OCCUPIERS' LIABILITY: ALBERTA PROPOSES REFORM

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In view of proposed reform of the law of occupiers' liability in Alberta, the common law approach to this area of law is examined by way of introduction. Professor Alexander adumbrates the categories of visitors and the duty of care owed to each, within the framework of the modern tort tendency to generalize. An examination in some detail is also made of the judicial techniques used in recent years to evolve the law of occupier's liability. As reform results from criticism, an examination of the criticisms of the present law, specifically judicial interpretation of the categories, as well as the categories themselves, their origin, compass and applicability to modern society, are undertaken. Based on the criticisms, law reform has occurred. From the point of view of evaluating whether the reform has answered the criticisms of the common law approach, the author attempts to examine the actual and proposed reform of England, Scotland, New Zealand, New South Wales, and Alberta. Particular detail is addressed to the Alberta proposals regarding a common duty of care, the trespasser, the child trespasser and the ability to exclude liability. Concluding that a convincing argument can be advanced for judicial reform in the area of private law, and that stare decisis *does not have justification in the law of tort, Professor Alexander proposes that, while reform can be valuable as a method of evolution, judicial history evidences that the Courts are able to adapt the law to meet changing social needs. The author concludes also that the common law today is preferable to the proposed Alberta reform.*

The common law's approach to the problem of those injured on the land of others has long been the subject of criticism. In a number of jurisdictions this criticism has resulted in legislative reform. The Alberta Institute of Law Research and Reform has recently proposed such legislation for Alberta. In this article I shall examine the common law's approach to occupiers' liability, the criticism of this approach, the legislation that has been enacted as a result of this criticism, and the Alberta proposals.

1. *The Approach of the Common Law*

The common law places those going on the land of others into a number of categories, with different obligations owed by occupiers to each category of visitor. One who goes on another's land without his permission is a trespasser. To a trespasser an occupier owes no duty of care in negligence; his only obligation is not to injure the trespasser intentionally or recklessly. One who goes on another's land with his permission, but who confers no economic benefit on him by so doing, is a licensee. To a licensee an occupier owes a limited duty of care in negligence, a duty to warn of hidden dangers of which he is aware. One who goes on another's land with his permission, and who confers an economic benefit on him by so doing, is an invitee. To an invitee an occupier owes a greater duty of care than to a licensee: he must use reasonable care to prevent injury to the invitee from unusual dangers of which he knows or ought to know. A fourth category of visitor is the contractual entrant whose rights are determined by the terms of his contract. The contractual visitor pays for the right to come on the land, and the occupier agrees as a term of the contract to take certain precautions for his safety. In many cases the duty of care owed to a

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contractual visitor will be greater than that owed to a licensee or an invitee.

I am aware that it is unrealistic, and not particularly useful, to set out legal rules as I have done without reference to the fact situations that gave rise to them. The statement of the legal rules of occupiers' liability is easy; their application to particular fact situations can be incredibly difficult. However, my purpose at the moment is not to examine the complexity of the problem, but rather to try to give an indication of the general approach of the common law to it.

The approach to occupiers' liability is inconsistent with the modern tort tendency to establish negligence duties of care by reference to reasonable foresight of harm. The occupiers' liability categories evolved in the early and mid-19th century, well before the first judicial attempt[1] to generalize the duty issue in negligence. The categories were created at a time when the economic and social importance of land justified its preferential treatment by the law. The limited obligations of an occupier to those coming on his land affords but one example of this preferential treatment.[2] To put it bluntly land and its unfettered use was considered more important in certain respects than human life.

With a reduction in the economic and social importance of land in the 20th century, and with a developing philosophy of negligence, there arose an increasing judicial dissatisfaction with the rigidity and formalism of the categories, which often seemed to dictate unjust results. Modern tort law involves a balancing process: an attempt by the courts to strike a balance between the claims of defendants to freedom of action and the claims of plaintiffs to security. The categories inhibit this process. But dissatisfaction with the occupiers' liability categories did not result in their abolition. The common law reforms by way of evolution, not revolution. Instead of abolishing the categories the courts worked within and without them to achieve results consistent with modern views of the proper balance between occupiers' claims to be free to use their land as they see fit and visitors' claims that their interests in their physical person and property be secure.

One judicial technique for controlling the categories is to confine their operation to occupiers, and to require of non-occupiers the ordinary duty of care.[3] Another technique, used most often with children, is to raise a visitor's status from trespasser to licensee by implying the occupier's consent to his presence.[4] Another technique, although with rather limited potential, is to treat a trespasser as a highway user to whom the ordinary duty of care is owed.[5]

The courts have improved a licensee's position in one of two ways: either by interpreting the concept of economic benefit generously so as to bring him within the invitation category,[6] or by increasing the

