INVITEES.[1]

The leading case in this branch of our law is not difficult to select. *Indermaur* v. *Dames*[2] has, for sixty years, been recognized throughout the Empire as the authority on the rights and duties of invitees. The proposition there laid down by Willes, J., and quoted below has been cited approvingly again and again by all English and Canadian courts[2a] and may be taken as part of our settled law.

In *Indermaur* v. *Dames* (*supra*) the plaintiff was a gasfitter who went on the defendant's premises to perform work in which plaintiff's employer and the defendant had a common business interest. On the defendant's premises was a shaft used for hoisting sugar. When in use, it was necessary that the shaft should be unfenced; when not in use it was sometimes necessary that the shaft should be open for ventilation purposes, but not necessary that it should be unfenced. While the plaintiff was at his work, he fell down the shaft without any fault or negligence on his part. The shaft was not in use and was not fenced at the time of the accident. Willes, j., after deciding that the plaintiff was not a guest, or bare licensee or servant, said:

> The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation express or implied.
>
> And 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,

[1] This is the fourth and last of a series of articles by Professor Macdonald dealing with the liability of possessors of premises. The first article appeared in 7 C. B. Rev. 665, the second in 8 C. B. Rev. 8, and the third in 8 C. B. Rev. 184.

[2] (1866) L.R. 1 C.P. 74; (1867) L.R. 2 C.P. 311.

[2a] See e.g.:—House of Lords;—*Fairman* v. *Perpetual etc. Scty.*, [1923] A.C. 74, *Mersey Docks* v. *Procter*, [1923] A.C. 725; Privy Council;—*Letang* v. *Ottawa Ry.*, [1926] A.C. 725: Sup. Ct. Canada;— *Ottawa Ry.* v. *Letang*, [1924] 4 D.L.R. p. 92. Ex. Ct. Canada;—*Brebner* v. *The King* (1913) 14 Ex. C.R. 242. P.E.I.: *Buchanan* v. *Orange Lodge* (1913), 7 E.L.R. 532. N.B.: *Guilfoil* v. *McAvity*, [1927] 3 D.L.R. 672. Ont.: *Nickell* v. *Windsor*, [1926] 59 O.L.R. 618. Man.: *Serediuk* v. *Posner*, [1928] 1 W.W.R. 258. Sask.: *Levine* v. *Dom. Express*, 15 Sask. L.R. 247. Alta.: *Mitchell* v. *Johnson* (1919), 3 W.W.R. 24. B.C.: *Despointes* v. *Almond* (1913), 18 B.C.R. 578.

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.

An analysis of the principle laid down by Willes, J., in *Indermaur* v. *Dames* (*supra*) indicates that to succeed in an action of this kind, the invitee must show:

(a) That he has suffered damage from unusual danger.

(b) That the occupier knew or ought to have known of such danger.

(c) That the occupier has not taken reasonable care to prevent the damage.

The occupier may show by way of defence that the invitee has not used reasonable care for his own safety.

If there is evidence of neglect (by the occupier—i.e. if he has failed to take care), the jury must decide whether such neglect is unreasonable or not. The jury must also decide whether the plaintiff has used reasonable care, or whether he has been guilty of contributory negligence.

Taking up in order the elements necessary to the plaintiff's case: he must first prove that the danger was "unusual." This question brings up one of the most difficult points in the application of the principle, namely, the effect of the plaintiff's knowledge of the danger. It is frequently stated that if the plaintiff knows of the danger, he cannot recover, because the danger cannot be termed, as to him, "unusual." Thus, in *Cavalier v. Pope*,[3] Lord Atkinson said:

> The case does not come within the principle of *Indermaur* v. *Dames* . . . because one of the essential facts necessary to bring a case within that principle is that the injured party must not have had the knowledge or notice of the danger through which he has suffered. If he knows of the danger and runs the risk, he cannot recover.

And in *Lucy* v. *Bawden*,[4] Atkin, J., said:

> The danger if any was patent to everyone and the plaintiff gave evidence that she herself had complained to the defendant's agent about it. . . . In such a case the true maxim seems to be *scienti non fit injuria.*

In *Guilfoil* v. *McAvity*,[5] White, J., delivering the judgment of the Supreme Court of New Brunswick, said:

[3] [1906] A.C. p. 432. This passage was cited with approval in *Westenfelder* v. *Hobbs Mfg. Co.* (1925), 57 O.L.R. 31; *Reid* v. *Mimico* (1926), 59 O.L.R. 579; *Way* v. *Leland Hotel Co.*, [1927] 3 W.W.R. 224.

[4] [1914] 2 K.B. 318; approved in *Keech* v. *Sandwich Ry. Co.* (1915), 22 D.L.R. 784 (Ont. Sup. Ct.), *Westenfelder* v. *Hobbs*, 57 O.L.R. 31.

[5] [1927] 3 D.L.R. 672 (Sup. Ct. N. B.) To the same effect see *Beckerton* v. *C. P. R.* (1914), 7 O.W.N. 51; *Fonseca* v. *Lake of the Woods Co.* (1905), 1 W.L.R. 553; *Humphrey* v. *Wait* (1873), 22 U.C.C.P. 580; *Headford* v. *McCreary* (1894), 24 S.C.R. 291; *Kempil* v. *Bruder* (1923), 25 O.W.N. 417; *C. N. Ry.* v. *Lepage*, [1927] S.C.R. 575.

I think it is quite clear that the defendant was not under any obligation to warn the plaintiff of the existence of the well in question when such existence was so obviously plain that the plaintiff using reasonable care could not have failed to see it for himself. . . No jury, properly instructed . . . could reasonably find that the defendant had been guilty of the negligence alleged in plaintiff's statement of claim.

On the other hand, Mr. W. H. Griffith in a valuable article in the *Law Quarterly Review*, states:[6]

But the defendant's duty is not merely to apprise the plaintiff of the danger. His duty is to take reasonable care to prevent damage and it is for the jury and not for the judge to say whether reasonable care has been taken where notice has been given to the plaintiff. The circumstances may be such that the penalty for inadvertence may be out of all proportion to the default. The danger may be so great that the defendant ought in reason to light or guard the dangerous object, however well informed the plaintiff may be of its existence.

