the defendants are not directly liable. If the occupiers are held liable for what is done, it is because they are in law responsible in proper cases *at an earlier stage* because of the permission which they gave for the use of their premises. This is the cause of action against them. . . . If they [the appellants] are to be held responsible, it must be because, by the permission which Mrs. Alexander . . . gave to the members of the church party, they created an *unusual danger* affecting the invitees. . . . The breach of duty (if any) may thus be stated to have been that in granting the permission they did not use reasonable foresight to guard the children from *unusual danger arising from the condition or use of the premises.* If the tea urn had been upset by the negligence of the appellants' servants, the appellants would have been liable in negligence. Whether or not they would have been liable as invitors in the alternative would depend on other considerations. *The cause of action in invitation is different,* because it depends primarily, not on what actually happened . . . but on *whether the invitor . . . knew or ought to have known that the invitee was being exposed to unusual danger.* Where the unusual danger was due to structural defects the question can be stated to be whether the invitor knew or ought to have known of the defects. In a case like the present the question is whether it can be said of Mrs. Alexander that she either knew or ought to have known that the children would be exposed to unusual danger by reason of the uses to which the premises were put by her permission for the tea urn to be carried into and down the passage. . . .[58]

Lord Wright then cites with approval the passage just quoted from the judgment of Bankes L.J. in *Cox* v. *Coulson.*[59]

From this language it appears that Lord Wright considered the question to be one of occupancy duty, even though at the time permission was given for the non-occupier's activity the plaintiff was already, to the occupier's knowledge, in the zone of alleged-

[57] *Supra*, footnote 54, at p. 460 (A.C.); emphasis added.
[58] *Ibid.*, at pp. 462-463; emphasis added.
[59] *Ibid.*, at p. 465. *Accord*, *Hanes* v. *Kennedy*, [1941] S.C.R. 384, [1941] 3 D.L.R. 397; *Kauffman* v. *T.T.C.*, [1960] S.C.R. 251, 22 D.L.R. (2d) 97—particularly *per* Kerwin C.J.C., at pp. 97, 101, and *per* Locke J., at p. 105.

ly foreseeable danger from this activity. But if this is the law, why did Lord Wright also say[60] that he need merely apply the principle in *Excelsior Wire Rope Co. Ltd.* v. *Callan*[61]—a case where the plaintiffs were at best licensees? Unfortunately, Lord Wright does not elaborate; but the explanation seems to be that the defendant in the *Callan* case was a non-occupier who, as we have seen,[62] owed to the plaintiffs the general duty of care of the law of negligence, and, in any event, so far as the defendant was concerned this was a question of active operations which would require the same duty of care. In this sense only is there a parallel between the two cases: in both, the duty of care was that of the general law of negligence. However, the facts were not analogous, because in the *Callan* case the occupier was not being sued.

The visitor's known presence in such a case should normally not impose an activity duty on the occupier but merely should affect the degree of care required of him under his occupancy duty. In theory, it seems that the occupier would have been under a lesser duty of care in the *Glasgow* case if the plaintiff had been a licensee and under a still lesser duty if the plaintiff had been a trespasser. This conclusion is not harsh to the licensee, because the occupancy duty owing to him is virtually the same as that owing to the invitee;[63] but it may seem harsh in trespasser situations where the occupier knew of the trespasser's presence and nevertheless permitted a non-occupier to carry out an activity known to be dangerous to the trespasser. However, the occupier should not be prevented by the known or likely presence of trespassers from making a reasonable use of his land—which would include permitting a *responsible* non-occupier to carry out activities there; if such a non-occupier is heedless of the trespassers' safety and causes them injury, he can be sued, as in the *Callan* case. If, on the other hand, an occupier who knows or ought to know of the presence of trespassers permits *irresponsible* persons to carry out activities dangerous to the trespassers or even fails to take reasonable steps to prevent such activities, he is making a socially unreasonable use of his land. This could be treated as a breach of his activity duty—that is, the positive creation of a danger when the presence of trespassers in the area is known or reasonably to be anticipated.[64]

[60] *Supra*, footnote 54, at pp. 461-462.
[61] *Supra*, footnote 43.
[62] See text accompanying footnotes 46-48, *supra*.
[63] See text accompanying footnote 117, *infra*.
[64] Where the danger to visitors becomes apparent after the non-occupier has entered the land, the occupier's occupancy duty in some circumstances may require him to use his power to expel or contain the non-occupier.

Of course, similar reasoning would apply if the plaintiff is an invitee or a licensee,[64A] and this may explain the views of three judges of the Supreme Court of Canada in the next case to be considered.

In *Booth* v. *St. Catharines*,[65] a municipality had organized a celebration in a public park and invited the public free of charge. During the celebration the parks manager, an employee of the municipality, had seen boys climbing the flagpole tower, which the manager knew not to be strong enough to support them; he had chased the boys away but had not posted a guard at the tower. Later another group of boys climbed higher up the tower, causing it to buckle and fall on the plaintiffs, who were attending the celebration. The case was decided on the basis that the plaintiffs were at least licensees, and all five judges held the municipality responsible. Only Kerwin J. and Rinfret C.J.C. decided the case on the sole basis of occupancy duty; following reasoning similar to that of the English Court of Appeal in *Ellis* v. *Fulham Borough Council*,[66] they held that the parks manager had sufficient knowledge of facts indicating a concealed danger to be required to take reasonable precautions to prevent the danger from injuring visitors such as the plaintiffs; in other words, the defendant had been in breach of its occupancy duty to the plaintiffs as licensees. Rand J. apparently treated this as a case of activity duty.[67] Kellock J. agreed with Rand J. but also cited with approval Lord Wright's judgment in *Glasgow Corporation* v. *Muir*—which dealt only with the position of invitees. The fifth judge, Estey J., in a confusing opinion, also apparently treated the case as involving the occupier's activity duty; yet he cited as authority the case of *Ellis* v. *Fulham Borough*

This situation arises most frequently where an intoxicated guest in a restaurant, bar or other public place becomes unruly and threatens violence to other guests. See, *e.g.*, *Lehnert* v. *Nelson*, [1947] 4 D.L.R. 473 (B.C. Sup. Ct.); *Hesse* v. *Laurie* (1962), 38 W.W.R. (N.S.) 321, 35 D.L.R. (2d) 413 (Alta. Sup. Ct.). The liability of school authorities for injuries inflicted by one schoolchild on another has developed along special lines and is beyond the scope of this article.

[64A] However, what constitutes reasonable steps to prevent activities by irresponsible persons would depend on the likelihood that visitors are present and the extent to which they may be expected to anticipate that the premises are free of dangers to them. *Cf.* text accompanying footnote 75 *infra*.

[65] [1948] S.C.R. 564, [1948] 4 D.L.R. 686.

[66] *Supra*, footnote 5.

[67] The act of soliciting the public to come to the park, he said, "called for reasonable precautions against foreseeable risks and dangers lurking in fact within [the park], an act which unaccompanied by that degree of prudence became a misfeasance"—[1948] 4 D.L.R. 685, at pp. 693-694. Marsh points out that this attitude of Rand J. would virtually obliterate any distinction between invitees and licensees. *Op. cit.*, *supra*, footnote 34, at p. 376.

Council[68]—a case definitely decided on the basis of occupancy duty. It would seem that the judgment for the plaintiffs in the *Booth* case can be justified for either of two reasons—(1) if this was a case involving occupancy duty, the defendant's employee was aware of facts that to a reasonable person would have indicated danger to licensees; (2) in not taking reasonable steps to prevent irresponsible persons from dangerous activity, the defendant was in breach of its activity duty to the plaintiffs.[68A]

Classification of visitors

As an intelligent layman may see even more readily than a lawyer, the attempt rigidly to classify each visitor on land is at best an unnecessary step. At worst it is a source of injustice, when some courts—and the House of Lords has been among the worst offenders[69]—have applied the categories in purely mechanical fashion to grind out decisions that are held out as inevitable. More often, fortunately, our courts preserve the trappings of categorization but strain mightily to interpret and apply them in such a way as to reach what they view as a just result. It seems that these categories are too deeply imbedded in our law to be susceptible of elimination by judicial fiat—at least not all at once. Consequently, the view that is so widely held among writers on the subject that the categories should be immediately discarded and the ordinary principles of negligence law substituted in all aspects of occupiers' liability[70]—commendable as it is *a priori*—has not met with favour from our courts.[71] It may be possible to accomplish this result by appropriate legislation, and indeed, if no judicial improvement and clarification of the present law are forthcoming, some legislation may become inevitable. As we shall see,[72] however, serious difficulties are involved in attempting to legislate the cate-

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[68] *Supra*, footnote 5.

[68A] The foregoing analysis should resolve the difficulties recognized in Baillie, Tavern Owner's Liability for Injuries Caused by Disorderly Patrons (1961), 19 U.T.L. Rev. 71, where several relevant cases are considered.

[69] ". . . many recent English decisions exhibit the worst characteristics of a 'mechanical jurispurdence' "—Wright, Cases on the Law of Torts (2nd ed., 1958), p. 549.

[70] See *supra*, footnote 32.

[71] Not surprisingly, the judgments of Lord Denning remain an exception; see, *e.g.*, his judgment in *Slater* v. *Clay Cross Co. Ltd.*, [1956] 2 Q.B. 264, [1956] 2 All E.R. 625 (C.A.). In Canada, O'Halloran J.A., of the British Columbia Court of Appeal, has been advocating for some years a much more flexible approach to the categorization of visitors; see, *e.g.*, his dissenting judgment in *Crewe* v. *North American Life Assurance Co.*, [1942] 3 W.W.R. 193, [1942] 4 D.L.R. 75 (B.C.C.A.).

