TORTS — RESTRICTION OF OCCUPIER'S LIABILITY TO LICENSEE — SUFFICIENCY OF NOTICE PURPORTING TO EXCLUDE LIABILITY FOR NEGLIGENCE — PRINCIPLES APPLICABLE

The English Court of Appeal, in *Ashdown* v. *Samuel Williams & Sons Ltd.*,[1] has decided that an occupier can relieve himself of liability for negligence towards a licensee by the simple expedient of posting sufficient notices purporting to exclude such liability.

The facts of this case are fairly simple. The first defendants owned a large dock area on the Thames, part of which area was leased to various tenants and part of which was retained in the occupation of the first defendants. Over some of this latter property ran a private road, crossed at intervals by railroad tracks, this road affording convenient access to the premises of the second defendants and having been used for years by their employees. Clearly visible to anyone using this road there was posted the following sign:

> NOTICE AND WARNING. This property is private property. Every person, whether an invitee or otherwise, whilst on the said property is there entirely at his own risk and must be deemed to take the said property with everything thereon as he finds it with notice of the nature, condition and state thereof and he shall not have or make any claim for injury or damage against Messrs. Samuel Williams and Sons Ltd., howsoever such injury and/or damage may be occasioned or any of their assigns or their respective lessees or tenants, or their respective servants, agents or workmen whether or not such injury or damage is in any way whatsoever due to any negligent act, breach of duty, default and/or omission on the part of Messrs. Samuel Williams and Sons Ltd. and/or any of their assigns or their respective lessees or tenants or their respective servants or workmen. All persons are only allowed to be on the said property upon the distinct understanding that they do so entirely at their own risk. Samuel Williams and Sons Ltd., W. J. Crafter Secretary.[2]

Plaintiff, an employee of the second defendants, used this road and, needless to say, was injured while crossing the railways tracks. It was found that her injuries were caused by the negligence of servants of the first defendants in failing to give proper warning of shunting operations.

The Court of Appeal, affirming the decision of Havers J. on this point, held that it was incontestable that an occupier could exclude his liability to a licensee by making known to him appropriate restrictions.[3] They then held that the present notice was sufficient for this purpose, covering, as it did, not only dangers resulting from the static condition of the property, but also those arising from the normal user of the land.[4] Finally they decided that since the plaintiff had read at least part of the notice, she was bound by the whole, and that, on the principle of *Parker* v. *South Eastern Ry. Co.*[5] and other of the famous "ticket cases", the defendants had done everything necessary to bring the conditions to the attention of the plaintiff.[6]

---

[1] [1957] 1 All E.R. 35, [1956] 3 W.L.R. 1104, reversing in part [1956] 2 All E.R. 384.

[2] The notice is set out at [1957] 1 All E.R. at pp. 39, 40.

[3] See for instance [1957] 1 All E.R. at p. 46 (per Parker L. J.)

[4] *Ibid.* at p. 41 (Singleton L.J.), at pp. 43-44 (Jenkins L.J.) and at pp. 47-48 (Parker L.J.)

[5] *Parker* v. *South Eastern Ry. Co.*, *Gabell* v. *Eastern Ry Co.*, (1877) 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540.

[6] [1957] 1 All E.R. at p. 40 (Singleton L.J.), at pp. 42-43 (Jenkins L.J.) and at p. 45 (Parker L. J.)

Now, it is not in dispute, in Charlesworth's words, that:

> A duty which is imposed by common law or statute for the protection of a particular person, or class of persons can, in general be waived . . . In the case of a common law duty, contracting out is permissible unless it is against public policy . . . There does not appear to be any instances in which it has been held that contracting out of liability for common law negligence is contrary to public policy.[7]

Common carriers and bailors of various descriptions have for years made use of conditions restricting or excluding liability for negligence. No doubt has ever been expressed as to the validity of such contracts, the only limitations imposed by the courts being that the contracts will be interpreted as narrowly as possible, and that the defendant must do whatever is reasonable under the circumstances to bring the restrictive conditions to the attention of the plaintiff.[8] To these agreements, however, the normal rules of contract are applicable, since it must be kept in mind that it is by contract alone that the normal liability is being avoided.[9]

Is the instant decision to be rested on a basis of contract, the acceptance being Mrs. Ashdown's entering of her common law rights in return for the license to do so? While it might be argued that the proper structure of a contract, albeit rather a strange one, is present in such circumstances, nevertheless the learned Lords Justices, in the present case, denied any such construction.[10] In *Wilkie* v. *London Passenger Transport Board*,[11] a decision relied on in the present case, Lord Greene M.R. stated quite specifically that:

> It is clearly nothing but a license subject to conditions, a very common form of license, e.g., a license to a neighbour to walk over a field, providing he does not go with a dog. You cannot spell such a thing as that as being a contract: 'I will let you go across my field in consideration of you, as a contracting party, agreeing not to take your dog.' . . . It is the mere grant of a revocable license subject to a condition that, while the license is being enjoyed, certain consequences shall follow. That is not contractual, but is a term or condition of the license, and if anyone makes use of the license he can only do so by being bound by the condition.[12]

It might also be objected that if a plaintiff give consideration he ceases, *ipso facto*, to be a licensee[13] Since the terms of the contract are to be read restrictively,[14] it would then be necessary to determine the precise nature of the liability to him of the occupier, apart from contract, in order to determine whether it is excluded successfully. This liability, while presumably based on a higher standard of care than owed to a mere licensee, could not be said to be based on the obligations of an invitor either, since the occupier can hardly be

---

[7] *Charlesworth on Negligence* (3rd Ed.) at pp. 617, 618.

[8] For a statement of the first limitation, see *Alderslade* v. *Hendon Laundry* [1945] 1 All E.R. 244; for one of the second see *Parker* v. *South Eastern Ry. Co.*, supra footnote 5.

[9] *Charlesworth, op. cit supra* footnote 7, at p. 620.

[10] See, for example, [1957] 1 All E.R. at p. 45 (Singleton L.J.)

[11] [1947] 1 All E.R. 258, [1947] L.J.R. 864.

[12] *Ibid.*, cited in F. J. Odgers, "Occupiers Liability: A Further Comment", 1957 C.L.J. 39.

[13] The reader is referred to *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274; 35 L.J.C.P. 184, the classic exposition of the categories of occupiers' liability. See also *Winfield on Tort* (6th ed. — 1954), at p. 696.

[14] See footnote 8 *supra*.

said to have a material interest in the presence of the plaintiff on the land.[15] Even assuming that the plaintiff can be classed as an invitee, the artificiality of recourse to the contractual concept in this regard is shown by the fact that a court would have to arrive at a higher standard of care in order that it may consider the applicability of a lower one, the original assertion of the lower standard being solely responsible for the erection of the higher one.

To resort to the terminology used in the *Ashdown* case, however, is, with respect, no more satisfactory. F. J. Odgers, in a recent article in the Cambridge Law Journal,[16] argues that in the example of the licensee with the dog, quoted above, the licensee, if he comes on the land with the animal, forfeits his license and becomes a trespasser.[17] To equate this with the facts of the present case, so far as is possible at any rate, the plaintiff here may or may not choose to be bound by the conditions of the license. If she decides not to be bound by the conditions it by no means follows that she is deprived of any remedy for damages suffered while on the land. Apart from contract she cannot be held to the terms stipulated, and all that can happen is that she forfeit her license, her rights reverting to those of a mere trespasser; but a trespasser, it must be emphasized, who is not bound by the conditions, and who, under the circumstances of the present case, might well have a right of action against the occupier.[18]

The above objection, it should be understood, relates merely to the use of the terminology of "conditional license": it does not attempt to dismiss the reasoning that lies behind it, and which will be discussed below. It is merely submitted that, without more, a "conditional license" is not a satisfactory concept on which to base decisions dealing with notices restricting liability to licensees, and that it may well prove a hindrance to sound analysis. Of course, it will readily be objected that, in the present case, the plaintiff did in fact accept the conditions of the license; but the answer to this is simply that if this is to matter at all, it must be as a result of some positive rule of law. It is submitted that the introduction of the concept of binding conditional licenses in cases such as the present is either (a) the introduction of a new principle of law (against which, of course, there is no *per se* objection) or (b) verbal camouflage, disguising the operation of already existing legal principles. If there are such existing

---

[15]See *Indermaur v. Dames supra*, footnote 13, Winfield *op cit. supra* footnote 13, at p. 682. The reader is also referred to *Dunster* v. *Hollis* [1919] 2 K.B. 795 where Lush J. stated himself to be of the opinion that there was a fourth category of persons coming on to the land of an occupier, one of persons who entered under "a contractural right to do so." Towards them the duty of an occupier is to take reasonable care to keep the premises in reasonably safe condition. This duty is higher than that owed an invitee. It would indeed be bizarre were it ever held applicable to the present type of case.

[16]See footnote 12 *supra*.

[17]*Ibid.* at p. 44.