This reasoning seems entirely accurate with reference to the latter part of Willes, J.'s principle. It seems, however, to disregard the *sine qua non* of the plaintiff's case, namely, that the danger was unusual. Once the danger is proved to be unusual then clearly the jury have to determine whether the defendant has taken reasonable care to guard against damage by "notice, lighting, guarding or otherwise." But first the plaintiff must prove that the danger was unusual. The cases cited above show that knowledge of the danger deprives it of its unusual character and in such a case therefore the plaintiff will never get so far as to have the jury consider whether the defendant has exercised reasonable care, but will have to see his case withdrawn from the jury.

The truth seems to be that the words "unusual danger" in the sense in which they are commonly understood, cannot be used consistently with the tests proposed by Willes, J., in the latter part of his principle. According to the latter part of the principle, even though a plaintiff has notice of the danger, he may still reach a jury and have them consider whether, by giving notice, the defendant has exercised reasonable care. According to the first part of the principle the plaintiff is helpless unless he can show unusual danger. What is unusual danger and what amounts to knowledge of such danger by the plaintiff?

In *Norman* v. *Great Western Railway*,[7] Phillimore, L.J., said:

[6] "Duty of Invitors," 32 L.Q. Rev. 255, pp. 256-7.

[7] [1915] 1 K.B. p. 596. See Hamilton, L.J., in *Latham* v. *Johnson*. "The duty which one person owes to another to take reasonable care not to cause him hurt by act or omission is relative both to the person injured and the person charged with neglect and the circumstances attending the injury." [1913] 1 K.B. p. 410.

> Unusual danger . . . means . . . danger unusual for the particular person. . . . 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 analyzing the expression "reasonably safe" one must take into account what is called in modern parlance the personal equation. . . . It is for that reason that the element of knowledge comes in.

The above is the only attempt at definition of unusual danger that has come to the writer's notice. It is a fair inference that Pickford, L.J., thought that knowledge alone would be enough to render the danger not unusual. In deciding what is knowledge, however, the particular invitee must be considered. Probably also there must be knowledge not merely of danger but of the probable or possible extent of the harm that may be suffered. A hole in a shop floor may be obvious to an invitee and he may not be able to recover if he bruises his foot by walking into the hole, but if underneath the shop floor are exposed electric wires which he does not know of, it would seem that he ought to be able to recover for injuries received from contact with the wires.[8] The element of time may also be important. What would not be an unusual danger in daylight may become so at night.

Another element that should, sometimes at least, be considered is the nature of the premises in which the danger exists. If a man goes on business concerning the occupier into a factory where materials are being hoisted and dangerous machinery operated, or if he goes into a house which is only partly completed, he must realize throughout the whole course of his visit that he has to "watch his step." He must be careful of dangerous machines, he must know that boards may be loose in, or missing from the floor of the partly built house. Such dangers are not unusual. Two decisions of the Supreme Court of Canada illustrate this. In *Davidson* v. *Stuart*,[9] Davidson had been employed to repair and manage an electric light plant. He was killed by coming in contact with an insufficiently insulated brass socket. The court denied recovery saying:

> Any of the defects complained of were the very matters which deceased undertook to remedy if discovered and the failure to discover such defects must be attributed to him. There was no evidence of negligence in defendants.

In *McGuire* v. *Bridger*,[10] Duff, J., said:

[8] "There may be a perception of the existence of the danger without comprehension of the risk." Bowen, L.J., in *Thomas* v. *Quartermaine*, 18 Q.B.D. p. 696, quoted in *Greer* v. *Mulmur* (1926), 59 Ont. L.R. 266.

[9] (1903), 34 S.C.R. 215.

[10] (1914), 49 S.C.R. 632.

A person going into such a place (a building under construction) assumes the responsibility of exercising the vigilance of a person of ordinary faculties and judgment in order to avoid the reasonably probable dangers of such a place, and the responsibility of the occupier must be considered in relation to this responsibility of the invitee. The result I think has been summed up by Mr. Justice Atkin in *Lucy* v. *Bawden*, [1914] 2 K.B. 318, in the proposition that the duty is to avoid setting traps.[11]

On the other hand, if a man goes into a shop to do business the presence of loose boards in the floor, or of openings in the floor are undoubtedly unusual conditions in such premises. If he, by particular alertness, discovers a loose board must he remember about it when he next visits the shop six months later? It would seem that knowledge, at some time or other, of the danger should not of itself be enough to bar a plaintiff from recovery. A danger may be "unusual" at the time of the accident even though at some previous time the presence of such danger was known to the plaintiff. So, in *Scriver* v. *Lowe*,[12] defendant's servants left two holes in the floor of a bathroom where they were working, while they went to dinner. Plaintiff, a lodger on the premises, noticed the holes when she went into the bathroom but forgot about them when leaving and stepped into one of them. It was held that momentary forgetfulness was not negligence, and that it was properly left to the jury to say whether plaintiff was negligent or not.

In *Denny* v. *Montreal Telegraph Co.*,[13] plaintiff fell through a trap door in the floor of defendant's office. It was argued that he should have seen the opening but Wilson, J., said:

Those who entered the office did not go there with notice or expectation of anything dangerous to life being there . . . the defendants invited them there expressly on the faith and understanding of everything being safe for them. . . . If they had been visiting a building in course of erection or of repair they would require to have used great caution because the condition of the place would have given them warning to look out for accidents even if they had been invited by the owner to make such visit. . . . But why was Denny to look out for an open trap door when he entered the office? . . He believed and he was invited to believe there was no such trap. . . . It is not the least evidence of negligence against Denny that he did not happen to see it.

In all cases it should be left to the jury to say whether the danger is unusual,[14] whether the defendant has exercised reasonable care

[11] See also *Valiquette* v. *Fisher* (1907), 39 S.C.R. 1; *Jones* v. *G. T. Ry.* (1889), 18 S.C.R. 696.

[12] (1900), 32 O.R. 290.

[13] (1878), 42 U.C. Q.B. 577, (affd. 3 Ont. A.R. 628).

[14] Whether a condition of premises can be said to be unusual is a question of fact in every case: Charlesworth "Liability for Dangerous

to prevent damage from such danger, and whether the plaintiff himself has used reasonable care for his own safety.

In considering whether the danger is unusual, the jury ought to have regard to the knowledge of the plaintiff of the danger, and ought in this connection to consider when it was acquired and what is the nature of the premises on which the danger exists, and whether such knowledge ought to be sufficient to put the invitee on his guard at the time when the injury occurred.

If the jury determines that the danger was not unusual under all the circumstances, the case should end at this point, and end unfavourably to the plaintiff. He has failed to show any duty owing by the defendant.