[72] See text accompanying footnote 125, *infra*.

gories out of existence; and it is possible—and probably preferable—to reach the same goal by evolution through decided cases.

Indeed, this process of evolution is already far advanced. In the first place, the area in which courts have held that categorization of visitors is relevant has been progressively shrinking: we have seen that the ordinary principles of negligence law are now applied where the defendant is not the occupier of the land and also where there can be found a breach of activity duty by the occupier.[73] In the second place, there has been a tendency to raise the level of the occupancy duty owed to licensees so as to make it nearly indistinguishable from that owed to invitees. Finally, we shall see that the occupancy duty owed to invitees has been established to be none other than the duty of reasonable care of the general law of negligence. It is true that the occupancy duty owed to trespassers is still very minimal under our law; yet this has been mitigated partly by a ready disposition on the part of many courts to imply a license[74] and partly by their disposition to find a breach of activity duty where a trespasser has been injured. Furthermore, it should be clear that even if the ordinary standards of negligence law were applied to determine the occupancy duty to trespassers, this duty would not be an onerous one, because in many cases occupiers cannot be expected to anticipate invasion of their land by trespassers and, in many other cases, the cost of taking adequate preventive action would be so great that "reasonable care in the circumstances" would not require that such action be taken.[75] If all other aspects of the law of occupiers' liability can be rationalized through the common-law process, it would seem feasible to make some legislative alteration in this small anomalous pocket of the law[76] without attempting to legislate over the whole field of occupiers' liability.[77]

[73] If we attempt to rationalize the *Glasgow* and *Booth* cases, this would include the situation where the occupier who knows or ought to know of the presence of visitors in the area of danger does not take reasonable steps to prevent irresponsible persons from carrying out dangerous activity on his land.

[74] See Fleming, *op. cit.*, footnote 3, p. 426. See also Hughes, *op. cit.*, footnote 26, at p. 635.

[75] See James, *op. cit.*, footnote 39, at p. 158. Hughes, *op. cit.*, *ibid.*, at p. 691, suggests that an increase in the number of verdicts favouring trespassers would necessitate only a slight increase in insurance premiums.

[76] See Hughes, *op. cit.*, *ibid.*, at p. 699.

[77] The occupancy duty to trespassers should go at least as far as s. 339 of the American Law Institute's Restatement of the Law of Torts, which would impose liability on the occupier in favour of trespassing children who are injured by a dangerous condition on the land where (1) the place where the condition is maintained is one upon which the possessor knows or should know that young children are likely to trespass; (2) the occupier should know that the condition involves an unreasonable risk of harm to

As long as our courts continue to categorize visitors, they will continue to be faced with difficult problems of categorization. Presumably the categories were established in the first place as a means by which nineteenth-century judges, who had never heard of the broad principles of negligence that were later to be proclaimed in *Donoghue* v. *Stevenson*,[78] could fix on the occupier a duty of care that they considered reasonable for each type of visitor.[79] Of course, their view of what was reasonable care was coloured by the then prevalent partiality in favour of an occupier's power to use his land as he saw fit without any more interference by outsiders than he chose to permit.[80] Since twentieth-century opinion is not willing to concede this much freedom to land occupiers, it is not surprising that virtually every recent writer on the subject has recommended that the law be made—to a greater or lesser degree—more favourable to the visitor and less favourable to the occupier; and, on the whole, our courts—though less boldly—have certainly moved in the same direction.

The system of categories has never worked smoothly, because it greatly oversimplifies the purposes for which and the circumstances in which a visitor might come upon land in the occupation of another. As a result, very often "the facts are made to fit the conception, instead of having the conception fit the facts. By this Procrustean method, the three categories are preserved intact even though reason and experience be sacrificed in the process."[81] As Dean Wright has appropriately put it,

> . . . despite heroic judicial efforts to the contrary, . . . categories have a habit of shading one into the other. This is inevitable since categories attempt to confine facts and facts have an annoying habit of resisting confinement. It would seem reasonably obvious to anyone not familiar with this part of the law that what we need are either more categories to fit the facts—which makes categorizing futile since there may not

such children; (3) the child, because of his immaturity, either does not discover the condition or does not in fact appreciate the danger involved; and (4) the utility to the occupier of maintaining the condition is slight as compared with the risk to the children involved. Prosser indicates that this section is perhaps the "most successful single achievement" of the Restatement of Torts and that in the United States it "has received such general acceptance that it may be regarded as a new point of departure for the modern law"—Prosser, *op. cit.*, footnote 34, p. 440.

[78] *Supra*, footnote 56.

[79] Atkin L.J. felt that the categories "correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use". *Coleshill* v. *Manchester Corp.*, [1928] 1 K.B. 776, at p. 791 (C.A.).

[80] See generally, Marsh, *op. cit.*, footnote 34, at p. 184. Categorization was also a device to keep juries under control. *Ibid.*, at pp. 185-186.

[81] A. L. MacDonald, Liability of Possessors of Premises, *op. cit.*, footnote 34, at p. 668.

> be enough different rules of law to fit each category — or a principle of law as elastic as the facts to which it must apply. Strange as it may seem, we frequently need to remind ourselves that the function of law is not primarily to categorize but to categorize only if necessary to decide issues of fact on consistent legal principles. The question is, which shall be master, categories or facts?[82]

Not surprisingly, the number of categories has tended to increase: in addition to the three traditional categories of invitee, licensee and trespasser, courts now recognize separate categories for persons who enter pursuant to a contract for accommodation, persons who enter pursuant to a contract not for accommodation, and employees; on the other hand, English and Canadian courts have rejected suggestions to create a further category of visitors entering "as of right" and have preferred to follow the difficult procedure of attempting to fit each such visitor into the existing categories.[83]

If we must categorize visitors, it seems entirely reasonable that the criteria of categorization be fixed having regard to the respective duties of care applicable to each category of visitor. This is essentially the basis of Prosser's view, already referred to,[84] that a visitor should be treated as an invitee whenever it is reasonable for him to anticipate that the occupier will have taken the degree of care for his safety that the law imposes on an invitor. The test of "business or material interest" — or, worse still, "common business or material interest"[85] — generally applied by our courts is a crude and not always effective means of reaching that result. As was suggested earlier,[86] many English and Canadian cases can be explained only by using the test proposed by Prosser; and it should

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[82] Wright, *op. cit.*, footnote 69, p. 550. To the same effect, see Wright, The Law of Torts: 1923-1947 (1948), 26 Can. Bar Rev. 46, at p. 82. Drawing on Prosser and some American decisions, Dean Wright asks what status should be accorded the following persons — (1) a person who enters a drugstore to use a public telephone; (2) the driver of a motor car who stops at a "gas station" to use the toilet only; (3) a pedestrian who uses the toilet of a gasoline station (citing *Fleming* v. *B.A. Oil Co. Ltd.*, [1953] 1 D.L.R. 70 (Man. C.A.)); (4) small children, such as a baby in arms, accompanying their parents on a trip through a department store; (5) a newsboy who goes into a bank to obtain change for a five dollar bill; (6) persons who enter a department store in order (a) to get out of the rain; (b) to invite a salesgirl to dinner; (c) to use the store as a short cut to an adjoining street — Wright, *op. cit.*, *ibid.*, p. 604.

[83] See Fleming, *op. cit.*, footnote 3, pp. 409-412. See generally, Prosser, *op. cit.*, footnote 11, at pp. 391-393 (Can. Bar Rev.); Paton, The Responsibility of an Occupier to Those Who Enter as of Right (1941), 19 Can. Bar Rev. 1; Friedmann, *op. cit.*, footnote 15 (criticized in Paton, Liability to Visitors of Premises (1943), 21 Can. Bar Rev. 440); Wallis-Jones, *op. cit.*, footnote 21.

[84] See text accompanying footnote 11, *supra.*

[85] See text accompanying footnotes 7-9, *supra.*

[86] See text accompanying footnotes 16-21, *supra.*

be still possible for our courts, when they re-examine what they have done—as distinguished from what they have said—in deciding categorization problems, expressly to endorse Prosser's test.[87] However, before we urge our courts to adopt, as a criterion for determining who is an invitee, the duty of care owed to invitees, we ought to clarify what that duty is. Once this has been done—and an attempt along these lines will be made presently—we shall be in a better position to rationalize our categories.[88]

One anomaly in the English law of categorization deserves special mention. In *Fairman* v. *Perpetual Investment Building Society*,[89] the plaintiff, who lodged with a tenant in the defendant's residential building, was injured when she tripped on a defective stair in the area of the building that remained in the defendant's occupation. The three majority judges held in favour of the defendant, on the ground that the defect in the stair was obvious to the plaintiff; consequently, it did not matter whether she was an invitee or a licensee. As well, each of these three judges expressed a tentative, "I think" opinion that the plaintiff was a licensee and not an invitee of the defendant. Twenty-seven years later, in *Jacobs* v. *London County Council*,[90] the House of Lords had to consider the claim of a woman who had tripped on an obstruction while she was crossing a forecourt on her way to a drugstore that the defendant municipality had leased to a tenant; the defendant had remained in occupation of the forecourt. All five sitting members of the House of Lords dismissed the plaintiff's appeal; treating themselves bound by what they considered one of the holdings of the *Fairman* case, they held that the plaintiff, as the invitee of a tenant, must be treated as a mere licensee of the defendant landlord in the part of the premises still in the landlord's occupation. Since the defendant did not actually know of the dangerous condition of the forecourt, it followed that no duty was owed to such a licensee.