1 *Heaven* v. *Pender* (1883) 11 Q.B.D. 503, per Brett, M.R..
2 Other examples are: 1. Trespass to land is the last of the forms of the old writ of trespass to yield to the concept of no liability without fault: *Mann* v. *Saulnier* (1959) 19 D.L.R. (2d) 130 (N.B.S.C.A.D.). 2. A trespasser ". . . is held strictly for all damage caused by his presence on the land, even if it resulted from conduct that would not otherwise have involved him in liability.": Fleming, *Torts* (3rd ed., 1965) at 38. 3. Reasonable mistake is not a defence to an action for trespass to land: id., whereas it probably is to an action for trespass to the person: id., at 80. 4. The House of Lords in *Read* v. *Lyons* [1947] A.C. 156, suggested that the strict liability principle of *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, may be confined to damage to land.
3 *Billings* v. *Riden* [1958] A.C. 240 (H.L.).
4 *Cooke* v. *Midland Great Western Ry.* [1909] A.C. 229 (H.L.).
5 *Barnes* v. *Ward* (1850) 9 C.B. 392.
6 *Griffiths* v. *St. Clement's School* [1938] 3 All E.R. 537 (Tucker J.).

duty of the care owed to him so that it is almost indistinguishable from that owed to an invitee.[7] Similarly, an invitee's position has been improved by equating the duty of care owed to him to the ordinary duty of care in negligence.[8]

A more promising technique for controlling the categories is to confine their operation to the static condition of the land and to impose on the occupier the ordinary duty of care with respect to activities taking place on the land—a duty owed to all visitors, including trespassers, foreseeably endangered by activities.[9] This technique involves the familiar tort distinction between nonfeasance and misfeasance—the distinction between failing to act to benefit another and actively creating risks of harm to him. As a matter of general tort theory liability for failure to act to benefit another depends on the existence of a duty to act for his benefit in the particular circumstances. However, the imposition of a duty to act depends not on foresight of harm alone, which is ordinarily sufficient to impose a duty on one carrying on an activity, but on a special relationship existing between the parties. With respect to the static condition of land the existence and nature of the occupier's duty of affirmative action depends on the visitor's category: to a trespasser there is no such duty, to a licensee there is a limited duty to act, to an invitee a more extensive duty, and to a contractual entrant often an even more extensive duty. On the other hand, according to this technique for controlling the categories, with respect to activities taking place on his land the existence of the occupier's duty depends only on foresight of harm to the particular visitor, regardless of his category.

Perhaps because of the difficulty of distinguishing static conditions from activities, or perhaps because they felt that with respect to some static conditions an occupier should owe the ordinary duty of care to those foreseeably endangered, the Australian High Court[10] evolved an even more promising technique for controlling the categories—a technique that might have eventually resulted in the abolition of at least the trespass category.[11] The Australian innovation is to view the occupier of land as owing in some circumstances both occupancy and non-occupancy duties. With respect to occupancy duties the categories are important. With respect to non-occupancy duties they are not. Non-occupancy duties are based on *Donoghue* v. *Stevenson*[12] principles, and may arise even where the occupier's conduct can be characterized as nonfeasance.

2. *Criticism of the Common Law*

The common law's approach to occupiers' liability can be criticized at two levels: the judicial interpretation of the categories, and, at a more fundamental level, the categories themselves.

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7 *Hawkins* v. *Coulson & Purley U.D.C.* [1954] 1 Q.B. 319 (C.A.).

8 *Hesse* v. *Laurie* (1962) 38 W.W.R. 321 (Alta., Riley J.).

9 *Videan* v. *B.T.C.* [1963] 2 Q.B. 650 (C.A., per Lord Denning M.R.).

10 In a series of cases: *Thompson* v. *Bankstown Corp.* (1952) 87 C.L.R. 619; *Rich* v. *Commissioner for Railways* (1959) 101 C.L.R. 135; *Commissioner for Railways* v. *Cardy* (1960) 104 C.L.R. 274.

11 I say might have because the technique was rejected by the Privy Council in *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054.

12 [1932] A.C. 562 (H.L.).

a. *Judicial Interpretation of the Categories*

Despite the demonstrated ability of the courts to manipulate the categories to achieve just results,[13] many decisions of the highest courts in England are difficult to support on any basis other than, perhaps, *stare decisis*. For example, in two widely criticized decisions, the House of Lords held that a business visitor of a tenant is merely a licensee of the landlord with respect to those parts of the premises remaining under the landlord's control,[14] and that an invitee's knowledge of an unusual danger always bars his action against the occupier.[15] The first decision takes a very narrow, and unrealistic[16] view of what constitutes economic benefit to a landlord. The second decision treats a question of fact, *i.e.*, an invitee's knowledge of an unusual danger, which should be important merely as one element in deciding whether or not the occupier and the invitee used reasonable care in the circumstances of the particular case, as conclusive of the result in every case.[17] Neither decision was inevitable,[18] and neither has been followed automatically in jurisdictions free not to do so.[19] Both decisions were overruled by legislation in England in 1957.[20]

More recently, a Privy Council "hostile to judicial experiment",[21] in rejecting the distinction between static conditions and activities with respect to trespassers, held that an occupier owes no duty of care to a foreseeable trespasser with respect to activity on his land.[22] Again hardly an inevitable conclusion, and one which awaits reconsideration by the House of Lords under its new approach to *stare decisis*.