But if, on the other hand, the danger is found to be unusual, the jury must go on to consider whether the occupier has taken reasonable care to prevent damage therefrom. Willes, J., suggests notice, lighting, guarding, as some of the measures which an occupier might take in this regard. These measures seem to be arranged by Willes, J., in the ascending order of effectiveness. Guarding a danger, e.g., putting a fence around the opening in *Indermaur* v. *Dames* (*supra*) would seem to be the most effective way of preventing danger, short of filling up or boarding up the opening. Lighting is also effective in that it brings home to the visitor at the very moment of danger, the presence of such danger. Notice may not be so effective as the presence of such danger. Notice may not be so effective as lighting (unless it is given by someone stationed at the source of danger) because of the time interval that may elapse between the giving or acquiring of the notice of danger and the actual encountering of the danger. It seems clear that notice given to an invitee on the occasion of his last visit a year ago would not be sufficient to relieve the occupier from the necessity of giving a further notice if the same invitee were to enter the premises to-day. It is not notice alone and unqualified that will satisfy—it must be the kind of notice that would put the invitee properly on his guard at the time of the injury.

But if the occupier has given such notice, or if the invitee in some other way is apprised of the danger, can the danger be said to be

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Things," p. 240, citing several cases, none of which directly states that it is a question of fact. But see *Crafter* v. *Metropolitan Ry.* L.R. 1 C.P. 300, where the Court of Common Pleas undoubtedly regarded the question as one for the jury, but held that there was no such evidence as could reasonably be left to a jury in the particular case before them. The other two matters, viz.: reasonable care by the occupier and reasonable care by the visitor are, by the terms of Willes, J.'s proposition, matters of fact for the jury.

unusual? It would seem not. The due care required on the part of the occupier, once the danger is proved to be unusual, would prevent the danger from being unusual at all. It appears impossible to reconcile knowledge of danger in the full sense with unusualness of danger, taking the latter term in the sense of Phillimore, L.J., in *Norman* v. *Great Western Railway* (*supra*).

If the term "unusual danger" be taken to mean unusual as regards such premises, consistency within the principle itself is attained. A danger may in this sense be known and still be unusual. It may be that this was the sense in which Willes, J., used the term, but it has not been so interpreted in subsequent decisions.

Finally, or rather intermediately, the jury must determine whether the occupier knew or ought to have known of the unusual danger. The words *ought to have known* mark the fundamental distinction between the duty to invitees and the duty to licensees. To the latter, there is no duty of inspection in order to discover unusual dangers.[15] To the former there is such a duty.

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The most important Canadian case of recent years on this subject is *Letang* v. *Ottawa Electric Railway Co.*[16] In that case, the plaintiff while ascending an outdoor stairway in order to travel by one of defendants' cars, fell and was seriously injured. The stairway was found to be on defendants' property and on the day in question was in an admittedly dangerous condition from snow and ice. It had been in a dangerous condition all winter and plaintiff had used it twice a day on six days of the week. The plaintiff's ground of action was the negligently dangerous condition of the stairway. The defences of contributory negligence and *volenti non fit injuria* were not taken until the case reached the appellate courts. In the Supreme Court of Canada, Anglin, J., who delivered the principal judgment, held that knowledge of the condition of the stairway must be imputed to the plaintiff and, that being so, there was no duty owing to her by the company. The true maxim was *scienti non fit injuria.* In the opinion of Anglin, J., that was the true basis on which the company's liability must be denied,[17] though

[15] The statement to the contrary in *Fairman* v. *Perpetual Bldg. Society* has already been commented upon (8 C.B. Rev. 187) and suggested to be unsound.

[16] 36 K.B. (Que.) 512; [1924] S.C.R. 470; [1926] A.C. 725.

[17] This is the basis of Lord Bowen's judgment in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, a case under the Employees Liability Act, Lord Bowen analogizes the duty of a master to his servant, in respect of premises, to the duty of an invitor to an invitee. But see Willes, J., in *Indermaur* v. *Dames*, L.R. 1 C.P. pp. 286, 287.

he felt also that a finding of contributory negligence or an application of the doctrine *volenti non fit injuria* would be justified. Anglin, J., came to these conclusions after adopting the standard laid down in *Indermaur* v. *Dames* (*supra*).

The Privy Council held that the case turned on the application of the maxim *volenti non fit injuria*. As there had been no evidence from the plaintiff herself on this question, nor any other evidence that she "freely and voluntarily with full knowledge of the nature and extent of the risk she ran, encountered the danger," their Lordships held that the maxim did not apply and the plaintiff must recover. Their Lordships treated the plaintiff as an invitee and applied the *Indermaur* v. *Dames* (*supra*) standard. Their Lordships declared that *volenti non fit injuria* must not be confused with *scienti non fit injuria* and approved the remark of Bowen, L.J., to this effect in *Thomas* v. *Quartermaine*.[18]

The judgment of Anglin, J., suggests, if it does not actually raise, the question whether in cases of the *Indermaur* v. *Dames* type, the maxim *volenti non fit injuria* is applicable at all. It is to be noticed that in the formula of Willes, J., the question "whether there was contributory negligence in the sufferer must be determined by a jury as a matter of fact." He says nothing about *volenti non fit injuria*. This omission of itself may not be significant, for "in the earlier cases there was little if any attempt made to distinguish between voluntary assumption of risk and contributory negligence."[19] But the duty of the occupier of premises as defined by Willes, J., is "to take reasonable care to prevent damage from *unusual* danger." If the danger is not unusual, but is, on the contrary, obvious to anyone using reasonable care, no duty on the part of the occupier arises toward the invitee. If there is no duty there can be no question of negligence, and consequently no question of contributory negligence can arise and the defence of *volenti non fit injuria* need not be considered because the proper course in such cases is for the judge to withdraw the case from the jury as was done in *Guilfoil* v. *McAvity* (*supra*) without considering the defence at all.

On the other hand, if there be some other sort of duty on the occupier such as to keep the premises safe[20] and a breach of that duty by

[18] (1887), 18 Q.B.D. pp. 696, 697.

[19] Bohlen, 21 H.L.R. 233.

[20] The duty of making premises safe is different from the duty to take care to prevent damage from unusual danger. The former is a duty not to have dangerous premises at all. W. H. Griffith, 32 L.Q.R. 257-58. And see *Brockley* v. *Midland Ry.* (1916), 85 L.J.K.B. 1596. But see *Norman* v. *G. W. Ry.*, [1915] 1 K.B. 584, and Salmond's doubt on the point, p. 461. ff., 7th ed.

the occupier be proved, then even though the danger be obvious the question of contributory negligence or *volenti non fit injuria* may arise. The occupier has been guilty of negligence and whether the plaintiff's contributory negligence should bar him from recovery, or whether he may be said to have voluntarily elected to encounter the risk, are proper questions for a jury.

