NOTES

Recent Cases on Occupier's Liability

The recent decision of the Alberta Supreme Court in *Marquardt* v. *DeKeyser & DeKeyser Enterprises Ltd.*[1] is another example of a judicial attempt to circumvent the somewhat Draconian attitude of the law to a trespasser. This is done by elevating him to the status of a licensee through an implication of consent by the occupier to his presence. When regarded as a licensee, the law affords him greater protection for any injuries he may suffer on an occupier's property than it would were he a trespasser.

The plaintiff, a thirteen year old boy, sued for damages arising from injuries (severe burns over his body) which he suffered on the defendant's land after a pile of shale on which he was climbing caved in under him. With the defendant's consent, part of the property had been used as a baseball diamond by members of the community in which the plaintiff was a resident. A rather deep, but dry, creek bed separated it both from an abandoned coal mine and piles of slack that had been hauled from the mine before it ceased operations in 1960. No fences enclosed this area; nor were there any visible "No Trespassing" signs near the shale.[2] Prior to the accident, two trucks were present at the pile for the purpose of removing it, which, in point of time, was five years after the last slack had been deposited there and which had not been disturbed since. The truckers, aware that some children (including the plaintiff) were watching them, chased the youngsters away from where they were working although they did not realize when they warned the children that under the top level of the pile was hot smouldering shale.[3]

Although Allen, J.A., in delivering the opinion of the Court, discussed the fact that the child might have been a trespasser,

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[1] [1972] 2 W.W.R. 49 (App. Div.).

[2] According to the facts of the case, at one time there had been a similar sign near the shale pit, but on the day of the accident this sign was lying in the weeds and was so battered as to be illegible.

[3] Only Hunter, a self-employed trucker, realized the possibility of the shale burning at the centre of the pile. Smith, who was employed by the defendant, was not aware of this possibility and the danger he had in mind when he chased the children off the property was of the general nature of the truckers' operations.

he did not decide whether the defendant would have been liable for the injuries that the plaintiff suffered in his status as a trespasser. Instead, he relied on the trial judge's finding[4] that the plaintiff was a licensee and, in consequence, dismissed the defendant's appeal on the basis that the danger

> ... although its precise nature may not have been appreciated, was known or ought to have been known to the occupier...[5]

Moreover, the latter had failed to take adequate steps to prevent the occurrence of the accident.

It is not quite clear how the licence is inferred. Finding a licence where no express permission to come onto land has been given is a frequently used method of fixing an occupier with liability.[6] Whenever he is conscious of a trespass and neglects to protest the presence of the trespasser, the latter becomes a licensee. But one cannot always imply a licence unless the category of trespasser be devoid of meaning. In *Edwards* v. *Railway Executive*,[7] it was stated resolutely that the burden is on the person claiming the licence to show either express permission by the occupier or some action on his part from which his consent to the trespass can be readily inferred. A property owner is not required to fence off his property against trespassers or erect signs warning against trespassing.[8] If he takes reasonable steps to object to an intruder's presence once he is aware of it, that is enough.[9]

While permission to play on part of the defendant's land was expressly granted in this case, this surely did not include permission to play on any part of the land. The shale pit was far enough from the ball diamond not to be included in the area permitted to be used for recreational purposes. The defendant was not obliged to fence off the pit, nor was it shown that the children played near it prior to the accident. Further, when the truckers saw the children they chased them away because of the danger involved in the truckers' operations. Were not the children then trespassers when they crossed the creek to go to the shale pile? An occupier is under

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[4] (1970) 75 W.W.R. 439, at p. 441 (Alta. Sup. Ct.).

[5] [1972] 2 W.W.R. 49, at p. 62.

[6] E.g.: *Lowery* v. *Walker*, [1911] A.C. 10, (1910) 103 L.T. 674 (H.L.).

[7] [1952] A.C. 737, [1952] 2 All E.R. 430 (H.L.).