The *Jacobs* decision is indefensible. In the first place, the categorization of the plaintiff in the *Fairman* case was almost an afterthought of the majority judges and was not intended by them to be a holding of the case; in the second place, even if it *was* part of

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[87] Dean Wright appears to agree—Wright, The Law of Torts: 1923-1947 (1948), 26 Can. Bar Rev. 46, at p. 86; Wright, *op. cit.*, footnote 69, p. 550. *Cf.* Goodhart, The 'I Think' Doctrine of Precedent: Invitors and Licensors (1950), 66 L.Q. Rev. 374, at pp. 388-389.

[88] Professor James would go a step further than Prosser and classify a visitor as an invitee if either the economic benefit or the invitation criterion is satisfied—James, *op. cit.*, footnote 39, at p. 612.

[89] [1923] A.C. 74 (H.L.).

[90] *Supra*, footnote 22.

their holding that the plaintiff was a licensee, this surely was a decision on the facts of the particular case and not a sweeping new proposition that in all circumstances the tenant's invitee can be only a licensee of the landlord. The House of Lords in the *Jacobs* case, by applying in a generalized and astonishingly mechanical fashion a mere suggestion in the *Fairman* case based on its particular facts, in effect expanded it into a rigid rule of law. No consideration was given to the possibility that in the purely domestic arrangement between the plaintiff and the tenant in the *Fairman* case there might be greater justification for failure to find that the landlord had a material interest in the plaintiff's presence than in the commercial relationship between the plaintiff in the *Jacobs* case and the tenant toward whose store she was walking. The result in the *Jacobs* case is certainly contrary to the "material interest" test, since the defendant had a definite and direct material interest in access by members of the public to stores leased to its tenants.[91]

Fortunately, the question that arose in the *Jacobs* case would probably be decided differently in Canada, in view of inconsistent Canadian decisions and the fact that our highest court no longer automatically bows to the authority of the House of Lords.[92] It is true that several Canadian cases, including at least one decision of the Supreme Court of Canada, have followed the *Fairman* case to the extent of holding that any visitor of a tenant of a residential building is a mere licensee of the landlord in the parts of the premises occupied by the landlord.[93] However, most Canadian courts, including the Supreme Court of Canada, in effect have refused to take the further step that the House of Lords did in the *Jacobs* case; instead, wherever they have found a commercial arrangement between the visitor and the tenant they have applied the "material interest" test and have held the visitor to be the landlord's invitee.[94]

[91] See generally, Goodhart, *op. cit.*, footnote 87.

[92] See the "declaration of independence" in *Fleming* v. *Atkinson*, [1959] S.C.R. 513, 18 D.L.R. (2d) 81.

[93] See *Power* v. *Hughes*, [1938] 2 W.W.R. 359, [1938] 4 D.L.R. 136 (B.C.C.A.); *Ottawa* v. *Munroe*, [1955] 1 D.L.R. 465 (S.C.C.); *contra*, *Lewis* v. *Toronto General Trusts Corp.*, [1941] 2 W.W.R. 65 (Sask. K.B.); *Mazur* v. *Sontowski*, [1952] 3 D.L.R. 333 (B.C. Sup. Ct.). *Cf.* the judgment of Scott L.J. in *Haseldine* v. *C. A. Daw & Son Ltd.*, *supra*, footnote 8.

[94] See *Gordon* v. *Canadian Bank of Commerce*, [1931] 3 W.W.R. 185, [1931] 4 D.L.R. 635 (B.C.C.A.)—tenant sharing an office with the plaintiff, who paid half the rent; *Greisman* v. *Gillingham*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472—pursuant to a term in his lease requiring the tenant to keep the premises clean, he hired the plaintiff to remove rubbish from the premises; *Hillman* v. *MacIntosh*, *supra*, footnote 7—an express company messenger on his way to pick up a parcel from a tenant in a com-

Standards of care

Let us review briefly the accepted formulas for the standard of care owing by the occupier to the various classes of visitor.[95]

The established rule used to be that the occupier owed a duty to any visitor who came upon his land pursuant to a contract with him to ensure that the premises were as safe as reasonable care and skill on the part of anyone could make them. This rule was treated as if it were an implied warranty in the contract and in effect made the occupier liable for the negligence not only of himself and his employees but also of independent contractors hired by him, as well as for remediable defects in the premises at the time he began to occupy them.[96] This rule came close to imposing strict liability on the occupier to such visitors. More recently this high standard of care has come to be applied only where the contract is for accommodation; whereas if entry by the visitor is only incidental to the main purpose of the contract—for instance, to see a performance or eat a meal—the occupier apparently discharges his duty by himself exercising reasonable care to make the premises safe: in other words, he is under the ordinary duty of care of the general law of negligence.[97]

The classical formulation of the duty owed to an invitee is that of Willes J. in *Indermaur* v. *Dames*[98]—a passage that has been accorded a degree of judicial reverence that is usually reserved for the language of Parliament—and sometimes not even then. Referring to an invitee, he said:

> . . . 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 shall on his part use reasonable care to prevent damage from unusual danger, 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.

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mercial building was injured in a freight elevator that was provided by the landlord specifically for the purpose of dispatching such articles; *Arendale* v. *Federal Building Corp. Ltd.* (1962), 35 D.L.R. (2d) 202 (Ont. C.A.)—tenant's employee; *contra, Wilson* v. *Institute of Applied Art Ltd.*, [1941] 4 D.L.R. 788 (Alta. Sup. Ct.).

[95] Because the duty to the occupier's employees is a specialized problem, it will not be considered here.

[96] *Maclenan* v. *Segar*, [1917] 2 K.B. 325 (K.B.D.).

[97] See Fleming, *op. cit.*, footnote 3, pp. 400-403. Fleming suggests that this development perhaps foreshadows elimination of the distinction between the occupier's duty to contractual entrants and that to non-contractual invitees—*ibid.*, at p. 402. See also Salmond, *op. cit.*, footnote 34 (12th ed.), pp. 485-486.

[98] *Supra*, footnote 6, at p. 288, aff'd (1867), L.R. 2 C.P. 311 (Ex. Ch.).

Ilsley C.J., in the Nova Scotia Supreme Court, has recently formulated the following four issues of fact to be determined when an invitee seeks damages from the occupier for injuries that are due to the condition of the premises[99]—(1) Was there an unusual danger? (2) If so, was it one that the defendant knew or ought to know? (3) If so, did the defendant use reasonable care to prevent damage to the plaintiff from the unusual danger?[100] (4) Did the plaintiff use reasonable care on his own part for his own safety?

I shall reserve for the present a consideration of the meaning of the term "unusual danger". The next question is, by what test does one determine whether the defendant ought to have known of a particular danger? In the judgment just referred to, Ilsley C.J. provided the following answer[101]—the occupier ought to know of dangers that are discoverable by the exercise of reasonable care and skill.[102] Once having discovered the danger, it is the occupier's further duty to take reasonable steps to prevent injury to the invitee; I shall return to this question presently.

It should be clear that all that is required of the occupier is to exercise reasonable care to learn of the danger and then to protect the invitee. Consequently, the mere fact that the occupier's inspection system failed to detect and permit rectification of a dangerous condition does not establish his negligence; but the longer the dangerous condition is shown to have remained undetected, the more likely it is that the occupier will be held liable.[103] In some cases, the maxim *res ipsa loquitur* may be invoked against the occupier, but only where it appears unlikely that anyone else would have created the dangerous condition or else where it is likely that a reasonable inspection system would have detected the condition.[104]

It is now well established in Canada that the fact that the invitee fails to use reasonable care for his own safety does not discharge the occupier's duty of care toward him. Instead, the plaintiff's

[99] *Smith* v. *Provincial Motors Ltd.* (1962), 32 D.L.R. (2d) 405, at p. 412 (N.S. Sup. Ct.).

[100] The extent to which the occupier is liable for the negligence of independent contractors hired by him is unsettled—see Fleming, *op. cit.*, footnote 3, pp. 416-417.

[101] *Smith* v. *Provincial Motors Ltd.*, *supra*, footnote 99, at p. 412, citing Charlesworth.

[102] In the circumstances of that case, Ilsley C.J. held that the degree of scrutiny that it was the duty of the defendant's employees to exercise was very much higher than could reasonably be required of the plaintiff in taking care for his own safety. *Ibid.*, at p. 413.

[103] See *Bennett* v. *Dominion Stores Ltd.*, *supra*, footnote 31, at p. 272.