In the *Letang* case (*supra*) the Privy Council adopted the *Indermaur* v. *Dames* principle. Having done so, it would seem that they should then have proceeded to deal with the fundamental question of whether the danger was unusual, and have had this matter of fact properly determined, or they should have adopted the course of Anglin, J., in the Supreme Court of Canada and said that the danger was so obvious that the plaintiff must have known of it and there was consequently no evidence of negligence to leave to a jury.

Instead, however, their Lordships proceeded to consider a defence which was not raised by the pleadings at all, and which was only incidentally referred to in the judgment of the Supreme Court of Canada. Finding that defence to fail, they decided that all defences failed. They gave no satisfactory answer to the judgment of Anglin, J., in the Supreme Court of Canada, but rested their judgment mainly on the not well known case of *Osborne & North Western Railway Company*[21] decided by a Divisional Court. That also was a case of slippery steps leading to a railway station. The case of *Indermaur* v. *Dames* was not mentioned in the arguments nor in the judgments in the *Osborne case*. In the *Osborne case* the County Court judge found negligence by the defendants and no contributory negligence by the plaintiff. The defendants on the appeal contended that, despite these findings, they should have judgment on their defence of *volenti non fit injuria*. The Divisional Court held that the defendants had not proved that defence and that therefore the judgment for the plaintiff should stand. The defendant's argument in the *Osborne case* is different from the defendant's argument in the *Letang case*. In the latter case the argument was made that the plaintiff's knowledge of the dangerous condition prevented her from recovering because it showed that defendants were under no duty to the plaintiff. That argument is not dealt with in the Privy Council judgment. Nor did their Lordships deal with

[21] (1888), 21 Q.B.D. 220. See unfavourable comment on this case in Beven, Negligence, 4th Ed., 796. It was distinguished in *Brackley* v. *Ry.* (1916), 85 L.J.K.B. 1596.

cases such as *Crafter* v. *Ry.*,[22] *Cavalier* v. *Pope*,[23] *Brackley* v. *Midland Ry.*,[24] which do not support the position their Lordships took.

The Privy Council by adopting the principle in *Indermaur* v. *Dames* indicate that a railway company is in the same position as any other invitor. Later on in their judgment[25] they say that the company was under a duty to make their premises reasonably safe for invitees. This seems to be a wider duty than the duty in *Indermaur* v. *Dames* and it may be doubted whether their Lordships intended to impose the wider duty. In *Norman* v. *Great Western Railway*,[26] Buckley, L.J., said:

> A railway company is a person to whose stations a member of the public is entitled to have access if he wants to travel by or make use of the railway. . . . Is the duty towards the person who so comes on the premises higher than that which is owed to an invitee properly so called? In my opinion it is not.

In the Divisional Court, Bray, J., had expressed the view that the duty of railway companies was a larger duty than that of ordinary invitees—it was a duty to make the premises reasonably safe, not merely a duty to prevent damage from unusual danger. Buckley, L.J., commenting on Bray, J.'s view believes that the duty of railway companies is the same as that of ordinary invitees, but in both cases the duty, he thinks, is to make the premises reasonably safe. Pickford, L.J., agrees with the view of Buckley, L.J. The case is not wholly satisfactory and has been sharply criticised by Mr. W. H. Griffith.[27] Its correctness is doubted by Sir Frederick Pollock.[28]

In *Brackley* v. *Midland Railway*,[29] decided a year later than the last case, the Court of Appeal expressly declare that the duty of railway companies is the same as that of ordinary invitees and that such duty is discharged if the plaintiff is warned of hidden

[22] (1866), L.R. 1 C.P. 300.
[23] [1906] A.C. 428.
[24] (1916), 85 L.J.K.B. 1596.
In *Reid* v. *Mimico* (1926), 59 Ont. L.R. 579, the Ontario Appellate Division referring to the Letang case said that the reversal of the decision of the Supreme Court of Canada "is manifestly founded on a question of fact, or perhaps more precisely, on the lack of evidence of a material fact, viz.: knowledge and understanding on the part of the plaintiff of the nature and extent of the danger to be incurred and a resolution voluntarily to take the risk—nothing in that decision was intended by their Lordships to alter the principles of law applicable to such cases."
[25] [1926] A.C. 732.
[26] [1915] 1 K.B. p. 592.
[27] 32 L.Q. Rev. 255.
[28] Torts, 12th Ed. 521, note *f*.
[29] (1916), 85 L.J.K.B. 1596.

danger. If the plaintiff knows of the danger there is no duty at all on the part of the railway company.[30] So far as the Court of Appeal is concerned the matter may be taken as settled by the *Brackley case* (*supra*).

In *Nickell* v. *City of Windsor*[31] the Ontario Appellate Division followed the last mentioned case in an action by a plaintiff who had slipped on the steps of a public library, the dangerous condition of the steps having been known to the librarian for some hours previous to the accident but not known to the plaintiff.[32]

There are, however, several English cases decided before the *Brackley case* that are difficult to reconcile with the duty of railway companies as defined in that case. Thus, in *Holmes* v. *North Eastern Railway*[33] plaintiff to whom a case had been shipped by defendants' railway went to the defendants' station to get the case and was injured by the giving way of a stone in a path provided by the company, Cleasby, B., said:

> There was an obligation on the defendants to that part of the public who were consigners of coal by their line to that station, to see that the flagged path should be, so far as they could command, in a reasonably fit state to be used with safety.

In *Lax* v. *Darlington Corporation*[34] defendant corporation were proprietors of a cattle market. Plaintiff's cow was injured on a spiked fence erected by the corporation. Lush, J., at the trial gave judgment for the plaintiff and on appeal this judgment was affirmed by Brett and Cotton, L.J.J., Bramwell, L.J., dissenting. Brett, L.J., said:

> Inasmuch as they received payment for that standing, they are *prima facie* under the liability of affording a place which is not dangerous for the purposes for which payment is made.

In *Simkin* v. *London and North Western Railway*[35] the Court of Appeal said:

[30] See especially Swinfen Eady, L.J., 1606, Phillimore, L.J., p. 1607, Bankes, L.J., p. 1608.