b. *The Categories*

Undoubtedly the occupiers' liability categories in their preferential treatment of occupiers of land represent the legal philosophy of a bygone age. With a change in philosophy, and despite the courts' considerable ability to manipulate the categories to reflect that change, there is a growing impatience with the categories simply because they are categories. In their imposition of distinct duties of care to each class of entrant the categories are inconsistent with the modern tort tendency to generalize. As Dean Wright pointed out:[24]

> [C]ategories 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

13 Text, *supra*.
14 *Jacobs* v. *L.C.C.* [1950] A.C. 361.
15 *London Graving Dock* v. *Horton* [1951] A.C. 737.
16 "If the occupier has any interest of a business kind in the presence on his premises of the other person such as would naturally lead him to 'invite' the visitor if he gave his mind to the question, it is, in my opinion, sufficient to cast on him that measure of care which the common law exacts towards an invitee . . . . [T]he landlord of a block of flats must inevitably be interested in making his staircases and lifts available to persons desiring to visit his tenants, for if he did not provide those facilities of access he could not let his flats.": *Haseldine* v. *Daw* [1941] 2 K.B. 343 at 352-353 (C.A. per Scott L.J.).
17 The majority decision in the *Horton* case was tellingly criticized by the dissenters, Lords MacDermott and Reid.
18 Any more than the English Court of Appeal's conclusion that a member of the public visiting a public park is a mere licensee: *Ellis* v. *Fulham Borough Council* [1938] 1 K.B. 212.
19 In Canada, for example, the Supreme Court appears to have rejected both cases: *Hillman* v. *MacIntosh* [1959] S.C.R. 384; and *Campbell* v. *Royal Bank of Canada* [1964] S.C.R. 85.
20 Occupiers' Liability Act, 1957, 5 & 6 Eliz. II, c. 31.
21 Fleming, *supra*, n. 2 at 445, footnote omitted.
22 *Comr. for Rlys.* v. *Quinlan*, *supra*, n. 11. The Privy Council accepted the distinction between static conditions and activities with respect to lawful visitors. As pointed out, *supra*, n. 11, and accompanying text, the Australian device of distinguishing occupancy and nonoccupancy duties was also rejected in the *Quinlan* case.
23 Policy statement by Lord Gardiner, L.C., [1963] 3 All E.R. 77.
24 Wright, *Cases on the Law of Torts* (4th ed., 1967) at 667-668.

> part of the law that what we need are either more categories to fit the facts—which makes categorizing futile since there may not 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.

The primary distinction drawn by the occupiers' liability categories is between lawful and unlawful visitors, between those who are on the land with the occupier's consent and those who are not. On its face a reasonable enough distinction, and one which would seem to justify different rules of law.

The main difficulty with the category of unlawful visitors, the trespass category, and its one rule of law, is the wide variety of people it encompasses. The toddler wandering away from his mother[25] and the felon engaging in burglary are both trespassers. While it seems reasonable that the only duty owed to the felon is not to injure him intentionally or recklessly (if indeed a felon is owed even this limited duty[26]), that this should be the extent of the occupier's duty to the toddler offends one's sense of justice. And yet this is the result of having only one rule for the trespass category. The fact that this rule can be manipulated by expanding the meaning of intentional or reckless conduct, or finessed by pushing a trespasser into a higher category does not provide a satisfactory solution to the trespass problem because such tactics depend on the predilections of the particular court.

The main distinction drawn by the categories with respect to lawful visitors is that between those who confer an economic benefit on the occupier and those who do not: the former are invitees, the latter are licensees. There is a distinct rule of law for each category. To an invitee an occupier owes a duty to use reasonable care to prevent injury from unusual dangers of which he knows or ought to know. To a licensee his only duty is to warn of hidden dangers of which he is aware. These allegedly distinct legal rules are often difficult to distinguish satisfactorily.[27] This may to some extent account for the previously mentioned[28] judicial tendency to bring the two duties together.

Ignoring for the moment the basis of the distinction drawn between lawful visitors (economic benefit to the occupier), one might well doubt the necessity or appropriateness of drawing a distinction at all. Why should all lawful visitors not be entitled to the same standard of care? Historically, the limited duty of care owed by occupiers to licensees evolved by analogy to gifts of chattels, which, in order to give rise to liability, required something like fraud by the donor. The analogy does not seem particularly apt. Fraud aside, the donee of a chattel seems to be in as good a position as the donor to inspect it for defects. This is not true, however, of a licensee of land. The reasonable expectations of the parties in the two situations seem to be different.

Accepting the distinction between lawful visitors, based on economic benefit to the occupier, there is obvious difficulty of deciding when such benefit is present and when it is not. For example, in the case of business premises open to the public, say a department store, how is economic benefit determined? Obviously a person who makes a purchase confers an economic benefit on the occupier and is thus an invitee.

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25 A child of just over two was held to be a trespasser in *Videan* v. *B.T.C.*, *supra*, n. 9.
26 see Prosser, *Torts* (3rd ed., 1964) at 118.
27 In particular, the distinction between "unusual" and "hidden" dangers.
28 Text, *supra*, n. 6, 7, 9, and 12.