[104] *Ibid.*, at p. 271; *MacNeil* v. *Sobeys Stores Ltd.*, *supra*, footnote 24, at p. 764. *Cf. Turner* v. *Arding & Hobbs Ltd.*, *supra*, footnote 25, at p. 912 (K.B.D.).

damages will be reduced under the terms of the applicable apportionment legislation, but he will not be denied *any* recovery.[105]

A major source of difficulty in this area is the extent of the occupier's duty to protect an invitee against a danger of which the occupier knows or ought to know. It should not be necessary to recount the well-known facts in the universally condemned decision[106] of the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton*,[107] which held that if the invitee is fully aware of the dangerous condition—whether through his own knowledge or because he has been warned by the occupier—the occupier's duty to him is discharged, and if he nevertheless encounters the danger and is injured, he has no claim against the occupier. This rule was held to apply even where the invitee was compelled to remain in the area of danger by the terms of his contract of employment with a third party, in the fulfilment of which the occupier had a direct material interest. That the decision of the majority in this case was neither inevitable nor just is clearly shown in the brilliant dissenting judgment of Lord MacDermott. Fortunately, the rule in the *Horton* case as yet has not been established as law in Canada. It is inconsistent with the judgment of the Judicial Committee of the Privy Council in the Canadian case of *Létang* v. *Ottawa Electric Ry. Co.*,[108] which, in effect, held that even though an invitee knew of the danger of slipping on icy steps in the defendant's occupation, she could still recover when she was injured on them, where she had no reasonable alternative route.[109] In any event, the scope of the *Horton* case has been considerably restricted by the recent decision of the House of Lords in *Smith* v. *Austin Lifts Ltd.*[110] The five sitting law lords were unanimous in holding that an invitee is not precluded from recovering from the occupier merely because he knew there was some danger: for the *Horton* rule to apply, he must have had a full appreciation of the danger. As Lord Denning said, "If he was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought it was, then he can recover."[111]

[105] *Brown* v. *B. & F. Theatres Ltd.*, [1947] S.C.R. 486, [1947] 3 D.L.R. 593; *Smith* v. *Provincial Motors Ltd.*, *supra*, footnote 99, at p. 414.

[106] See Fleming, *op. cit.*, footnote 3, p. 414, note 32. Among the most able criticisms are those to be found in the judgment itself, in the dissenting opinions of Lords MacDermott and Reid.

[107] *Supra*, footnote 28.

[108] *Supra*, footnote 30.

[109] In accord with the *Horton* case, *Wasmund* v. *Smith*, [1947] O.R. 181, [1947] 2 D.L.R. 637 (C.A.); *contra*, *St. George* v. *Condran* (1949), 24 M.P.R. 83, [1949] 2 D.L.R. 697 (N.S.C.A.). See also text accompanying footnotes 167-170, *infra*.

[110] [1959] 1 All E.R. 81, [1959] 1 W.L.R. 100 (H.L.).

[111] *Ibid.*, at p. 93 (All E.R.).

In the case of a licensee, the usual formulation of the standard of care is that the occupier is bound only to warn him of concealed or hidden dangers[112] of which the occupier actually knows.[113] As we have seen, however, the courts in recent years have given an extended interpretation to the "actual knowledge" of danger that an occupier must have before he owes an occupancy duty to a licensee.[114] The result of these decisions is, as Fleming says,[115] that "liability can no longer be avoided, if there is knowledge of a latent condition which to the prudent observer would spell the risk of danger".[116] The difference, if any, between the kind of danger of which knowledge will be imputed to an invitor and to a licensor respectively has become so slight and esoteric that it may almost be ignored.[117] Nevertheless, the occupier's duty to invitees is higher than his duty to licensees (1) if, as Fleming suggests,[118] the category of "unusual danger" is somewhat broader than that of "concealed danger" and (2) if the *Horton* decision is not to be followed, in which event the visitor's knowledge of the danger would always discharge the occupier's duty toward a licensee but not always toward an invitee.

The standard of care required of an occupier to discharge his occupancy duty toward a trespasser[119] is a most complicated and confused aspect of the law of occupiers' liability and one that cannot be considered in this article.[120] It has usually been said that

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[112] See Salmond, *op. cit.*, footnote 34 (12th ed., Heuston, 1957), p. 505.

[113] See Fleming, *op. cit.*, footnote 3, pp. 418-419.

[114] Among the leading decisions are *Ellis* v. *Fulham Borough Council*, *supra*, footnote 5; *Pearson* v. *Lambeth Borough Council*, *supra*, footnote 5; *Hawkins* v. *Coulsdon & Purley Urban District Council*, [1954] 1 Q.B. 319, [1954] 1 All E.R. 97 (C.A.).

[115] Fleming, *op. cit.*, footnote 3, p. 419.

[116] This development should practically eliminate the anomalous conclusion that it pays a licensee not to inspect his premises — see Fleming, *op. cit.*, *ibid.*, p. 421; Goodhart, *op. cit.*, footnote 87, at p. 386.

[117] See also Salmond, *op. cit.*, footnote 34 (12th ed. Heuston, 1957) pp. 507-509, (13th ed. Heuston, 1961), pp. 528-530.

[118] Fleming, *op. cit.*, footnote 3, p. 421.

[119] "The category of trespasser includes many diverse personalities. A random selection of trespassers might be: a burglar; a canvasser who ignores a 'No Canvassers' notice; a man who deliberately takes a short cut over his neighbor's field; a man who mistakenly walks on another's land believing it to be his own; a man who is wrongly directed into premises which he has no permission to enter; a man who in good faith accepts an unauthorized invitation to go into another's premises; a policeman who walks through the open door of a warehouse at night to satisfy himself that all is well; a girl whose father takes her out for a ride in his employer's truck. To classify all these persons under one doctrinal rubric for the purposes of contributory negligence makes no sense." — Hughes, *op. cit.*, footnote 26, at p. 688.

[120] The literature is extensive. See, *e.g.*, Fleming, *op. cit.*, footnote 3, pp. 425-431; Prosser, *op. cit.*, footnote 34, pp. 432-445; James, *op. cit.*,

the occupier's only occupancy duty to a trespasser—whether adult or child—is not deliberately to set a trap for him: it is not clear whether the term "trap" means anything different from a "concealed danger".

The injury for which the visitor sues will usually have occurred to him while he was on the occupier's premises; but in some circumstances the occupier's occupancy duty will apply even though the visitor was elsewhere. Thus the danger may consist in the possibility that the visitor will fall off the occupier's land and sustain injury on adjoining land.[121] The visitor still must have been injured *as a result* of his having been on the occupier's land; otherwise the case would be one of nuisance rather than occupiers' liability in the strict sense. As well, the occupancy duty will attach even though the defect is on adjoining premises, if it is likely to cause injury to visitors while they are on the occupier's land.[122]

Statutory developments

General dissatisfaction in the United Kingdom with the state in which the law of occupiers' and landlords' liability had been left as a result of several particularly wooden decisions of the House of Lords[123] and with the artificial distinctions between invitees and licensees led to investigation of the field by the Law Reform Committee. The Committee's recommendations were adopted by Parliament in the Occupiers' Liability Act, 1957, which came into force on January 1st, 1958. Under the Act an occupier owes the same duty—called the "common duty of care"—to all lawful visitors on his land, except to the extent that this duty has been lawfully altered by agreement or otherwise. The "common duty of care" is defined as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is permitted or invited to be there. For all practical purposes, therefore, the only remaining distinction among visitors is between lawful entrants and trespassers. The rule in the *Jacobs* case disappears, and that in the *Horton* case is expressly reversed.[124]

footnote 39. Hughes, *op. cit.*, footnote 26. For a recent judicial discussion, see *Graham* v. *Eastern Woodworkers Ltd.*, *supra*, footnote 2.

[121] See *Perkowski* v. *Wellington Corporation*, *supra*, footnote 38, at p. 68.

[122] See *Mitchell* v. *Johnstone Walker Ltd.* (1919), 47 D.L.R. 293, 297 (Alta. Sup. Ct.).

[123] *E.g.*, *Cavalier* v. *Pope*, [1906] A.C. 428 (H.L.); *Jacobs* v. *London County Council*, *supra*, footnote 22; *London Graving Dock Co. Ltd.* v. *Horton*, *supra*, footnote 28.

[124] For a full discussion see Salmond, *op. cit.*, footnote 34 (12th ed., Heuston, 1957), Ch. 12, (13th ed., Heuston, 1961), Ch. 12.

Perhaps this is a reasonable solution to the problem, perhaps not. Consider the following observations by Dean Wright:

> While judicial decision has done much to reach broad generalization of the fault principle, the general reluctance of English courts openly to recognize their creative powers has been ameliorated by remedial legislation. Indeed, it can be argued that by steadfastly maintaining an appearance of the law's inability to surmount difficulties the English courts make legislative reform easier and more wide-sweeping. The Occupiers' Liability Act, 1957, is an illustration in point. This legislation followed close upon two or three House of Lords judgments which were remarkable for their enthusiasm in reaching results that were far from inevitable, were indeed opposed to common sense, and could only be supported by a literal interpretation of isolated words in early decisions. . . .
>
> Legislation of this kind raises many questions. Is it sounder to use a wide generalization than to leave the creative work of reform to the courts? Will legislation of this kind wipe out all distinctions between a private owner of uninsured land and a business corporation throwing its premises open to the public, or will the courts have merely a new starting-point for further elaboration of differences? . . . .
>
> In Canada one thing is sure. It will be much more difficult to persuade nine jurisdictions to pass legislation extending liability. Powerful insurance lobbies; the fact that Canadian lawyers, like American, are closely allied to business interests as compared to the barrister of England; and the virtual exclusion of the academic lawyer in Canada from matters of law reform would seem to indicate greater hope in that country in relying on judicial creativeness.[125]

III. *The Duty of Care to Invitees—What is "Unusual Danger"?*

I have suggested that clarification of the occupancy duty owed to invitees may go a long way toward simplifying this area of the law. You will recall the traditional formula of Willes J. in *Indermaur* v. *Dames*[126]—"he, 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". The meaning of this passage should become clear when we examine the way in which its key term—"unusual danger"—has been interpreted.