[31] (1926), 59 Ont. L.R. 618, [1927] 1 D.L.R. 379. See also *Jones* v. *G. T. Ry.* (1889), 18 S.C.R. 696; *Lepage* v. *C. N. Ry.*, [1927] 3 D.L.R. 1030 (Can. S.C.)

[32] In the following cases action was successfully brought by invitees against public bodies: *Marshall* v. *Exhibition Assn.*, 1 O.L.R. 319; (aff. 2 O.L.R. 62); *Knowlton* v. *Hydro-Elec. Com.*, 58 O.L.R. 80; *Flynn* v. *Toronto Exhibition*, 9 O.L.R. 582. In the following cases, actions were unsuccessful but public bodies were treated as ordinary invitors: *Newton* v. *Brantford*, 10 W. N. 965; *Reid* v. *Mimico*, 59 O.L.R. 579; *Rogers* v. *Toronto School Board*, 27 S.C.R. 448.

[33] (1869), L.R. 4 Ex. 300.

[34] (1879), 5 Ex. D. 28.

[35] (1888), 21 Q.B.D. 453.

The duty which the defendants owed the plaintiffs was to provide a reasonably safe mode of leaving their station having regard to the business they carried on at their station.

None of the three last mentioned cases are dealt with in the *Brackley case* (*supra*).

In the article by Mr. Griffith,[36] already referred to, the argument is made that "The duty of a railway company springs from seed and soil other than those which produce the duty of a private invitor. The private duty derives its origin from invitation. . . . A railway company . . . renders accommodation which the public enjoy, not by invitation but as of right."

As will be seen later, when a possessor receives money from persons who come on his premises under a contract with him—such as spectators at athletic contests or paying guests in hotels—the duty cast upon the possessor is higher than that in *Indermaur* v. *Dames*. It is difficult to see why there should be a greater duty to such visitors than to passengers at a railway station or other patrons of public utilities, who also pay to get on the premises.

Assuming one is an invitee the question may arise as to the extent of the invitation, i.e. whether one getting on premises by invitation may roam where he will thereon and still be an invitee. The rule in such cases is clear that he cannot. In the Ontario case of *Connor* v. *Cornell*[37] Mr. Justice Middleton, speaking for the Ontario Court of Appeal, said:

Liability of the occupier is commensurate with the extent of the invitation. . . . The invitor is not an insurer of the invitee against all accidents that may befall him while upon the premises, but his duty is to protect him against unusual dangers in the place where he is invited to go.

In *Walker* v. *Midland Railway Company*,[38] Lord Selborne declared the duty of the invitor to be limited to those places where the invitee might reasonably be expected to go in the belief reasonably entertained that he was entitled or invited to do so. And see

[36] 32 L.Q.Rev. 255, 260. In Smith's Leading Cases, 12th Ed., 875, the question "whether persons or corporations who are bound or empowered to offer accommodation to the public generally are not under an obligation somewhat more onerous than that imposed upon an ordinary invitor" is said to be "perhaps open." The comments by Mr. Griffith and by the editors of Smith's Leading Cases appeared after the Norman case was decided but before the decision in the Brackley case.

[37] (1925), 57 O.L.R. 35 pp. 37, 38, followed in *Azzole* v. *Yates Co.* (1927), 61 O.L.R. 416.

[38] 55 Law Times Rep. 489. Quoted in *Lepage* v. *C. N. Ry.*, [1927] S.C.R. 575, and in *Mersey Docks* v. *Procter*, [1923] A.C. p. 260. See also *Knight* v. *G. T. P. Co.*, [1927] 1 D.L.R. 498 (Can. S.C.)

Struthers v. *Burrows*[39] and *Azzole* v. *Yates Co.*[40] for rigorous applications of this rule. It was put tersely by Scrutton, L.J., in *The Carlgarth*:[41] "When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters."

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No Canadian case has come to the writer's attention dealing with the position of persons who come on another's premises rightfully, such as policemen, firemen, or other public officers, though not with the consent of the possessor of the premises. In the English case of *Great Central Railway* v. *Bates*[42] a policeman observed during the night an open door in defendant's warehouse, went in to "see if everything was right" and fell into a sawpit near the door. It was held that he had no right to enter and was therefore a trespasser, but that even if he had a right to enter there was no obligation on the defendant either to keep the premises safe or to warn the constable. It may be doubted whether the case can be taken as a general authority on the position of policemen and others, for the policeman here was in the employ of the plaintiffs, though by statute he had the same powers as public constables have to preserve the peace and secure persons and property against felonies. Furthermore, his motive in entering the premises was mainly to put in a safer place a bicycle which he saw on the far side of the building.

Sir Frederick Pollock thinks that a person entering premises "in the discharge of a public duty or otherwise with justification would seem to be in the same position as a customer and not to be a mere licensee."[43] He does not refer to the *Bates case* (*supra*). Sir John Salmond concludes that no one "is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier—unless he knows or ought to know that his entry is prohibited."[44] Strictly speaking, this rule does not cover the case of policemen at all but deals with book agents, canvassers and such persons.

If the policeman enters of right it is not easy to understand why some duty should not be cast on the occupier. Lord Sterndale, M.R., said in *Great Central Ry.* v. *Bates* (*supra*) that the policeman was "neither an invitee nor licensee" and consequently there was no

[39] (1917) 40 O.L.R. 1.
[40] (1927), 61 O.L.R. 416.
[41] [1927] Prob. 110.
[42] [1921] 3 K.B. 578.
[43] Torts, 12th Ed. 522 (1923).
[44] Torts, 7th Ed. 470.

obligation on the defendant even to warn. He may not have been either an invitee or licensee in the ordinary sense of these terms, but still, may there not have been a duty of some sort to him? If, as is often said in English cases, the effect of a license is merely to prevent a visitor from being a trespasser, the *right* to enter would seem *a fortiori* to have that effect.

Warranty of Safety.

Some Canadian Courts have added a fourth class of visitors to premises, viz.: those who enter under a contract with the possessor and pay money to him for the privilege of entering. To this class it has been said the possessor is under a duty to make the premises as safe as reasonable care and skill can make them.[45] So, in *Stewart* v. *Cobalt Curling and Skating Association*,[46] the plaintiff paid for a gallery seat in defendant's rink to witness a hockey match. During an exicting moment in the match spectators pressed forward against the gallery railing which gave way and plaintiff was thrown to the ice and injured. In spite of the fact that defendants had employed a competent architect to plan the rink, they were held liable, the railing not having been constructed so as to withstand the pressure that might reasonably be expected to be put upon it. The English cases of *Francis* v. *Cockrell*[47] and *Marney* v. *Scott*[48] were followed and several Scottish cases were referred to.