But what if he merely looks and does not buy, or returns something that he bought previously? Or what of a child accompanying his mother? Or what of a person who enters the store to use a public telephone? Or to take a short cut between streets? Or to get out of the rain? Or to invite a salesgirl to lunch? Or what of the comparison shopper from a rival store who, if he buys something, invariably returns it later? Do all these people confer an economic benefit on the department store? Surely not if the term has any real meaning. And yet should not the occupier of business premises open to the public owe the same duty of care to all such visitors? If the answer to this last question is yes, then, perhaps, economic benefit is an inadequate basis on which to formulate the duty of care owed by an occupier of business premises.[29] And this brings me back again to the question of whether there should be two categories of lawful visitors at all, at least with respect to business premises.

On the other hand, might two categories of lawful visitors, distinguished in terms of economic benefit, be justified with respect to private premises? The social guest "invited" to dinner would be a licensee who must accept the premises as they are known to his host, unless that host had some business motive in inviting him. Again there may be difficult problems in deciding whether a visitor to private premises has conferred an economic benefit on the occupier and is thus to be categorized as an invitee. For example, how is a door to door salesman to be categorized? And will it make a difference if he makes a sale? And if it will, does this mean that he is in one category when he comes to the door, and in another when he leaves? And what of a garbageman picking up trash, or a fireman putting out a fire, or a policeman apprehending a thief? Do they all confer an economic benefit on the occupier? And even if they do not should they be put in the same category as the social guest?

3. *Legislative Reform*

Legislative Reform of the law of occupiers' liability has occurred in England, Scotland, and New Zealand, and has been proposed in New South Wales, and most recently, in Alberta.

a. *England*

The Occupiers' Liability Act, 1957[30] was enacted as a result of recommendations contained in the Third Report of the English Law Reform Committee.[31] The Committee's most important recommendations were that the common law distinctions between licensees, invitees, and contractual visitors (where the contract is silent on the terms of entry) be abolished; that the occupier owe a common duty of care to all lawful visitors; that the common duty of care be capable of modification or exclusion; and that the law relating to trespassers remain the same. Sections 1(1), (2), 2(1), 2(2), and 5(1) of the Act effected these recommendations. The most important provision is that which

[29] The prevailing American view is that when premises are thrown open to the public there is a representation of safety by the occupier, and a reliance by the visitor, which justifies putting him in the invitation category, quite apart from the question of economic benefit: Prosser, *supra*, n. 26 at 398-399.

[30] *Supra*, n. 20.

[31] Cmd. 9305 (1954). The two House of Lords' decisions, *Jacobs* v. *L.C.C.*, *supra*, n. 14, and *London Graving Dock* v. *Horton*, *supra*, n. 15, provided the main impetus for the initiation of reform in England.

establishes a common duty of care to all lawful visitors. Section 2(2) defines the common duty of care 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 purposes for which he is invited or permitted by the occupier to be there."

The Act creates two categories of entrants on real property: lawful visitors and trespassers. Common law principles will determine whether a particular entrant is a trespasser, or is on the premises with the occupier's express or implied consent and is thus a lawful visitor. Presumably, there will be the same tendency to find an implied consent with respect to trespassing children that there is at common law.[32] Similary, common law principles will determine whether a lawful visitor has exceeded "the purposes for which he is invited or permitted by the occupier to be there", and has thus become a trespasser, and common law principles will also determine whether or not a defendant is an occupier.

The common duty of care arises once the relationship of occupier and lawful visitor is established. The common duty is the ordinary duty of care in negligence. Thus with respect to lawful visitors who at common law would be licensees the Act imposes a greater obligation on the occupier. With respect to those who at common law would be invitees the Act probably imposes about the same obligation, and with respect to at least some contractual visitors probably a lesser obligation.

Presumably, ordinary negligence principles will apply in determining whether an occupier is in breach of his common duty of care and thus is negligent. He will have to come up to the standard of the reasonable man of ordinary prudence. In determining whether he has met that standard the court will balance the chance and seriousness of the threatened harm against the utility, if any, of the occupier's conduct and the measures he would have to take to eliminate the risk of harm. One matter that may be considered relevant is the purpose of the entrant's visit: did he come on the occupier's land for his own purposes or did his visit result in some benefit to the occupier, contractual or otherwise? What I am suggesting is that the distinctions drawn at common law among different categories of lawful visitors may be relevant in determining whether an occupier has discharged his common duty of care in a particular case under the Act.

Perhaps the most controversial provision of the English Act is that which allows the occupier to exclude his liability to lawful visitors.[33] Section 2(1) of the Act provides that "An occupier of premises owes the same duty, the 'common duty of care', to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitors or visitors by agreement or otherwise." This section accepts the common law view that an occupier can set the terms upon which visitors come to his property. The most notorious exposition of this view is to be found in *Ashdown* v. *Samuel Williams &*

[32] *Supra*, n. 4.

[33] Section 2(1). Criticized, among others, by Odgers, *Occupiers' Liability: A Further Comment* (1957) Camb. L.J. 39; Payne, *The Occupiers' Liability Act* (1958) Mod. L. Rev. 359.