[8] *Addie* v. *Dumbreck*, [1929] A.C. 358, at p. 369 (H.L.); *Adams* v. *Naylor*, [1944] K.B. 750, [1944] 2 All E.R. 21 (C.A.); *Dean* v. *City of Edmonton*, (1965) 51 W.W.R. 539, at p. 547 (Alta. Sup. Ct.).

[9] *Addie* v. *Dumbreck*, [1929] A.C. 358, at p. 372 (H.L.), *per* Viscount Dunedin; approved in: *McEwen* v. *C.N.R. and Imperial Oil Ltd.*, (1961) 34 D.L.R. (2d) 743, at p. 748 (Alta. Sup. Ct.); *Bonne* v. *Toews*, (1968) 64 W.W.R. 1, at p. 5 (Man. Q.B.); *Nelson* v. *The Pas*, (1969) 67 W.W.R. 580, at p. 582 (Man. Q.B.).

no liability to an entrant unless injury occurs while his property is being enjoyed in the manner and to the extent contemplated by his consent.[10] If an individual ventures onto another part of the premises to which no permission to visit has been given, he can expect no greater rights than those conferred on trespassers.[11]

A court may, however, be more ready to infer a licence by means of the doctrine of allurement where the entrant is a child. Thus, where a child has been given permission to go onto part of an occupier's land, and, being attracted by some object, wanders off to another part of the land, it might be said that the occupier should have realized that the object would entice children and that he has tacitly permitted them to go onto the other part.[12] It would seem that this is how Allen, J.A. arrived at the conclusion that a licence had been created since he adopted the finding of the trial judge. The latter stated:

> The evidence clearly indicates that there was implied permission for residents, particularly children... to enter the company lands. There was express permission for them to use the ball diamond that lies just east of the shale pit. The company took no steps whatever to effectively post its lands with signs or to fence it in any way. It knew or ought to have known that neighbourhood children played on its lands which formed a natural and attractive playground for them. It did nothing whatever to prevent them.[13]

It would seem quite likely that the coal mine and shale pits were sufficiently attractive traps to warrant the operation of the doctrine.[14]

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[10] "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters...". *The Carlgarth*, [1927] P. 93, at p. 110, *per* Scrutton, L.J.; *Hilden and Pettigrew* v. *I.C.I. (Alkali) Ltd.*, [1936] A.C. 65 (H.L.), at p. 69, *per* Lord Atkin.

[11] *Jenkins* v. *Great Western Ry.*, [1912] 1 K.B. 743, [1911-13] All E.R. Rep. 216 (C.A.); *Knight* v. *Martelle*, (1965) 53 D.L.R. (2d) 390, at p. 403 (Ont. C.A.); *Connor* v. *Cornell*, (1925) 57 O.L.R. 35 (App. Div.).

[12] *Glasgow Corp.* v. *Taylor*, [1922] 1 A.C. 44, [1921] All E.R. Rep. 1 (H.L.); *Victoria Rys.* v. *Seal*, [1966] V.R. 107 (Sup. Ct.).

[13] [1972] 2 W.W.R. 49, at p. 53.

[14] The trap must be both attractive and inherently dangerous and these are a question of fact. The following have been regarded as traps: poisonous berries in a public park: *Glasgow Corp.* v. *Taylor*, [1922] 1 A.C. 44, [1921] All E.R. Rep. 1 (H.L.); a bomb-damaged house in the course of demolition: *Davis* v. *St. Mary's Demolition and Excavation Co.*, [1954] 1 W.L.R. 592, [1954] 1 All E.R. 578 (Q.B.); a bank on which children were allowed to play, at the foot of which were tins and broken glass: *Williams* v. *Cardiff Corp. Council*, [1950] 1 K.B. 514, [1950] 1 All E.R. 117 (C.A.). *Contra:* a heap of paving stones: *Latham* v. *Johnson*, [1913] K.B. 398, [1911-13] All E.R. Rep. 117 (C.A.); a stack of metal: *Morley* v. *Staffordshire County Council*, [1939] 4 All E.R. 92 (C.A.); and also: *Prince* v. *Gregory*, [1959] 1 W.L.R. 177, [1959] 1 All E.R. 133 (C.A.)