The next case is *Gunn* v. *Canadian Pacific Railway*.[49] There, plaintiffs bargained with defendants for the stabling of plaintiff's horses on defendant's premises. A horse broke through the floor and was killed. The defendants' agent admitted that the floor was not reasonably strong for the purpose and that he was "nervous" about it. The Manitoba Court of Appeal, Perdue and Cameron, J.J., Richards, J., dissenting, held that plaintiffs could recover, Perdue, J., said: "the defendants impliedly warranted that the stable was reasonably fit and safe for the purpose," and Cameron, J., quoted the statement in Pollock: Torts, 8th Ed. 508: "The structure must be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so."[50]

[45] But the possessor does not absolutely warrant the safety of the premises. *Readhead* v. *Midland Ry.* (1869), L.R. 4 Q.B. 379.

[46] (1909), 19 O.L.R. 667.

[47] (1870), L.R. 5 Q.B. 501.

[48] [1899] 1 Q.B. 986.

[49] (1912) 1 D.L.R. 232. See annotation, 1 D.L.R. 240.

[50] In the passage quoted, Sir F. Pollock is dealing with structures intended for human use and occupation. In the 12th edition the passage occurs at page

In *Seredinuk* v. *Posner*,[51] Denistoun, J., of the Manitoba Court of Appeal declared that "When there is a contract and the plaintiff for a sum of money paid to defendants makes use of defendant's premises, that . . . may lead to the implication of a warranty which carries the duty of a defendant substantially beyond the obligation indicated in *Indermaur* v. *Dames*."

There is a considerable body of English judicial opinion to the same effect beginning with the case of *Francis* v. *Cockrell*,[52] in 1870. There the defendant, the occupier of a race course, was held liable for injuries suffered by the plaintiff who had paid for a seat in a grandstand which collapsed. The defendant had been guilty of no negligence but the contractor who built the stand had been negligent. Kelly, C.B., said that the defendant had impliedly warranted that the stand should be reasonably fit, but did not contract against unseen defects which could not be discovered by the exercise of reasonable care.

The question was carefully considered by McCardie, J., in *Maclenan* v. *Segar*[53] a *Nisi Prius* case. The plaintiff was a guest for reward at a hotel of which defendant was lessee and occupier. Fire broke out during the night due to a defect in the construction of the hotel attributable to the carelessness of the architects or builders. The plaintiff, in endeavouring to escape through a window, fainted and fell upon a glass roof below. The jury found that the premises were not as safe as reasonable care and skill could make them and that the plaintiff's conduct was not unreasonable. McCardie, J., after a comprehensive review of the English cases, held that *Indermaur* v. *Dames* was to be distinguished from cases where there was a contract between the parties. In the latter type of case the obligation was wider—there was "an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them." The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by

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518, but it has been changed to read "Such a person is entitled without qualification to find a state of things as safe for the purpose in hand as reasonably competent care and skill can make it." Instead of requiring the *structure* to be safe, as in the 8th edition, Sir F. Pollock would now require *a state of things* to be safe. This latter requirement seems identical with the principle of *Indermaur* v. *Dames*.

[51] [1928] 1 W.W.R. 258, c.f. *Silverman* v. *Imperial Hotels*, 137 L.T. Rep. 57—"Defendants (who had let a room for hire) owed . . . a wider duty than that laid down in *Indermaur* v. *Dames*."

[52] (1870), L.R. 5 Q.B. 501.

[53] [1917] 2 K.B. 325.

reasonable care or skill on the part of "any person[54] concerned with the construction, alteration, repair or maintenance of the premises. . . . The principle is basic and applies alike to premises and vehicles. It matters not whether the subject be a race stand, a theatre or an inn; whether it be a taxicab, an omnibus or a railway carriage."

It would appear, therefore, that a railway company, for example, is under an obligation to make its carriages reasonably safe for its passengers, and there are many cases to support this statement. But we have seen above that the duty of a railway company as to its *premises* is not necessarily to make them reasonably safe. In other words, a passenger who has bought his ticket and who, while waiting for his train, is injured by a defect in the railway station itself, is placed in one class, whereas the same passenger, if injured by a defect in another part of the defendant's property, i.e. its railway carriage, is put in a different class. It may well be doubted whether there is any solid ground on which to rest this distinction. There may be something to say on behalf of the distinction between ordinary invitees and people who pay for the privilege of entering the premises, though it is difficult to see in some cases why there should be any distinction. The ordinary invitee often pays, indirectly at least, for entering another's premises. It seems still more difficult to see why the same invitee is treated differently according to whether his injury is received on one part of the premises or another.

The whole question of the duty of owners of premises to invitees requires careful review by a court of last resort. If the principle of *Indermaur* v. *Dames* is to be accepted as a guide through this portion of the law there should be a final pronouncement on such questions as:

(a) Whether obviousness of the danger to the invitee is alone sufficient to prevent the danger from being termed unusual.

(b) Following from (a), whether there is any difference between "making premises safe" and taking steps to "prevent damage from unusual danger."

(c) Whether the defence of *volenti non fit* is applicable in the ordinary type of invitee case.

(d) Whether railway companies and others operating public

[54] The effect of this statement is, as pointed out by McCardie, J., himself, to make the possessor in this class of case liable for the negligence of an independent contractor or his servants as well as for negligence occurring before the possessor had anything to do with the premises.

utilities are under a greater obligation to their patrons than are private occupiers of property.

(e) What is the position of persons such as policemen, firemen, etc., who enter premises in the course of their duty?

Within the last twenty years either the Privy Council or the House of Lords have had several opportunities to restate the law as to the liability of possessors of premises. Beginning with the case of *Lowery* v. *Walker* (*supra*) in the House of Lords in 1911, and the case of *Grand Trunk Railway* v. *Barnett* (*supra*) in the Privy Council in the same year, as to trespassers; the cases of *Fairman* v. *Perpetual Building Society* (*supra*) and *Mersey Docks* v. *Proctor* (*supra*) in the House of Lords in 1923 as to licensees and invitees; the case of *Letang* v. *Ottawa Electric Railway* (*supra*) in the Privy Council in 1926 as to visitors to the premises of public utility companies and the case of *Addie & Sons* v. *Dumbreck* (*supra*) in the House of Lords in 1929 as to child trespassers, the highest judicial tribunals in the Empire have had before them almost every type of case imaginable on this subject. Yet the law remains little clearer than it was before. It may be that the problem is such as to admit of no more definite solution than that already reached but more probably, it is submitted, the difficulties are not so much inherent in the problem as in the method of approach.