Section 2(1) does not allow the occupier to exclude his liability to visitors who enter as of right, such as policemen and firemen, because their entry is not dependent on his permission. Section 2(6) of the *Act* conclusively presumes the existence of this permission with respect to such entrants, so as to bring them within the category of visitors to whom the common duty of care is owed.

Sons, Ltd.[34] There it was held that a occupier could exclude his liability to a licensee by posting a notice, which the licensee read, disclaiming liability for injury however caused. A startling conclusion with serious implications for occupier's liability, and one that is inconsistent with general negligence principles. As a matter of general negligence principles a notice excluding liability would have no relevance at all to the issue of the occupier's negligence, unless it referred to a specific danger on the premises, and even then it would not be conclusive.

The Occupiers' Liability Act, 1957 has, apparently, worked well,[35] and has not resulted in an increase in litigation.[36]

b. *Other Jurisdictions*

The Occupiers' Liability (Scotland) Act, 1960[37] was enacted as a result of recommendations contained in the First Report of the Law Reform Committee for Scotland.[38] The most important difference between the Scottish and the earlier English legislation is that the Scottish Act provides that the occupier owes the ordinary duty of care in negligence to trespassers as well as to lawful visitors.[39] This, in effect, returns the law of occupiers' liability in Scotland to its orginal basis of *culpa*, the categories having been introduced into Scottish law by the House of Lords in 1929.[40] The extension of the duty of care to trespassers is a reflection of a different attitude to trespassers in Scotland.[41] Apparently, since the enactment of the Scottish Act there has been only one reported decision involving a trespasser.[42] Of course, the fact that an entrant is a trespasser is relevant to the issue of whether or not the occupier has been in breach of his duty of care. Normally an occupier has no reason to expect trespassers. Thus if the chance of trespass is very small the occupier is unlikely to be held negligent because the risk of injury to trespassers will also be very small.

The New Zealand legislation[43] is substantially the same as the English. So far, apparently, there has been only one reported decision interpreting it.[44]

In 1969 the Law Reform Commission of New South Wales made a thorough investigation of occupiers' liability problems.[45] Their tentative conclusion was that the ordinary duty of care in negligence should apply to all entrants on real property. However, because of the prevalence of jury trials in New South Wales,[46] and the Commission's fear

34 [1957] 1 Q.B. 409 (C.A.). The trial judgment of Havers J., to the same effect, [1956] 2 All E.R. 384, is criticized by Gower, *A Tortfeasor's Charter?* (1965) 19 Mod. L. Rev. 532.

35 See Report of the Institute of Law Research and Reform, Occupiers' Liability (Alta. 1969) at 47-48.

36 See Law Reform Commission (N.S.W.), Working Paper on Occupiers' Liability (1969) at 76.

I have not attempted to examine the jurisprudence interpreting the English Act, of which there is by now a fair amount. For a good summary of that jurisprudence see Street, *Torts* (4th ed., 1968) at 178-198.

37 8 & 9 Eliz. II, c. 30.

38 Cmd. 88 (1957).

39 Occupiers' Liability (Scotland) Act (1960), s. 2(1).

40 Law Reform Committee (Scotland), *supra*, n. 38 at 7. The House of Lords decision is *Addie* v. *Dumbreck* [1929] A.C. 358.

41 Law Reform Committee (Scotland), *id.*, at 7-8.

42 See Law Reform Commission (N.S.W.), *supra*, n. 36 at 38.

43 Occupiers' Liability Act, 1962, No. 31

44 See Law Reform Commission (N.S.W.), *supra*, n. 36 at 37.

45 *Id.*

46 Unlike England, where jury trials in personal injury actions are almost unknown. Five members of the Scottish Law Reform Committee were not prepared to recommend abolition of the trespass category if actions against occupiers were to be heard by juries: Law Reform Committee (Scotland), *supra*, n. 38 at 15.

of too much power being given the jury in occupiers' liability cases, they recommended that the judge retain control over the duty issue. This is in contrast to the English, Scottish, and New Zealand legislation, under which the duty of care arises as soon as the relationship of occupier and entrant is established. The Commission felt that the judge would decide the duty issue on the basis of modern negligence principles. The Commission suggested that "the statutory test consistent with the modern common law approach might be whether the entrant in all the existing circumstances was reasonably entitled to expect that the defendant occupier would as a reasonable man regulate or modify his conduct in respect of the protection of the entrant from the damage he suffered."[47]

Duty, of course, is an essential element in a negligence action. If no duty is owed the plaintiff, the defendant can be as negligent as he pleases towards him. Whether or not a defendant owes a plaintiff a duty of care in a particular case is a question of law for the judge to decide. Thus duty is a control device[48] by which the judge can withhold a case from the jury. He might do this by saying, for example, that in the particular circumstances harm to the plaintiff was not reasonably foreseeable, and, therefore, no duty of care was owed,[49] or he might say that despite foresight of harm to the plaintiff no duty was owed because of the nature of the plaintiff's interest intereferred with by the defendant's conduct.[50] Sometimes the judge might allow the jury to participate in deciding the duty issue by holding that the existence of a duty depends on whether harm to the plaintiff was reasonably foreseeable, and leaving the question of reasonable foresight to the jury. In such a case the duty and breach of duty issues would coalesce.