That which would be an open and obvious source of danger for an adult could well be an attraction, a fascination and a temptation for a child, luring him onto the property. What is curious, however, is that the Court held that the infant plaintiff was contributorily negligent for the accident. He was old enough to have realized the peril in which he placed himself and should have been aware that the shale pile was dangerous, even if only that it might collapse while he was climbing on it. In the view of Allen, J.A.:

> Kenneth was not a child of tender years and must be fixed with some appreciation of the possibility of danger he might encounter on the pile.[15]

Is it not somewhat anomalous that a child could be considered at the same time as being sufficiently old to realize the possibility of danger, but young enough to benefit by the doctrine of allurement? There is no logical contradiction here, but it is clear that this involves a considerable extension of that doctrine.

Although Allen, J.A. found that the plaintiff was a licensee, he said that he was not altogether sure that it would have made any difference if the plaintiff were a trespasser.[16] He gave the impression of being influenced by the judgment of the Court of Appeal in *Herrington* v. *British Railways Bd.*,[17] where a six year old child was electrocuted by a live rail after crawling through an unrepaired hole in a fence built by the defendant to enclose its railroad from a nearby public estate. The Court followed the rule in *Addie* v. *Dumbreck* [18] that a trespasser has no claim against an occupier unless the injury is caused by his intentional act or reckless disregard. However, two of the three judges who decided the case thought that "reckless disregard" does not differ in kind from ordinary negligence. It is rather a question of degree. Edmund Davies, L.J. held that it was gross negligence,[19] and Cross, L.J. found that it was simply a very high degree of negligence.[20] In *Marquardt*, it would appear that Allen, J. A. would have been willing to find the defendant liable under this expanded definition of recklessness had he not found him liable as a licensor, although this was not expressly discussed.

Since this decision of the Alberta Supreme Court, the House of Lords has had the opportunity to consider the decision of the Court of Appeal in *British Railways Bd.* v. *Herrington*.[21] Although it dis-

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[15] [1972] 2 W.W.R. 49, at p. 63.
[16] *Ibid.*, at p. 54.
[17] [1971] 2 W.L.R. 477, [1971] 1 All E.R. 897 (C.A.).
[18] [1929] A.C. 358, [1929] All E.R. Rep. 1 (H.L.).
[19] [1971] 1 All E.R. 897, at p. 914.
[20] *Ibid.*, at p. 918.
[21] [1972] 1 All E.R. 749 (H.L.).

missed the appeal, it called into serious question the rule in *Addie's* case, which had essentially been followed by the Court of Appeal.

All five Lords concurred in the dismissal, but only Lords Pearson, Morris and Diplock were willing to depart from the rule in *Addie's* case. Considering the extensive changes in both physical and social conditions since that decision, it was held that the occupancy duty enunciated in that case should be discarded forthrightly rather than circumvented.[22] The remaining members of the Court, Lords Reid and Wilberforce, did comment on the inadequacy of the law, but they were not willing to alter it so drastically without Parliamentary assistance.[23]

In a general but succinct manner, Lord Pearson accurately reflected his position, as well as that of Lords Morris and Diplock, in the following passage:

> If the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes to a lawful visitor. Very broadly stated, it is a duty to treat the trespasser with ordinary humanity...[24]

Although the members proposed a new treatment of the duty owing to a trespasser, they did not intend to so completely alter the position of the occupier with respect to a trespasser as to impose any more demanding a burden on him than is necessary. The duty is to arise only when the occupier has:

1. actual knowledge of either the presence of the trespasser on his land or facts which make it likely that the trespasser will come onto his land;[25] and

2. actual knowledge of facts concerning the condition of his land or of activities carried out on it which are likely to cause personal injury to a trespasser who is unaware of the danger.[26]

Until the time arrives that the above two conditions are met, the position of the occupier is to remain the same as it always has. That is, he is still under no duty to fence off his land against

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[22] *Ibid.*, at p. 769, *per* Lord Morris; at p. 779, *per* Lord Pearson; at p. 787, *per* Lord Diplock.