[18]If the duty to avoid positive misfeasance is independant of occupiers' liability in the more usual sense, this would be the case. The following cases may be cited in support of the proposition that the above duty is owed even to a trespasser. *Excelsior Wire Rope Company Ltd.* v. *Callan* [1930] A.C. 404, *Mourton v Poulter* [1930] 2 K.B. 183 (C.C.A.), *Heitt Zien* v. *Acme Towel and Linen Supply Ltd.*, [1940] 1 D.L.R. 736 (B.C.C.A.), and *Canadian Pacific Railway* v. *Kizlik* [1944] S.C.R 98. Against the proposition may be urged *Robert Addie and Sons (Collieries) Ltd.* v. *Dumbreck* [1929] A.C. 358, and *Canadian Pacific Railway* v. *Anderson*, [1936] S.C.R. 200.

principles, then the introduction of a new one would seem to be unnecessary. Worse, since the concept under discussion may appear to carry contractual implications, its adoption may allow a much more ready exclusion of liability by occupiers than would be the case by the application of the principles of the law of tort that it will be contended are really applicable.[19]

Having thus considered contract and license as possible bases for the instant decision and having found them in the main unsatisfactory, it is now necessary to turn to two other possible bases. The first of these is that the notice serves as an effective discharge of the licensor's duty. It will be remembered that the duty of a licensor is simply to warn the licensee of dangers of which he knows.[20] But, as the Court of Appeal in the present case admitted, there is a further and independent duty which is owed. This duty is stated by Salmond, in a passage quoted by Jenkins L.J. in the present case:

> The occupier is also liable if he or his servants do any act of positive misfeasance by which the licensee suffers harm, as by negligently driving over a person whom he has permitted to use a private way. The license is granted subject to existing dangers, but no further act must be done by the grantor or his servants to endanger the safety of the person to whom it was given.[21]

Now, while a warning of the nature of the one quoted above may comprehend, as their Lordships held that it did, both the condition of the land and the normal activities carried on on it, it is to be doubted whether a warning of a danger is a discharge of the occupier's duty of care to avoid positive misfeasance.[22] In this respect his duty is hardly that of an occupier at all, and it surely makes no difference whether a servant of the occupier, driving a car bearing a large placard warning of impending danger, negligently strikes a plaintiff on or off the land of his master. The normal duty of care is not, without more, displaced by such a warning.

A duty of care can, however, be displaced by warning if that warning, having conveyed to a reasonable man an adequate knowledge of the peril, is then coupled with acceptance of the danger, or with what must be taken to be such acceptance, on the part of the person warned.[24] This is nothing more than the doctrine of assumption of risk or *volenti non fit injuria*, and it is submitted not only that this is the most satisfactory basis for the decision in *Ashdown* v. *Williams*, but that it was in fact the guiding principle behind the present decision. Singleton L.J., for instance, said:

> The danger arising from shunting operations was one which must have been present to the mind of everyone who went on the property, and the words of the notice were intended to relieve the defendants from liability for negligence during that operation.[24]

---

[19]The danger may lie in the fact that, on principle, if the terms of a contract are wide enough to apply to a certain class of negligence, liability for it is excluded. If it is not specified, either expressly or by implication, this would not be the case in tort.

[20]See, e.g. *Winfield op. cit., supra* footnote 13 at p. 696. The conclusion as to the present case is shared by Odgers, *op. cit.*, footnote 12.

[21]Salmond on Torts, (11 ed.) at p. 53 cited [1957] All E.R. at p. 42.

[22]See footnote 21 *supra*. This duty, like the normal duty to avoid positive misfeasance, is not expressed in terms of warning, as is that of an occupier to a licensee in regard to static dangers. See also footnote 13, *supra*. But see (1956) 19 Mod. L.R. 532.

[23]See, e.g., *Winfield, op. cit.*, footnote 13, *supra*, at pp. 26-48.

[24][1957] 1 All E.R. at p. 41.

earlier, he had stated:

> There were railway lines and trucks on the property, and shunting took place, as the plaintiff knew. She took the risk of an engine of a truck being in her way . . . I should feel more difficulty if we had to consider a claim arising from negligence in the driving by the defendant's servants of a motor car and damages arising therefrom.[25]

The same *leitmotif* runs through the judgment of Jenkins L.J.

> The notice is somewhat verbose, but I think it would be clear to any reasonable person reading the whole of it that it was intended to convey to any person who might choose to go on to the land to which it related that such person . . . would be there entirely at his own risk . . . It should be noted that, as appears from the plaintiff's answer in cross-examination, she did at all events appreciate that the notice said she would be there at her own risk.[26]

Parker L.J. was even more explicit, particularly when he said that "Each case must depend on its own facts and in particular on what the licensee knows as to the use of the land."[27] As Dr. Glanville Williams has stated:

> To constitute a defence [such as the one under discussion], there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.[28]

It is interesting to note that the same view in regard to the defence of voluntary assumption of risk has been advanced in the Supreme Court of Canada.