The New South Wales Commission's desire to retain the judge's control over the jury in occupiers' liability cases is understandable. After all, such control exists in other areas of negligence. However, the test of duty[51] proposed by the commission bothers me. Might not a judge be tempted to resurrect the categories in determining the duty issue?

4. *Alberta Proposals*

A study of occupiers' liability was undertaken by the Alberta Institute of Law Research and Reform "because we concluded that it is too late for the courts to clear away the jungle, and because an Edmonton practitioner had done a valuable study of the subject and was available to bring it up to date."[52] In principle, hardly compelling reasons for initiating law reform, even if pragmatically sufficient.[53]

47 Law Reform Commission (N.S.W.), *supra*, n. 36 at 50.
48 Fleming, *Remoteness and Duty: The Control Devices in Liability for Negligence*, (1953) 31 Can. Bar Rev. 471.
49 As was done by Cardozo, speaking for the majority in the New York Court of Appeal in *Palsgraf* v. *Long Island R.R.* (1928) 248 N.Y. 339.
50 As was done by the majority of the English Court of Appeal in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164. Since overruled, of course, by the House of Lords in *Hedley Byrne* v. *Heller* [1964] A.C. 465.
51 Text, *supra*, n. 47.
52 Bowker, *Organized Law Reform in Alberta*, (1969) 19 U. of T. L.J. 376, at 384. Professor Bowker, formerly Dean of the Faculty of Law, University of Alberta, is the Director of the Institute. The Edmonton practitioner is D. C. McDonald. Presumably, the study referred to is McDonald & Leigh, *The Law of Occupiers' Liability and the Need For Reform in Canada*, (1965) 16 U. of T. L.J. 55. Mr. McDonald brought this study up to date in a report to the Institute on "The Law of Occupiers' Liability", circulated by the Institute to interested persons in 1969.
53 Earlier in his article, Bowker, *supra*, n. 52 at 383-384, said about law reform generally: "It seems to the writer that in Alberta at least, the factors in determining the subjects to undertake are (1) reforms already made elsewhere and (2) availability of manpower and funds. Theoretically, of course, urgency should be the main factor."

The Report of the Alberta Institute provides a thorough examination of occupiers' liability problems.[54] The Report begins by pointing out the unsatisfactory nature of the common law of occupiers' liability; it continues with a summary of its main recommendations, followed by a critical examination of the existing common law rules, interspersed with detailed proposals for legislative change. The Report concludes with a list of its detailed proposals and a recommendation that they form the basis for an Occupiers' Liability Act. The appendices to the Report include the Occupiers' Liability Acts of England, Scotland, and New Zealand.

I shall examine what I consider to be the four most important proposals. These are: first, that there be a common duty of care owed to all visitors; second, that the duty owed to trespassers remain unchanged, except for child trespassers; third, that there be a special duty owed to child trespassers in some circumstances; and, fourth, that an occupier be able to exclude his liability.

(a) *Common Duty of Care*

The Report recommends:[55]

> 1. That the occupier of premises should owe to all visitors the same duty of care; and that the common duty of care should be a duty to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier or is permitted by law to be there; and this duty should apply to the condition of the premises, activities on the premises and the conduct of third parties.

This recommendation incorporates several of the English Act's provisions,[56] which the Alberta Institute, after examining the reported cases, was convinced had worked well.[57] Because doubts had been expressed[58] whether the English Act's common duty of care includes activities as well as conditions, the Report in this recommendation makes it clear that the common duty does extend to activities, as well as to the conduct of third persons. This latter provision imposes an obligation on the occupier to use reasonable care to control the conduct of those threatening harm to his visitors.[59] The Report recommends leaving to the courts the determination of what is reasonable care because "the law does this elsewhere in the field of negligence, and this field [occupiers liability] is one with which the Courts are familiar by training and experience."[60]

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[54] The Report, *supra*, n. 35 at 2, confines itself to the liability of occupiers, unlike the legislation in England, Scotland, and New Zealand, which deals with the liability of lessors out of occupation to some extent.

[55] *Id.*, at 99-100. "Occupier" is defined in recommendation 2: id., at 100. "Visitor" is defined in recommendation 3, *id.*, as "(1) A person whose presence on premises is not unlawful. (2) A person whose presence on premises has become unlawful and who is taking reasonable steps to leave those premises." It is not at all clear from the Report's comments on the definition of "visitor", *id.*, pp. 48-50, what situations are covered by sub-paragraph (2). The only one I can imagine is where an occupier revokes his permission, but I should not have thought that such a visitor's presence became unlawful until after he had been given a reasonable opportunity to leave.

Recommendation 8 provides "that where persons enter or use any premises in exercise of a right conferred by contract with an occupier of premises, the duty he owes them insofar as the duty depends on a term to be implied in the contract by reason of its conferring that right, should be the common duty of care.": id., at 101.

[56] Occupiers' Liability Act, 1957, s. 2(1), (2), & (6).

[57] Report, *supra*, n. 35 at 47.

[58] Law Reform Commission (N.S.W.), *supra*, n. 36 at 54.