[23] *Ibid.*, at pp. 757-8, *per* Lord Reid; at p. 778, *per* Lord Wilberforce.

[24] *Ibid.*, at p. 779, *per* Lord Pearson. See also: at p. 765, *per* Lord Morris; at pp. 776-7, *per* Lord Wilberforce.

[25] *Ibid.*, at p. 758, *per* Lord Reid; at p. 776, *per* Lord Wilberforce; at p. 795, *per* Lord Diplock.

[26] *Ibid.*, at p. 758, *per* Lord Reid; at pp. 767-8, *per* Lord Morris; at pp. 777-8, *per* Lord Wilberforce; at p. 794, *per* Lord Diplock.

trespassers, children included. There is no general duty on the part of the occupier to foresee the possibility or likelihood of a trespass on his land, or to carry out an inspection to see whether a trespass is occurring.[27]

When it is imposed, it would seem that this duty is simply to take reasonable care to enable the trespasser to avoid the danger.[28] As such, it is open to question whether the new duty differs greatly from the duty of a licensor to warn of hidden dangers which he knows or of which he has imputed knowledge. Such a warning, at least in the case of an adult, would probably suffice to enable him to avoid the danger.

It is less clear, however, what an occupier must do to absolve himself of liability to a trespassing child. A warning on a sign could not suffice if the child is too young to read. In this case, the defendant was found liable for failing to repair the fence after it knew that children played in the vicinity. It had failed to act with due regard to humane considerations by not taking those steps which common sense would dictate.[29] Where the likely trespasser is a child too young to understand or heed a warning, the occupier may have a duty to maintain adequate physical obstacles to keep the child away from danger if it is not possible to be on hand continuously to chase him away.[30] This is quite possibly what the licensor would have had to have done in the *Marquardt* case in order to avoid liability had the plaintiff been very young.[31]

It is therefore suggested that this new duty is not unlike the duty of an occupier to licensees. If this is the case, one must feel great sympathy with Lord Diplock's comment that this new duty has now rendered obsolete the judicial technique of finding an occupier liable by inferring a licence.[32] Two years ago, Professor

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[27] *Ibid.*, at p. 776, *per* Lord Wilberforce; at p. 783, *per* Lord Pearson.

[28] *Ibid.*, at p. 767, *per* Lord Morris; at p. 786, *per* Lord Pearson, at p. 796, *per* Lord Diplock. The duty is, in any event, not so stringent as the common duty of reasonable care owed to lawful visitors under the *Occupiers' Liability Act, 1957*, 5 & 6 Eliz. 2, c. 31, s. 2. *Cf.* Lord Morris at p. 767 and Lord Diplock at p. 795.

[29] *Ibid.*, at p. 759, *per* Lord Reid; at p. 767, *per* Lord Morris; at p. 779, *per* Lord Wilberforce; at p. 786, *per* Lord Pearson; at p. 796, *per* Lord Diplock.

[30] *Ibid.*, at p. 767, *per* Lord Morris; at p. 779, *per* Lord Pearson.

[31] *Cf.* the view of the trial judge: [1972] 2 W.W.R. 49, at p. 53, cited *supra*, at p. 101. *Sed quaere* whether the entry might not be conditional or the child's parents might be liable for contributory negligence: *Latham* v. *Johnson*, [1913] 1 K.B. 398, [1911-13] All E.R. Rep. 117 (C.A.).

[32] [1972] 1 All E.R. 749, at p. 790.

Fleming stated that "[h]owever distasteful, this devious practice will retain its pull until it becomes permissible frankly to admit a duty of care for trespassers in suitable cases".[33] Now that such a duty exists, it is to be hoped that this most strained of legal fictions will be discarded.

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[33] John G. Fleming, *The Law of Torts*, 4th ed., (Australia, The Law Book Co. Ltd.: 1971), at p. 401.

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