We must not forget that this formula was proposed in the

[125] Wright, The Adequacy of the Law of Torts (1961), 6 J.S.P.T.L. 11, at pp. 13-14, [1961] Camb. L.J. 44, at pp. 47-48. Dean Wright questions whether the statutory changes in England are either necessary or wise: they "certainly raise queries in jurisdictions not technically bound by those [objectionable House of Lords] decisions whether they should be followed or whether, indeed, they were the inevitable outgrowth of previous common law experience"—Wright, *op. cit.*, footnote 69, p. 549. See, to the same effect, Wright, The English Law of Torts: A Criticism (1955), 11 U.T.L.J. 84, at p. 111.

[126] *Supra*, footnote 6.

middle of the nineteenth century, many years before the modern principles of negligence law were elaborated. In view of the way courts have applied this formula, we should now be able to simplify it: the occupancy duty to invitees seems now to be merely an application in the circumstances of the broad rules of negligence law; in no decision of importance in which that occupancy duty was in issue—except the *Horton* case—is there anything to suggest that a different result would have been reached by applying the principles of *Donoghue* v. *Stevenson*[127] and *Bourhill* v. *Young*[128] from that actually reached by applying Willes J.'s formula; furthermore, several courts have expressly or impliedly treated the two tests as identical.

What the courts have said about "unusual danger"

Our courts still seem to find considerable difficulty in interpreting the term "unusual danger", and it is probably significant that several recent Canadian cases have raised this question. First, however, let us consider the leading English decisions in which the meaning of the term has received judicial comment.[129]

The term came under careful judicial scrutiny for the first time in the judgment of the English Court of Appeal in *Norman* v. *Great Western Ry. Co.*[130] In his judgment, Buckley L.J. said that the duty required of occupiers by *Indermaur* v. *Dames* may be defined as "a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care".[131] His use of the term "reasonably safe" seems to describe the state of the premises after the occupier has taken care to prevent damage to the invitee from "unusual danger": the word "unusual" has thus been dropped from his formula, which merely uses the familiar language of the general law of negligence. In response to argument by counsel on the extent of the duty of care owed by a railway company to its invitees, Phillimore L.J. made the following observations:[132]

> I am not certain that a way to avoid misapprehension which might arise from the use of the words "unusual danger"—which means, in

[127] *Supra*, footnote 56.

[128] [1943] A.C. 92. [1942] 2 All E.R. 396 (H.L.).

[129] It seems generally agreed that whether a danger is "unusual" is a question of fact—see A. L. MacDonald, Invitees (1930), 8 Can. Bar Rev. 344, at pp. 348-349—but where such an issue has been left to juries, they have seldom been given much judicial guidance in applying the term to the facts before them.

[130] [1915] 1 K.B. 584 (C.A.). [131] *Ibid.*, at p. 594.

[132] *Ibid.*, at p. 596. Pickford L.J. agreed with this opinion. *Ibid.*, at p. 598.

> my opinion, danger unusual for the particular person — might not be found by substituting the word "unexpected" for "unusual." It is not a question whether the danger is unusual with regard to all the world, but whether it is unusual with regard to the individual complainant. In other words, in analysing the expression "reasonably safe" one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises. For instance, in loading a ship in a dock a gangway consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary persons, not accustomed to ships, might not find it easy to use, because the stevedore and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business, and so far as any complainant is concerned it has to be reasonably safe for him. If it is safe for him, it does not matter whether or not it is safe for anybody else. It is for that reason that the element of knowledge comes in.

This attempted explanation contained a troublesome ambiguity: if the unusualness of a danger depends on the particular invitee, is this to be determined by the subjective knowledge and experience of the invitee or objectively, by the reasonable expectations of the invitor as to what knowledge and experience the invitee probably had?[133] Some subsequent cases and commentators have interpreted the *Norman* case as having made the test subjective and have concluded that if the invitee in fact knows of the danger, it cannot be an "unusual" danger, and the occupier owes no duty to him.[134]

In *Hayward* v. *Drury Lane Theatre Ltd.*,[135] Scrutton L.J. said:

> The rights of an invitee who does not pay for his presence are stated in *Indermaur* v. *Dames*, and are that the owner of premises must use reasonable care to protect him either by warning or precaution against traps, whether existing or new, dangers which the licensee, if ignorant of the premises, could not avoid by reasonable care and prudence. Against dangers which are not traps in this sense the owner is under no liability — that is, he does not warrant the premises safe or as safe as reasonable care could make them.

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[133] See this decision criticized in Griffith, Duty of Invitors (1916), 32 L.Q. Rev. 255, on the ground that Willes J.'s language in *Indermaur* v. *Dames* could not be improved upon.

[134] The language of Phillimore L.J. was criticized by Isaacs J. in *South Australian Co.* v. *Richardson* (1915), 20 C.L.R. 181, at pp. 194-196 (Aust. H.C.); in his view "the word 'unusual' has relation to the premises, not to the visitor. If, as thought by Phillimore L.J. and Pickford L.J., it meant danger unusual for the particular person, it would follow that on his first visit to such a place all danger would be unusual. If, as there suggested, it means 'unexpected' in fact, the obligation of the occupier would depend on an utterly unknown and undiscoverable factor." Isaacs J. felt that the language of Willes J. in *Indermaur* v. *Dames* was inconsistent with this view.

[135] [1917] 2 K.B. 899, at p. 914 (C.A.).

Despite the rather unfortunate use of the word "trap",[136] Scuttton L.J. seems to be saying merely that the occupier's duty is to take reasonable care to prevent damage to invitees from any condition on the premises that may constitute an unreasonable risk to him.

The ambiguities that were left in the meaning of "unusual danger" after the *Norman* case were considered by the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton.*[137] It is strange that in this same decision in which an entirely indefensible limitation was placed on the invitor's duty of care, we find a very full and quite sensible analysis of the meaning of "unusual danger". In this respect all five sitting law lords were unanimous, and their pronouncements have helped clarify the meaning of this difficult term. This aspect of their judgments deserves careful attention.

The following passage appears in Lord Porter's judgment:[138]

> . . . what is declared to be the duty is not to prevent unusual danger but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important: either may prevent damage though the unusual danger admittedly exists. . . . To my mind danger may be unusual though fully recognized and I am not prepared to accept the view that the word "unusual" is to be construed subjectively as meaning unexpected by the particular invitee concerned.
>
> Moreover, I get little assistance from the alternative word "unexpected" suggested by Lord Phillimore (then Phillimore, L.J.) in *Norman* v. *Great Western Railway Co.*: I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore, L.J., in *Norman* v. *Great Western Railway Co.* is speaking of individuals as individuals but of individuals as members of a type, *e.g.*, that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.
>
> In the present case undoubtedly there was a danger of slipping owing to the wide spacing of the planks, and that danger is, in my opinion, accurately described as unusual.

Lord Normand said:[139]

> It may not be unreasonable to suppose that Willes, J., was aware

[136] In addition, the term "owner" is incorrect and should be replaced by "occupier"; the term "licensee" in context means "licensee with an interest", or, in other words, "invitee".

[137] *Supra*, footnote 28.

[138] *Ibid.*, at p. 745 (A.C.).

[139] *Ibid.*, at p. 751.

that "unusual" is a word which might take a colour from the circumstances of the case, and that a definition of unusualness might hinder instead of helping a just solution of a specific problem and the rational development of the law.

Referring to Phillimore L.J.'s observations in the *Norman* case, Lord Normand continued:[140]

> I humbly confess that I find them more ambiguous and uncertain than the words they seek to explain. I do not find that the substitution of "unexpected" for "unusual" helps me much. But the real difficulty is that the Lord Justice speaks with two voices, sometimes saying that the premises have to be safe for the class of persons who come onto them on business, and sometimes that the danger is unusual if it is unusual for the particular individual. I think that there is a confusion between the condition which gives rise to the duty, the existence of an unusual danger, and the notice, or its equivalent, the knowledge of the individual invitee, which may be a discharge of the duty. I am of opinion that if the persons invited to the premises are a particular class of tradesman then the test is whether it is unusual danger for that class. So if the occupier supplies the sort of gangway which stevedores usually use he has performed his duty so far as stevedores are concerned, and if a particular stevedore suffers from a defective sense of balance and falls off the gangway he cannot complain of the occupier's failure of duty. The sufferer knew the danger for him and he must accept the responsibility of using a gangway which might be dangerous for him because of his idiosyncrasy. But a gangway which is reasonably safe for stevedores and which is no unusual danger for them, may well be an unusual danger for another class of workman or for members of the public generally . . . a danger may also be "usual" or "unusual" in relation to the place. For example, a quay is dangerous, though it is not in daylight an unusual danger for normal adults, but an uneven joint between two stones near the edge of the quay may be an unusual danger to anyone, and is none the less an unusual danger though it is not a concealed danger. I would not agree that a danger which is unusual in either of the ways I have suggested ceases to be an unusual danger because through frequent visits to the place it becomes familiar. In such a case another question will arise, whether in fact the invitee had sufficient notice, but the danger in my opinion remains an unusual danger. Though I think it is possible to discriminate in a concrete case between a danger which is unusual and one which is not unusual, no attempt to formulate a definition of unusualness appears to me to be likely to succeed.