> If A is driving an automobile for private purposes from X to Y and is hailed on the road by B who requests a lift towards Y, what would most likely be said by A if the question of misconduct by either during the trip was at that moment raised? I think he would ordinarily say, or at least could reasonably be found that he implies — 'You may come along, but you must take my skill and care and the risk of my ordinary conduct as I myself am doing, from which I am not likely to but might have a minor lapse' . . . [29]

The concept of agreement implicit in these lines, moreover, refers to an agreement to which the rules of contract are inapplicable, thus obviating the difficulties mentioned earlier. In the words of Dr. Williams:

> If the giving of an effective consent to the risk of negligence requires some sort of agreement between the parties, the question may be asked whether this agreement must follow the rules of the law of contract. The answer may be in the negative. Thus . . . consent may be given by an infant, at any rate if he is nearly of age, although a contract to this effect might not be binding on him as a contract on account of his infancy. It seems there is no need to enquire into the existence of consideration for the agreement . . . [30]

On the basis of the foregoing analysis it is clear that in the present case the danger was brought to the attention of the plaintiff, bearing in mind the notice and the fact that she knew of the shunting operations. Had the damage resulted from some other cause, the result might well have been different, as both Singleton and Parker L.J.J. are careful to point out.[31] Similarly, consent to run the known risk can easily be implied from Mrs. Ashdown's conduct.

The question of the status of notices generally must now be faced. On the proposed basis, no wholesale escape from liability by occupiers would result. A notice simply purporting to relieve from liability would *per se* be of little use in the majority of cases, since it would be in few cases indeed that a person

---

[25] *Ibid.*

[26] *Ibid.* at pp. 43, 44.

[27] *Ibid.* at p. 47.

[28] Glanville Williams, *Joint Torts and Contributory Negligence*, (1st ed. 1951) at p. 308.

[29] per Rand J. in *Car and General Insurance Corp'n Ltd.* v. *Seymour and Maloney*, (1956) 2 D.L.R. (2nd) (S.C.C.), at p. 372.

[30] Williams, *op. cit.*, footnote 28, at p. 312.

[31] [1957] 1 All E.R. at pp. 41, 47.

could be taken to consent to assume all dangers, sight unseen, even if, as is by no means clear, the law will permit him to do so.[82] However, a notice-board coupled with a context, whether such a context form part of the notice (as by specifying the dangers), or whether it consist of the physical surroundings which may, as in the present case, speak for themselves, would form a sufficient communication of the extent of the peril in appropriate cases. Voluntary acceptance of the risk would then be a question to be determined, in the majority of cases, from the conduct of the party encountering the danger. This may be provided, in cases such as the present, by the act of coming on to the land, despite the knowledge.[83]

One final point may be taken. It seems to be the case that where *volenti non fit injuria* is applicable, contributory negligence and apportionment are not far off.[84] While there is a difference in theory between a case where no duty of care is owed (as is the case where the defence of *volenti* is established) and one where there is a duty of care but the consequences of the breach of such a duty are partly the fault of the person injured, there is very little distinction between the two in fact. In many cases, reduction, rather than total elimination of the damages recoverable by the licensee, would seem to be the fairer solution. The establishment of *Ashdown* v. *Williams* on what, it is submitted, is its proper footing, may allow for such a possibility.

—R. R. Stuart
Second Year Law

---

[82] "Theoretically it might be within the defence to argue alternately that the plaintiff was an invitee, who had accepted an invitation to enter and be upon the defendant company's premises on an express condition, brought home to his mind that if he was hurt by the invitees negligence he would have no right of action. But to this plea, the answer would be the same, namely that the defendant company had not taken all the steps, reasonably necessary to bring that astonishing surrender of his elementary rights home to his mind." per Scott L.J. in *Henson* v. *L.N.E.R. and Coote and Warren Ltd.*, [1946] 1 All E.R. 653 (C.A.) cited *Odgers op. cit., supra* footnote 12, at p. 45. See also Williams, *op. cit., supra* footnote 28, at p. 312.

[83] It need not, of course; see Winfield, *op. cit., supra* footnote 13 at p. 35.

[84] See the *Seymour* case, *supra*, footnote 29: see *Williams, op. cit., supra*, footnote 28 at p. 312; see also 2 Alta L.R. 127.