[59] An obligation recognized in certain circumstances by the common law of occupiers' liability: *Booth v. St. Catherine's* [1948] 4 D.L.R. 686 (S.C.C.).

[60] Report, *supra*, n. 35 at 46.

(b) *Trespassers*

The Report recommends: [61]

> 13. That the liability of occupiers to trespassers should be for wilful or reckless conduct, subject to the special provision for child trespassers.

Trespassers were excluded from the common duty of care because ". . . the present law relating to trespassers is satisfactory."[62] Apparently, this view of the present law is based on a passage in Mr. McDonald's report to the Institute in which he said there is "general satisfaction in the legal profession with the [common law] duty"[63] owed to trespassers. If this is in fact the reason for the Reports' recommendation that the *status quo* be retained, and assuming the existence of this professional satisfaction, I question its basis and relevancy. There are many lawyers who do not share the Report's enthusiasm for the law relating to trespassers.[64]

(c) *Child Trespassers*

The Report recommends: [65]

> 14. That where an occupier knows or has reason to know that there are trespassing children on his premises and that conditions or activities on the premises create a danger of death or serious bodily harm to those children, the occupier should be under the common duty of care toward them; in determining whether the duty has been discharged consideration should be given to the youth of the children and their inability to appreciate the risk and also to the burden of eliminating the danger or protecting the children as compared to the risk to them.

The Report did not recommend that the common duty of care be applied generally to child trespassers, because of a fear of placing an undue burden on occupiers.[66] This recommendation imposes the common duty of care in specific circumstances only. In framing these circumstances the Report relies on a number of sections of the American Restatement of Torts.[67] I wonder whether this special provision for trespassing children really imposes a more onerous obligation on occupiers than that imposed at common law, particularly if, as the Report suggests,[68] recklessness is probably equivalent to gross negligence? In other words, where an occupier knows or has reason to know (and the Report emphasizes that "has reason to know" means something more than "should know"[69]) of the presence of trespassing children and that conditions or activities on his land create a danger of death or serious bodily harm to them, would not most courts find him guilty of recklessness, *i.e.*, gross negligence, if he did not take steps to protect them?[70]

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[61] *Id.*, at 102.
[62] *Id.*, at 51.
[63] McDonald, *supra*, n. 52 at 26. I should point out that this is not Mr. McDonald's personal view. His recommendation with respect to trespassers, id., at 31, was not accepted by the Report.
[64] A number of academic critics of the common law as it applies to trespassers are mentioned in the Report, *supra*, n. 35 at 50-51. In addition the Judges in the High Court of Australia, *supra*, n. 10, have evinced a strong dislike for the law of trespassers.
[65] Report, *supra*, n. 35 at 102. The Report id., at 102, also recommends that "child" not be defined. This raises the problem of the age up until which a child can claim the benefit of recommendation 14: id., at 55-57.
[66] *Id.*, at 52.
[67] *Restatement (Second) Torts*, ss. 333-339.
[68] Report, *supra*, n. 35 at 51.
[69] *Id.*, at 54.
[70] The risk to children in the imagined circumstances, in terms of chance and seriousness, would seem to be substantial enough to call the defendant's conduct gross negligence, particularly if there is no or little utility in that conduct, and the measures necessary to eliminate the risk are minimal. Insofar as it applies to natural conditions on land the special provision for trespassing children probably goes beyond the common law position.

The decision in the *Cardy* case, *supra*, n. 10, the facts of which would seem to fit nicely within the Report's special provision for trespassing children, was upheld by the Privy Council in the *Quinlan* case, *supra*, n. 11, on the basis that the defendant's conduct could be characterized as wilful or reckless.

(d) *Exclusion of Liability*

The Report recommends: [71]

> 10. That liability may be extended, restricted, modified or excluded by express agreement or express stipulation, and reasonable steps must be taken to bring to the attention of visitors any restriction, modification or exclusion of liability.

The main difference between this recommendation and the comparable English provision[72] is that the English provision speaks of excluding liability "by agreement or otherwise". Is an exclusion "by express agreement or express stipulation" the same as an exclusion "by agreement or otherwise"? The Report in its comments about this recommendation[73] is not clear on the meaning of this clause. Would the type of notice in the *Ashdown* case,[74] excluding liability for injury however caused, be considered an "express agreement or express stipulation"? Many commentators believe that the English clause includes the *Ashdown* type of notice.[75] On the other hand, Mr. McDonald in his report to the Institute criticized the *Ashdown* case, and recommended that that type of notice be insufficient to exclude liability.[76] Apparently, however, the Report includes the *Ashdown* type of notice in the clause "express agreement or express stipulation" on the basis that there is "no evidence of widespread use of exculpatory notices" and, in any event, "Canadian cases construe them narrowly".[77]

I fail to see the necessity or justification for such an exclusionary provision. If there is a contract between an occupier and a visitor, the extent of the occupier's obligations may be expressly dealt with in the contract.[78] But the Report's recommendation on the exclusion of liability is not concerned with contract law. It is concerned with excluding tort liability. Where you have provided for a common duty of care based on ordinary negligence principles is there any reason to provide more than the ordinary negligence defences? I think not. The Report recommends that contributory negligence[79] and assumption of risk[80] be defences to an occupier. In my opinion an exclusionary agreement or stipulation should be merely one factor to be taken into account in deciding the issues of whether an occupier has discharged his common duty of care,[81] or a visitor has used reasonable care for his own safety, or has assumed the risk.[82] However, the type of general exclusionary notice involved in the *Ashdown* case would not seem to be relevant to any of these issues, and thus should be completely ineffective.