Lord MacDermott felt that the expression "unusual danger", ". . . was intended to exclude the common, recognizable dangers of everyday experience inherent in premises of an ordinary type, such as the danger of working on a factory chimney or at the ledge of a reasonably lit wharf".[141] "A man working, for example, on a platform supported by a frayed rope, or at the unloading of a

[140] *Ibid.*, at pp. 752-753.

[141] *Ibid.*, at p. 762.

ship on fire, would surely never think of describing his danger as usual, no matter how well he appreciated the risk."[142] In Lord Reid's view:[143]

> If removal of a danger is easy it could hardly be a usual danger, because reasonable people who are careful of the safety of others would remove such dangers from their premises[144]. . . . I agree with Phillimore, L.J., at least to this extent: in considering whether a danger is usual or unusual you must have regard to the nature of the place where it is and to the apparent experience of the invitee. A danger may be usual for a stevedore but quite unusual for an ordinary tradesman. . . it would be contrary to ordinary principles that the question whether one person owes a duty to another should depend not on objective considerations or on facts which he can ascertain, but on the state of mind of that other person, which may well be unknown to him. . . . If "usual" is an apt word, as I think it is, to denote the class of dangers which give rise to no duty, it would surely be a misuse of language to say that something hitherto unknown has become "usual" the moment it is seen.

This emphasis on the foresight of the occupier, objectively determined, and the reasonable anticipation of the invitee, brings into the determination of the occupier's duty to the invitee the most fundamental principles of the general law of negligence. Yet, as Fleming points out,[144A] the effect of the majority judgments is that even though the invitee's knowledge of danger does not prevent the invitor's duty from coming into existence, it has the effect of immediately discharging that duty—with identical consequences for the unfortunate invitee. The minority view—that the invitee's knowledge of danger will not always discharge the invitor's duty but in some cases will be relevant merely to the question of contributory negligence—seems much more consistent with the unanimously expressed view of the meaning of "unusual danger".

In *Christmas* v. *General Cleaning Contractors Ltd.*,[145] Denning L.J. held that a window cleaner could not expect windows to be in perfect condition, in the sense that he could put his trust in them. Such minor defects as rusty screws or worn sash cords or ill balanced weights "are, for window cleaners, common recognizable dangers of everyday experience and cannot be classed as 'unusual'. They are therefore dangers against which window clean-

[142] *Ibid.*, at p. 763.

[143] *Ibid.*, at pp. 774, 775, 776-777.

[144] *Cf.* Williams C.J.Q.B. in *Schade* v. *Winnipeg School District No. 1* (1958), 27 W.W.R. (N.S.) 546, at p. 566 (Man. Q.B.), aff'd (1959), 28 W.W.R. (N.S.) 577, 19 D.L.R. (2d) 299 (Man. C.A.). "There can in my opinion be no unusual danger in anything that is stationary and clearly visible."

[144A] Fleming, *op. cit.*, footnote 3, p. 415.

[145] [1952] 1 K.B. 141, [1952] 1 All E.R. 39 (C.A.), aff'd on another point, [1953] A.C. 180, [1952] 2 All E.R. 1110 (H.L.).

ers must provide their own safeguards. They cannot saddle the householder with damage which results from them."[146] In *Bates* v. *Parker*,[147] Goddard C.J. said that the law thus laid down is not peculiar to window cleaners: "Where a householder employs an independent contractor to do work, be it of cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he is to work. He is left to himself to decide how and in what manner he will perform his task."[148] This is presumably because the occupier can reasonably expect that such an independent contractor will use reasonable care to detect any dangers in the area in which he is working: the dangers are not "unusual", because they are not an unreasonable risk for this type of invitee.

Now let us turn to some Canadian cases.

In *Gareau* v. *Charron*,[149] a carpenter who fell through the partially completed floor of a house was denied recovery against the occupier. McRuer C.J.H.C. held that "unusual danger" is a danger unusual to the particular circumstances of the case and to the particular person injured. Quoting Charlesworth, he held that the occupier's duty to an invitee is to use reasonable care to make the premises as safe as normal premises of the same kind; if there is a danger that is expected, either from the character of the premises or from the ignorance or inexperience of the particular invitee, the occupier will be liable for it unless he gives warning to the invitee.[150] Here the danger was not unusual to the plaintiff. The decision seems correct on its facts, though the subjective knowledge of the particular invitee should not have been treated as relevant to the existence of "unusual danger".[151]

In *Swan* v. *C.P.R.*,[152] Sheppard J.A. (Bird and Davey JJ.A. concurring) said that whether a danger is "unusual" depends upon (1) whether it is a danger usual to the premises where found and (2) whether it is unusual for the particular persons going there. To be unusual, it is not necessary that the danger be unseen or unknown; though the fact that the danger is known would be

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[146] *Ibid.*, at p. 148 (K.B.).
[147] [1953] 2 Q.B. 231, [1953] 1 All E.R. 768 (C.A.).
[148] *Ibid.*, at p. 235 (Q.B.).
[149] [1951] O.R. 280, [1951] 2 D.L.R. 704 (H.C.).
[150] *Ibid.*, at pp. 709-710 (D.L.R.).
[151] Accord, *Foster* v. *C. A. Johannsen & Sons Ltd.*, [1962] O.R. 343, 32 D.L.R. (2d) 261, at pp. 264-267 (C.A.) — objective test used; *Portelance* v. *Board of Trustees, Grantham, supra*, footnote 20, at p. 343 (D.L.R.); *Fiddes* v. *Rayner Construction Ltd.* (1962), 35 D.L.R. (2d) 63 (N.S. Sup. Ct.) under appeal.
[152] (1959), 19 D.L.R. (2d) 51, at p. 61 (B.C.C.A.).

relevant to the issue of whether the plaintiff had voluntarily assumed the risk.

In *Diederichs* v. *Metropolitan Stores Ltd.*,[153] the plaintiff recovered for injuries she sustained when she tripped over a small plastic toy that had fallen onto the floor of the defendant's store, in which she was a customer, after having been carelessly piled on a counter. Thomson J. held that the toy constituted an unusual danger. It seems, however, that this use of terminology is confusing: surely the *danger* is not the thing itself but the possibility that the thing will be a source of injury. The thing is *dangerous* rather than a *danger*. This ambiguity in the word "danger" would be eliminated if we substitute for it the word "risk", which is familiar in other areas of the law of negligence.

In three recent judgments, MacDonald J. of the Nova Scotia Supreme Court has attempted to clarify the meaning of "unusual danger". His views are most fully set forth in *Rafuse* v. *T. Eaton Co. (Maritimes) Ltd.*,[154] where the plaintiff, a customer, was injured by falling over a baby stroller in the aisle of the defendant's store. After noting the frequency with which such objects are to be found in stores of this kind, MacDonald J. held that the stroller was not an "unusual danger" and dismissed the action. In the case of a store, he said that an "unusual danger" "is a danger which is not usually found by customers when coming upon and using the premises for the purposes of shopping and at a time and place relevant to the invitation".[155] "Unusual danger is thus a relative term. In particular, it is relative to the *kind of premises visited.*"[156] "The term is also relevant to the *class of person to which the visitor belongs.*"[157] The discussion of "unusual danger" in the *Horton* case is cited with approval. MacDonald J. then held that if the stroller constituted a "danger", it was a "usual" one—since this was the first such claim in the quarter century that the defendant's store had been in operation.[158]

In *MacNeil* v. *Sobeys Stores Ltd.*,[159] a customer who slipped on a strawberry on the floor of the defendant's supermarket was denied recovery for her resulting injuries. In the course of his

[153] (1956), 20 W.W.R. (N.S.) 246, 6 D.L.R. (2d) 751 (Sask. Q.B.).
[154] (1957), 40 M.P.R. 149, 11 D.L.R. (2d) 773 (N.S. Sup. Ct.).
[155] *Ibid.*, at pp. 775-776 (D.L.R.).
[156] *Ibid.*, at p. 776; emphasis in text.
[157] *Ibid.*, citing *Gareau* v. *Charron*, *supra*, footnote 149; emphasis in text.
[158] *Ibid.*, at pp. 777-778. As suggested earlier, it would be preferable to say not that a stroller is a danger but that it is a *source* of danger, or, better still, a source of risk.
[159] *Supra*, footnote 24.

judgment, MacDonald J. said: "Though the matter is not free from difficulty in relation to modern self-service stores, I am persuaded that the presence in a customer-aisle of foreign matter such as vegetation does constitute an unusual danger, particularly as the customer's attention is seduced largely from the floor to the more imminent business of scanning the shelves, securing articles, avoiding other customers and their bundle buggies, etc."[160] Nevertheless he held that the defendant had taken reasonable precautions in the circumstances to prevent such accidents.