Mention has already been made[55] of the typical English and Canadian method of first putting the visitor in a category and then prescribing the duties, if any, owing to persons in such category. *Great Western Railway* v. *Bates*[56] shows the difficulties that may attend such a method. Even where the plaintiff is categorized, it may be found that the rules applicable to the particular class in which he is placed are unsuited to that particular plaintiff. In such cases, it is common to find courts—torn between the influence of the old conceptions and classifications on one hand and the desire to do justice in the particular case on the other—resorting to obvious fictions in order to reach a just result. Thus, we have seen that courts which insist that the only duty to a trespasser is not to wantonly or wilfully injure him will, when pressed, find wantonness or wilfulness in acts which are merely ordinarily negligent. Again, as to "tolerated intruders," so called, many courts seemed to feel that to treat such persons as ordinary trespassers would be unjust. But a category had to be found for them and by an easy promotion they were placed among the licensees—"licensees by acquiescence," or

[55] See 7 C.B. Rev. 667.
[56] *Supra* note 42.

"implied licensees"—and accorded whatever privileges belong to that class, though there was no element of license present in many cases.[57]

Such a method of dealing with the problem is obviously artificial and unsatisfactory and it has been subjected to trenchant criticism in recent years.[58] The question arises whether anything better can be substituted, whether instead of a rigid division of visitors to premises into a few groups, with fixed duties for each group, a general standard of conduct can be laid down, to which the conduct of the possessor of premises must attain.

Most of the Canadian cases on this subject are to be found in the Digests under the heading "Negligence," and the inquiry suggests itself as to whether the principles and standards of the law of negligence are sufficient to account for all the cases. Sir Frederick Pollock believes that the liability of a possessor is apart from the law of negligence which he says "is inadequate to account for it."[59]

No Canadian or English case has been found which attempts to explain the whole subject in terms of negligence,[60] though we have seen that as to children, Lord Macnaghten in the *Cooke case* laid down a standard of conduct which is practically identical with that of Brett, M.R., in *Heaven* v. *Pender*. Brett, M.R.'s famous statement was:

> Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[61]

It is true that Cotton and Bowen, L.J.J., who sat with Brett, M.R., in *Heaven* v. *Pender*, expressly declared their unwillingness to concur in Brett's principle and that ten years later in the case of *LeLievre* v. *Gould*,[61a] Brett, M.R. (then Lord Esher), limited his former statement by declaring that the duty was "not *to do* that which may cause a personal injury . . . or may injure property."

[57] See Bohlen, 69 U. of P.L.R. p. 348, note 16.
[58] See e.g. Bohlen, 69 U. of P.L.R. Hudson, 36 H.L.R. 826.
[59] Torts, 12th Ed., 516. Cp. *Sullivan* v. *Waters* (1864), 14 Ir. C.L.R. 460.
[60] See however *Smiles* v. *Edmonton Bd.* (1918), 41 D.L.R. 400, (1918) 43 D.L.R. 171; and see annotation to *Gunn* v. *C.P.R.* (1912), 1 R.L.R. 240, where the commentator says that "the rule" (as to the liability of possessors) "was broadly declared in the celebrated case of *Heaven* v. *Pender*,' citing the passage herein quoted from that case.
[61] (1883), 11 Q.B.D. p. 509.
[61a] [1893] 1 Q.B. 491.

In other words, the standard as originally set forth applied to both negligent acts and to omissions to act. As limited by *LeLievre* v. *Gould* (*supra*) it applies only to negligent *acts*.

While the broad doctrine laid down by Brett, M.R., in *Heaven* v. *Pender* has been in terms condemned in some cases and criticised by some writers, it has on the other hand been approved as a general statement of law by Mr. Justice (now Chief Justice), *Cardozo*, of the New York Court of Appeals, in *McPherson* v. *Buick Motor Co.*,[62] where Cardozo, J., said: "It (*Heaven* v. *Pender*) may not be an accurate exposition of the law of England. . . . Like most attempts at comprehensive definition it may involve errors of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualification may be called for as they are applied to varying conditions, are the tests and standards of our law." Mr. Street[63] calls Brett, M.R.'s statement "the most powerful judicial effort which has ever been put forth to generalize the theory of negligence." Mr. Street does not, however, accept it as an entirely satisfactory test of negligence but when he deals with the subject of dangerous premises he declares that Brett's generalization, limited by the doctrine of assumption of risk, is of "absolute accuracy" and "universal application" so far as the question of dangerous premises is concerned.

Professor Hudson declares[64] that "a set of rigid rules built on a series of rigid categories of visitors seems . . . undesirable. We must seek a standard of judgment—and leave its application to depend upon the variables which will arise in the cases. That standard is at hand in the general legal standard of social conduct, our requirement that one who acts in society, whether it be merely to maintain land, or to conduct operations upon it, or to place its product upon the market, must use due care under the circumstances to avoid injury to others."

Professor Leon Green makes the generalization that if one engages in business or uses property for his own benefit, he assumes an obligation to use reasonable care to protect from injury persons who without fault may be reasonably expected to come within the zone of danger.[65]

[62] 217 N.Y. 382.
[63] Foundations of Legal Liability, Vol. I, 93.
[64] 36 H.L.R. 826; Harvard Essays 415-16.
[65] 57 Am. Law Rev. 342.
This formula would exclude trespassers and would appear to be, on that account, too narrow. Professor Goodrich, while inclining in the view that

While, as will be illustrated later, the present condition of the law as to possessors' liability may not fully justify Brett's doctrine, the trend of the cases dealing with the question is in the direction of that doctrine. As Professor Bohlen points out:

> There has been a gradual but persistent weakening of the original concept that the owner was sovereign within his own boundaries and as such might do what he pleased on or with his own domain. . . . When the comparatively modern law of negligence reached the relations of landowners to persons entering their property, it found the field occupied by this concept of the owner's right as sovereign to do what he pleased on or with his own property. The history of this subject is one of conflict between the general principles of the law of negligence and the traditional immunity of landowners.[66]