5. *Conclusion*

Perhaps the basic question is whether the common law of occupiers' liability is in need of legislative reform. Professor Bowker sug-

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71 Report, *supra*, n. 35 at 101.
72 Occupiers' Liability Act, 1957, s. 2(1), the provisions of which are set out in the text, *supra*.
73 Report, *supra*, n. 35 at 72-76
74 *Supra*, n. 34.
75 Odgers, *supra*, n. 33; Payne, *supra*, n. 33.
76 McDonald, *supra*, n. 52 at 23.
77 Report, *supra*, n. 35 at 75. The final clause of recommendation 10, id., at 101, seems to support this view.
78 Recommendation 8, id., at 101, provides the common duty of care for a contractural visitor only if there are not express provisions in the contract to the contrary.
79 Recommendation 7, id., at 101.
80 Recommendation 6, id., at 100.
81 After all, recommendation 5, id., provides that a warning does not necessarily discharge the occupier. Recommendation 5 is designed to overturn the *Horton* case, *supra*, n. 15.
82 Assumption of risk is interpreted very narrowly by Canadian Courts: *Lehnert* v. *Stein* [1963] S.C.R. 38.

gested, as one justification for the Alberta study, that "it is too late for the courts to clear away the jungle".[83] On the other hand, later in the same article when discussing law reform generally he said:[84] "[T]here are some areas, particularly in private law, where a good case can be made for judicial development. This is particularly true in tort where *stare decisis* never had the justification that it has in contract and property. One can give endless examples to show that the common law of tort has, in fact, developed as new problems have arisen."

Are the courts capable of rationalizing the common law of occupiers' liability? There is some evidence that they are. Such previously mentioned[85] judicial techniques as confining the categories to static conditions while applying general negligence principles to activities, or in certain circumstances going outside the categories to find non-occupancy duties based on general negligence principles, indicate the courts' ability to adapt the law to meet changing social needs. However, the courts are probably incapable of abolishing the categories. No doubt there is an air of artificiality about judicial attempts to pay lip service to the categories on the one hand and to escape from their confining effects on the other. The most attractive aspect of legislative reform is that such travails will no longer be necessary.

And yet may there not be dangers in legislation that provides a common duty of care with respect to all visitors, or at least with respect to all lawful visitors? As Dean Wright said:[86]

> 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? And if so, what are the significant factors that the courts will consider or, for that matter, what were the social facts considered by the Committee? . . .
>
> Of more importance, however, is the question whether a generalization of this kind may not obscure important differences. Without expressing disapproval of legislation of this kind, in a sense it is a tidying-up process reached in the interest of logical symmetry in pursuit of the "fault" principle. Even assuming the validity of that principle, is there not as much reason for distinguishing the care to be expected of a person inviting a social guest to dinner and the proprietor of a large department store throwing its doors open to the public? And if there is a move to strict liability to members of the public via the nuisance route in England,[87] should this be extended to the expected public in department stores? And if juries administer this law, will they not tend to apply a strict liability to such stores and, if so, will they not tend to do the same to the private homeowner? It may be that the English judge, sitting alone, will be able to make some of these distinctions, but only if he is willing to recognize his creative role and to use it in the realization that . . . there is a world of difference in the mere shifting of a loss from a plaintiff to a defendant, and a liability which is not shifted to the defendant alone but to him as a means of loss distribution. In other words the new legislation must, to be realistic, furnish merely a new starting-place for further distinctions.

Surely, as Dean Wright suggests, there is a crucial distinction between private and business premises, both in terms of the expectations of visitors with respect to their safety, and the availability and incidence of insurance. And yet the common duty of care established by legislation in a number of jurisdictions, and proposed for Alberta,

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[83] Bowker, *supra*, n. 52 at 384.
[84] *Id.*, at 386.
[85] *Supra*. Text. *supra*, n. 14 and 15.
[86] Wright, *The Adequacy of the Law of Torts*, [1961] Camb. L.J. 44 at 47 and 48. The committee referred to by Dean Wright is the 1954 English Law Reform Committee.
[87] A reference to *Wringe* v. *Cohen* [1940] 1 K.B. 229 (C.A.).

takes no account of this distinction. Admittedly the courts can take account of it in determining the standard of care in particular cases. But will they, particularly if juries are involved?

Before proposing legislation should not the Alberta Institute have investigated the social facts of occupiers' liability in Alberta? For example, what kinds of cases come before the courts? What are their results? How often is insurance involved? What is the incidence of liability insurance on private and business premises? What impact is legislative reform likely to have on insurance rates, and settlement practices of insurance companies?

In expressing these doubts about legislative reform, no doubt I have revealed my common law bias.