In *Bennett* v. *Dominion Stores Ltd.*,[161] a customer who slipped on a broken bottle of onions on the floor of the defendant's supermarket failed to recover for her injuries. Here, too, MacDonald J. found that the defendant had taken reasonable care in the circumstances. He admitted difficulty in applying the concept of "unusual danger" in the case of large self-service stores, "where the twin objective is to display the wares so stacked and packaged as to be conveniently visible and accessible to the eyes and hands of the customer that the latter can serve himself without intervention of the proprietor or his staff except for the payment of the aggregate sum of the individual purchases to a cashier at the end of the visit. I have no doubt that these changes in merchandising will produce ultimate changes in the governing law or changes in its application."[162]

In *Smith* v. *Provincial Motors Ltd.*,[163] a customer of the defendant fell on a thin film of ice on its used car lot while on his way to pay a bill at the defendant's office. The ice patch was not obvious to the plaintiff but would have been detected if a reasonable inspection had been made by the defendant's employees. Ilsley C.J. gave judgment for the plaintiff, holding that the ice patch was an unusual danger because it could have been easily removed and because an invitee in the position of the plaintiff would reasonably have expected that the defendant's employees would have removed any such dangerous spots. Here, too, the invitee's reasonable anticipation—in the sense of the occupier's foresight of the degree of danger that this kind of invitee would anticipate—is a vital consideration. In effect, an "unusual danger" was considered to

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[160] *Ibid.*, at p. 763. There was evidence that at the time she fell, the plaintiff was running to get back into her place at the checkout counter. Might this hurrying be such an abuse of her invitation as to render her a mere licensee or perhaps even a trespasser? Or is it only relevant to the question of contributory negligence? *Cf. Burke* v. *Batcules*, [1961] O.R. 769, 29 D.L.R. (2d) 509 (H.C.); rev'd, [1962] O.R. 697, 33 D.L.R. (2d) 544 (C.A.).

[161] *Supra*, footnote 31. [162] *Ibid.*, at p. 270. [163] *Supra*, footnote 99.

be one that the particular kind of invitee could not reasonably be expected by the occupier to anticipate in the circumstances.[164]

In a somewhat similar case, *Such* v. *Dominion Stores Ltd.*,[165] a customer of the defendant's store slipped and fell on some ice in the store parking lot when returning to his car. He was aware that the lot was covered with snow, ice, and slush and, unlike the plaintiff in *Smith* v. *Provincial Motors Ltd.*, knew that the walking was dangerous; nevertheless his action succeeded. Citing the *Horton* case, Moorhouse J. held that a danger may be "unusual" even though fully recognized; he found that the snow and ice—even though commonly found in that part of Canada at that time of year—constituted an unusual danger,[166] particularly where simple precautions by the defendant would have avoided the accident. It is only possible to conclude that by "unusual danger" Moorhouse J. merely meant *an unreasonable risk in the circumstances.* Thus, "unusual danger" refers not merely to a danger that the invitee cannot be expected to anticipate, as might be suggested by the *Smith* case, but to one that in all the circumstances the particular kind of invitee cannot reasonably be expected to take precautions against so as to avoid being injured. If there is an unreasonable risk of injury—whether or not anticipated by the invitee—the occupier is under a duty to take reasonable steps to avoid that injury.

Moorhouse J.'s judgment has recently been reversed by the Ontario Court of Appeal.[167] Speaking for the court, Schroeder J.A. said that (1) it was extremely doubtful that the presence of snow and ice at that time of year in the parking lot was an unusual danger; (2) in any event, the plaintiff was fully aware of the danger,

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[164] In *Campbell* v. *Royal Bank of Canada* (1963), 41 W.W.R. (N.S.) 91, 37 D.L.R. (2d) 725 (Man. C.A.), an invitee who slipped on water from melted snow on the floor of a bank on a winter day was denied recovery for her resulting injuries. The three majority judges found on the facts (two judges dissenting) that the danger was too commonly present at that time of year in that part of the country to be "unusual" and that, in any event, the bank's employees had taken reasonable care to minimize the danger. Some confusing language in the lengthy majority judgment appears to suggest that a further reason for denying the plaintiff's claim was that she had voluntarily assumed the risk; on the facts such a conclusion would be opposed to the tests established in *Car & General Ins. Corp. Ltd.* v. *Seymour*, [1956] S.C.R. 322, 2 D.L.R. (2d) 369, and *Lehnert* v. *Stein*, [1963] S.C.R. 38, 40 W.W.R. (N.S.) 616, 36 D.L.R. (2d) 159. Although the majority judgment wanders far afield, the *ratio* of the case seems to be that the danger was too common to be unusual.

[165] [1962] O.R. 421, 32 D.L.R. (2d) 500 (H.C.).

[166] *Ibid.*, at p. 503 (D.L.R.), citing *Létang* v. *Ottawa Electric Ry. Co.*, *supra*, footnote 30 and thereby in effect declining to follow the holding in the *Horton* case—see text accompanying footnotes 108 and 109 *supra*.

[167] [1963] O.R. 405, 37 D.L.R. (2d) 311 (C.A.).

and therefore, following the majority judgment in the *Horton* case, he was precluded from recovering from the occupier; (3) furthermore, the plaintiff voluntarily assumed the risk of injury.[168] None of the court's three conclusions seem to have received the careful consideration they deserved; and its decision to follow the majority view in the *Horton* case is particularly unfortunate.[169] It is to be hoped that this judgment is not the last word on the subject in Ontario or elsewhere in Canada. The legitimate interests of a business visitor whose presence is of commercial advantage to the occupier and who cannot, by reasonable care, protect himself against a danger that can easily be removed by the occupier deserve to be given greater weight in the scales of justice.[170]

Whether or not the danger that materializes in a given case is unusual may depend on the frequency with which this kind of danger is to be found and whether it is a new kind of danger or one that has been well known for some time. As we have seen, in *Rafuse* v. *T. Eaton Co. (Martimes) Ltd.*,[171] baby strollers were held not to be an unusual danger in the circumstances, because they had been familiar in that and similar stores for many years. Likewise, in *Openshaw* v. *Loukes*,[172] it was held that a highly polished, slippery floor in a store was not an unusual danger. On the other hand, in *Burke* v. *Batcules*,[173] a customer in the defendant's restaurant was injured when, while hurrying to catch a bus, she crashed through a plate glass window, which she mistook for an open door; the trial judge held that she was entitled to recover. Spence J. said that "slippery and highly polished floors have been a condition present for decades and a condition which anyone

[168] This last conclusion is opposed to the tests laid down by the Supreme Court of Canada in *Car & General Ins. Corp. Ltd.* v. *Seymour* and *Lehnert* v. *Stein*, *supra*, footnote 164.

[169] See text accompanying footnotes 106-109. The Ontario court accepts the view expressed by Lord Normand in the *Horton* case that the *Létang* case (see text accompanying footnotes 108 and 109) can be distinguished on the ground that the argument there before the Judicial Committee concerned whether there had been voluntary assumption of risk and did not raise the question whether proof of this was essential to the defendant's case. I suggest that this attempted distinction is illegitimate; the Judicial Committee was reversing a decision of the Supreme Court of Canada — [1924] S.C.R. 470, [1924] 4 D.L.R. 89 — which held (as, indeed, appears in a quotation from that judgment in the *Such* case, *supra*, footnote 167, at p. 315 (D.L.R.)) that mere knowledge of the danger by the plaintiff relieved the defendant from responsibility. The Judicial Committee therefore must have been aware of this view of the law and rejected it.

[170] The difficulties of legislative correction in Canada of such unsatisfactory precedents should be kept in mind by our courts. See text accompanying footnote 125.

[171] *Supra*, footnote 154.

[172] (1957), 21 W.W.R. (N.S.) 378 (B.C. Sup. Ct.).

[173] *Supra*, footnote 160.

using any commercial premises should keep in mind while these clear glass panels, unprotected and unmarked, are a part of modern architecture which the architects themselves realize may constitute hazards . . .".[174] On appeal it was held that the danger should have been obvious to the plaintiff and that her injury, on the facts, could be attributed solely to her own carelessness. Presumably in these cases the test of "unusual danger" will continue to be the reasonable foresight of the occupier as to the likelihood of injury to the kind of invitee that he can expect to come upon his premises.

Although, as Prosser says,[175] the principle of *Indermaur* v. *Dames* has been generally accepted in the United States, the antiquated terminology of Willes J. has been dropped, so that American courts are not troubled by the term "unusual danger" when considering an occupier's duty to an invitee. Thus, section 343 of the *Restatement of the Law of Torts* uses instead the phrase "unreasonable risk". The result is that the invitor's occupancy duty—both in language and in fact—is determined by the ordinary tests of negligence law.[176]

Some English and Canadian courts have gone this far in fact by using the ordinary language of negligence law when formulating an occupancy duty toward invitees. As we have seen,[177] *Glasgow Corporation* v. *Muir*[178] was basically a case involving the occupancy duty to an invitee. While there is some talk of "unusual danger" in the judgment of Lord Wright, all the law lords agreed that the ordinary criteria of the law of negligence, as laid down in *Donoghue* v. *Stevenson*[179] and in *Bourhill* v. *Young*,[180] were to be applied.[181] As Lord Thankerton said, citing *Bourhill* v. *Young*, "the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed".[182] Lord Macmillan said that "the degree of care required varies directly with the risk involved".[183] While Lord Wright's language is at points confusing, he clearly agreed that the rule of *Donoghue* v. *Stevenson* applied; and Lord Romer said that "the appellants can only be fixed with liability if it can be shown that there materialized a risk that ought to have been within the appellants' reasonable contemplation".[184]

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[174] 29 D.L.R. (2d) 509, at pp. 520-521.
[175] Prosser, *op. cit.*, footnote 34, p. 453.
[176] The American cases are discussed in James, *op. cit.*, footnote 88, at pp. 623-631.
[177] See text accompanying footnotes 54-62, *supra.*
[178] *Supra*, footnote 54. [179] *Supra*, footnote 56. [180] *Supra*, footnote 128.
[181] *Accord*, cases cited in footnote 59, *supra.*
[182] *Supra*, footnote 54, at p. 454 (A.C.). [183] *Ibid.*, at p. 456.
[184] *Ibid.*, at pp. 467-468. Lord Romer also uses the phrase "unusual risk", *ibid.*, at p. 466.