The most striking instance of the "weakening" process referred to by Professor Bohlen is to be found in the rules as to trespassing children adopted by many American Courts. In many cases children are placed in almost as favoured a position as persons invited to the premises on business concerning the possessor. English cases, while insisting that the duty to children trespassers is the same as the duty to adult trespassers, are nevertheless quick to seize on a chance to call children licensees, and so are likely to be found using such terms as "implied license," "implied invitation," "allurement," "enticement," and the like. In many cases these phrases cannot be given their ordinary meaning. How many people, for instance, allure or entice children to a dangerous machine for the purpose of harming the children? Some other English and Canadian Courts[67]

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there is no duty to warn, even a seen trespasser, of hidden dangers in the condition of the premises, nevertheless observes the distinction between failing to help a man and doing him harm, and cites a long list of Iowa cases in support of the view that after a trespasser's presence is discovered, there is a duty on the possessor "to exercise ordinary care to avoid injury," 17 Ia. L.B. 72-73, Professor Hudson believes that if trespassers "are seen to be on the land, or actually anticipated by reason of some special situation the owner must act with reference to their presence, and must take the ordinary precautions, when he carries on active operations or changes the condition of the premises, to avoid inflicting injury," 36 H.L.R. 845-46. While this last seems to the writer to represent a desirable condition of the law, it is doubtful if the cases fully support the position taken by Professor Hudson.

[66] 69 U. of P.L.R. 237.

See also on this point *Landowner* v. *Intruder—Intruder* v. *Landowner*." Leon Green, 57 Am. Law Rev. 321-22. "The right to use land has no reason to claim immunity higher than that granted to other rights, which yield to the changing needs of a social organism." L. P. Wilson, 57 Am. Law. Rev. 877.

"The structure of civilization would not be shaken if the law made an exception in favour of the child by cutting down the landowner's freedom from immunity to trespassers." Professor Goodrich, 7 Ia. L.B. 67.

[67] See e.g. Lord Macnaghten in the *Cooke case; Burbidge* v. *Starr Mfg. Co.* (1921), 54 N.S.R. 121; Finlay, L.C., in *Glasgow* v. *Dumbarton*, [1918] S.C. 96.

emphasize the fact that the possessor should have known that the activity or condition would attract children and should have guarded against injury to the children in some way. At all events, Courts are cutting in on the landowner's immunity, in what Professor Bohlen describes as "a natural response to a public sentiment which is justified by the grave risk to a numerous and socially important class of citizens and the comparatively slight burden upon the landowner."[68]

Similar instances of the "weakening" are seen in the better position in which most courts now place seen trespassers and so called "tolerated intruders." It would seem that in the conflict between negligence and the immunity of landowners, negligence is gaining the mastery. "The law is rapidly tending toward the enforcement (contrary, no doubt, to old authorities and some recent ones), of a general duty to be careful as well as to abstain from wilful harm. . . . ."[69] And again, "As society becomes more complex and the consequences of negligence more far-reaching, the obligation of using care becomes stricter in morals, and will have to become stricter in law."[70]

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If a standard such as that of Brett, M.R., in *Heaven* v. *Pender,* or the less general but nevertheless practically identical standard of Lord Macnaghten in the *Cooke case,* were adopted, how far would the present state of the law as to possessors' liability fall short of such a standard? There are two situations where the law does not go so far as Brett's formula would carry it. First, no case has come to the writer's attention in which it has been stated that a possessor is under a duty to warn a trespasser of a concealed danger on the premises. Thus, if a trespasser be observed walking towards a pit on the premises made for the purpose of catching wild animals and covered lightly with turf, the possessor is not, it seems, bound to warn the trespasser. How long the law will continue in such a state is another matter.[71] There would seem to be in this case none of the practical difficulties that sometimes present themselves when it is sought to impose affirmative duties on others[72] and if one is bound to act with reasonable care, as to driving his car, when he

[68] 69 U. of P.L.R. 348.

[69] 5 L.Q. Rev. 203.

[70] 7 L.Q. Rev. 107. Both of these quotations from the Law Quarterly Review, are used by the late Professor Jeremiah Smith in an article "Liability for Negligent Language.' 14 H.L.R. 184. Harvard Essays 334.

[71] See Ames "Law and Morals," 22 H.L.R. 197.

[72] I.e. affirmative duties where there is no relation between the parties.

sees a trespasser on his driveway, it is difficult to see why he should not be obliged to shout a warning to the trespasser walking toward the pit. Secondly, the cases seem to make a distinction between natural and artificial conditions of land and to be more reluctant to impose liability in respect of the former than in respect of the latter. Brett's doctrine takes no account of such a distinction.[73]

The adoption of such a standard as that of Brett, M.R., would not therefore make so radical a change in this branch of the law as is sometimes supposed. The advantages of such a standard, or rather the disadvantages of a rigid system of categories of liability, have been already referred to. If such a standard were adopted it would not carry with it the overthrow of all our law on this subject. Much of it indeed could and should be retained. We should still have to consider whether the visitor's presence was lawful or unlawful, known or unknown, anticipated or unanticipated, whether he came on business concerning the occupier or on a social visit, or in the discharge of some public duty. The degree of care required of the possessor may vary with each of these circumstances and where the law has already fixed the duty owing in one of these circumstances, and where such duty is generally recognized and accepted, it would undoubtedly continue to be recognized even under a general formula. It is not the idea of having different categories of liability that is mainly objected to. The writer's main objection is to the idea that placing a person in a category is the chief purpose of the law, whereas in fact that should only be a factor in the determination of the prime question, viz.: what, from all viewpoints, ought to be done in this particular case. Furthermore, the attempt to cover the whole field by a closed and sealed group of categories takes no account of new situations which may arise, such as that in *Great Central Railway* v. *Bates* (*supra*). If the duties attaching to a possessor in respect of the various groups were to be occasionally revised, and extended to meet changing conditions and demands, or if courts were free to create new groups when occasion required, the system of classifying visitors to premises into various groups could undoubtedly be made to suffice.

One thing at least seems clear. The methods of determining the liability of possessors of premises at present followed in most of the English and Canadian Courts are frequently uncertain, sometimes illogical, and often inadequate. If our law is to serve its purpose, it ought to be reviewed in the light of modern conditions rather than

[73] See 7 C.B. Rev. p. 678. footnote 51; 8 C.B. Rev. p. 25, footnote 74.

in the shadow of ancient cases. The call of the Canadian lawyer is for an accurate and comprehensive treatment of this subject by the House of Lords or the Judicial Committee of the Privy Council.

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