In other words, unusual danger merely means, in more modern legal language, a risk of injury that is unreasonable in the circumstances; the circumstances of course would include the degree of safety of the premises likely to be expected by the visitor and the extent to which he can be expected to protect himself against any known risks.[185]

Conclusions as to "unusual danger"

It may be concluded that the test whether an "unusual danger" (or unreasonable risk) exists is objective—whether the occupier, with such knowledge as he has or ought reasonably to have as to the particular invitee or class of invitees who come upon his premises, ought to foresee unreasonable risk of harm unless precautions are taken to prevent it. For this purpose the occupier must take into account, among other things, what he knows or ought to know about the likelihood that the invitee will take sufficient precautions for his own safety. If a breach of duty by the occupier occurs, resulting in injury to an invitee through the materialization of a risk of which the invitee knew something, the question of contributory negligence arises; and in determining the extent, if any, of the invitee's contributory negligence, his *actual* knowledge of the risk will be taken into account—even though it is his *probable* knowledge that is taken into account in fixing the occupier's duty toward him.[186] Unless the *Horton* case is to be followed, even *full* knowledge of the risk by the invitee will not be a complete discharge of the occupier's duty in all cases.[187]

In *Carroll* v. *Chicken Palace Ltd.*,[188] the plaintiff, a blind customer in the defendant's restaurant accompanied by a blind companion, had been assisted to a table by employees of the defendant, who were aware that both customers were blind. The plaintiff knew that, on request, these employees would assist her when she wished to leave, but nevertheless she left her table without as-

[185] *Accord*, the dissenting judgment of O'Halloran J.A. in *Lusk* v. *Rogers*, [1947] 3 D.L.R. 210 (B.C.C.A.). See also *Hesse* v. *Laurie* (1962), 38 W.W.R. (N.S.) 321, 35 D.L.R. (2d) 413 (Alta. Sup. Ct.), where Riley J. held (in a case in which an invitee was injured by a non-occupier) that the duty of invitor to invitee is simply to take reasonable care for the invitee's safety. See also James, *op. cit.*, footnote 88, at p. 623: "If people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight"; and at p. 628: "The gist of the matter is unreasonable probability of harm in fact."

[186] See *Smith* v. *Austin Lifts Ltd.*, *supra*, footnote 110.

[187] See *Such* v. *Dominion Stores Ltd.*, *supra*, footnote 165.

[188] [1955] O.R. 798, [1955] 3 D.L.R. 681 (C.A.).

sistance and sought the exit. In so doing she fell down an open stairway, which would have been obvious to a person with sight, and was injured. Of course her action was dismissed. As Aylesworth J.A. observed, to the plaintiff "these premises were full of 'unusual dangers', although to a person with the gift of sight there was present nothing whatsoever of an unusual or dangerous nature".[189] Citing *Bourhill* v. *Young*,[190] he held that the defendant's employees could not reasonably have contemplated that the plaintiff would act as she did, and they were not required to mount a constant guard at her table.

I submit that this decision is right both in result and in approach. The existence of "unusual danger" is to be ascertained from the occupier's knowledge, actual and constructive. Since the occupier's employees knew that the plaintiff was blind and was accompanied only by a blind companion, the danger to her of falling down the stairway if not assisted was an unusual one. However, by remaining prepared to assist the plaintiff to leave when she asked, these employees were exercising reasonable care in the circumstances to prevent damage from unusual danger (or unreasonable risk) and had discharged their duty.[191] Therefore no negligence could be attributed to the defendant. The court's finding that the plaintiff failed to exercise reasonable care for her own safety, though justified, was consequently unnecessary.

IV. *Possible Future Developments.*

Once our courts admit that the occupancy duty to an invitee is merely the duty of care of the general law of negligence applied in the special circumstances of the invitor-invitee relationship—which I suggest has long been an accomplished fact—they will have taken a major step toward rationalizing the whole law of occupiers' liability. It then would not be long before the occupancy duty to a licensee is found to be the duty of care of the general law of negligence applied to the special circumstances of the licensor-licensee relationship; in view of recent cases,[192] even *this* principle is close to having become established. Because of the general social interest in protecting the life and limb of visitors on land in another's occupation, the occupier cannot plead non-

[189] *Ibid.*, at p. 684 (D.L.R.). [190] *Supra*, footnote 128.

[191] If the employees neither knew nor could be expected to know that the plaintiff was blind, no duty to protect her from falling down the stairs would have rested on them in the first place: objectively considered, there would have been no unreasonable risk.

[192] See text accompanying footnotes 114-117, *supra*.

feasance as a defense to claims by lawful visitors who have been injured on his land: by allowing them to come on his land, he is considered to have assumed a positive duty of care toward them. This principle has long been recognized by our courts, though they have attempted to impose limits on the extent of that duty. In the case of trespassers, on the other hand, the nonfeasance defense is still upheld. It would seem that the social interest in our crowded, industrialized society requires some modification of this harsh view, particularly in the case of children—not by fictitously calling them licensees but by recognizing an occupancy duty toward them that would strike a reasonable balance between reducing the peril to them and preserving the legitimate interests of the occupier. In the United States some progress along these lines has been made by the courts, guided by the pioneering work of the American *Restatement*,[193] though perhaps this progress has not been sufficient.[194] If the courts in Canada are unwilling or unable to produce an acceptable adjustment, legislative intervention ought to be considered.

As a result of these recent and prospective developments, our courts will probably begin to look upon the traditional categories not as watertight compartments into one of which each occupier case must be squeezed, however uncomfortably, but rather as convenient guideposts to the community's sense of what the visitor's reasonable expectations are likely to be of the degree of care taken by the occupier for his safety and the occupier's likely expectations of the visitor's capacity to avoid being injured. The basic question, then, will be whether the occupier has taken reasonable care for the visitor's safety, having regard to all the circumstances.

It may be objected that if the questions of fact in an occupier case are put to a jury in these broad terms, we shall face a startling increase in the number of verdicts in favour of the plaintiff and that, in effect, strict liability will be substituted for the "fault" principle. Part of the answer to this objection is that the trend toward favouring plaintiffs has been in evidence—in both jury and non-jury cases—for some time, through devious manipulation by judges and juries alike of the categories of visitors. Graham Hughes provides a more fundamental answer:[195]

> How long can a legal system survive when it goes in terror of one of its fundamental institutions? No amount of cautionary tales can

[193] See footnote 77, *supra.*
[194] See Hughes, *op. cit.*, footnote 26, at p. 699.
[195] *Ibid.*, at p. 700.

> ultimately obscure the realization that we must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.

Most occupier cases in England and in much of Canada are dispatched with little difficulty in the absence of a jury: if the attitude of the jury is so much to be feared, it should not be difficult to eliminate the jury from all such cases.[196]

It is perfectly consistent to hold, on the one hand, that there are valid distinctions between activity and occupancy duties and that the content of the occupancy duty should vary with the kind of visitor and the circumstances of his visit and, on the other hand, that the broad principles of negligence should be—and, indeed, to a large extent have been—applied *throughout* the law of occupiers' liability. What constitutes reasonable care by an occupier who maintains or creates a dangerous condition on his land at a time when no visitor is in the area of potential danger involves quite different considerations from what constitutes reasonable care if he creates a danger at a time when visitors are known or likely to be in the area. Similarly, as I have emphasized before, what constitutes reasonable care in fulfilment of an occupancy duty to a particular visitor or class of visitors must necessarily depend on all the circumstances of the visit—including whether it is expected or permitted by the occupier, whether it is a social or a business visit, whether in a private home or a place of business. In this sense the categories developed by the courts are not basically unreasonable and need not be discarded outright, though such rigidities of classification as remain should be broken down in favour of a flexible approach. With the possible exception of the occupancy duty to trespassers, this development is entirely within the power of our courts.[197]

Even within the framework of the general principles of negligence, much more attention needs to be devoted to the principles of loss distribution that are socially reasonable in the circumstances. Such questions as the availability and prevalence of insurance coverage for occupiers, the difficulty of establishing "fault" before a court of law, and whether injuries to others are an inevitable

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[196] After examining the French experience in this field, Hughes concludes that the general theory of liability found in the civil law is practicable and "need not lead to incessant verdicts in favor of the plaintiff". *Ibid.*, at p. 684.

[197] See also Wright, *op. cit.*, footnote 125, pp. 14 (J.S.P.T.L.), 48 (Camb. L.J.).

risk of the defendant's enterprise and should be borne by him as a cost of doing business, deserve much more careful consideration then they have received in the past. Investigation along these lines may suggest different conclusions in such areas as automobile accidents and products liability, on the one hand, and occupiers' liability on the other. Even within the area of occupiers' liability there may be considerable justification for a greater disposition to shift losses sustained by lawful visitors to business than to non-business premises. Also, the increasing likelihood that in Canada an injured visitor will have his hospital and medical bills largely or entirely covered by insurance may facilitate ultimate resolution of this problem. For the foreseeable future, however, until these complex issues can be resolved, the flexible principles of negligence law seem best designed both to promote the social interest and to facilitate the administration of justice in the law of occupiers' liability.