COMMENTS
COMMENTAIRES

Veinot v. Kerr-Addison: A Case Note

Occupiers' liability has long been an unsettled field of law, particularly as far as the vexed question of liability towards trespassers is concerned. Some clarification was provided recently by the Supreme Court of Canada in *Veinot* v. *Kerr-Addison Mines Ltd.*[1]

The facts of the case were simple: The plaintiff, Mr Veinot, was driving his snowmobile one night when he lost his way, ran into a steel pipe and injured himself. The pipe belonged to the defendants, who had put it up twenty years earlier to form a gate across their private road in order to discourage vehicles from entering their property. They alleged that the plaintiff was a trespasser, and that they owed him no duty. The plaintiff argued that he had an implied license, and that the pipe was a concealed danger. The jury agreed and he won the case; the defendants appealed.

Meanwhile, the House of Lords had denounced the implied license doctrine in *D.R.B.* v. *Herrington.*[2] In the light of this case, Arnup J.A. of the Ontario Court of Appeal found that there was no evidence of implied license to go to the jury. Following several earlier decisions, he held that the forseeability of a trespasser appearing on the defendants' land was the criterion of their liability as owners. On the facts before him he came to the conclusion that "a few isolated and recent instances of trespass by snowmobilers"[3] did not suffice to make the plaintiff's presence foreseeable, and the appeal was allowed.

The plaintiff in turn appealed to the Supreme Court and was successful on the primary ground that the jury's finding of an implied license should not have been disturbed. However, the Court also held that even if Mr Veinot was a trespasser the defendants would be liable since his presence should have been anticipated and the danger averted by clearly marking the pipe.[4]

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1 (1974) 51 D.L.R. (3d) 533 (S.C.C.); rev'g (1972) 31 D.L.R. (3d) 275 (Ont.C.A.).

2 [1972] A.C. 877.

3 (1972) 31 D.L.R. (3d) 275, 281.

4 (1974) 51 D.L.R. (3d) 533.

The Supreme Court, however, was divided and the division mirrored the split between two opposing philosophies. The older philosophy which maintains the sanctity of private property and sees the trespasser as a nuisance or a danger, was expressed by Lord Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck* as follows:

> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.[5]

The alternative philosophy puts considerations of humanity and personal safety before undisturbed enjoyment of property. It is reflected in the words of Mr Justice Peters of California who said of the trespasser that his "life or limb does not become less worthy of protection by the law ... because he has come upon the land of another without permission".[6]

One of the problems facing the Supreme Court was the difference between a trespasser and a lawful visitor. Invited guests get a better welcome than unknown strangers whose business is unclear. Accordingly, the common law distinguished between trespassers and lawful visitors and defined the occupier's duty of care to the latter far more stringently than that towards the former. The Supreme Court in *Veinot* v. *Kerr-Addison* took a different attitude and the decision continues a recent trend shared by all common law countries towards the more humane view of the trespasser outlined above.

Since the occupier's liability depended on the status of the person entering his premises, much legal finesse went into distinguishing not only between trespasser and lawful visitor, but within the latter category, between licensee and invitee. Often it was hard to see where the line between the invitee and the licensee was drawn. The occupier's business interest was a poor criterion, giving the awkward result that a licensee, perhaps a family friend invited to dinner, was less protected than the invitee, often a shady character reluctantly admitted to discuss a business deal. This distinction was abolished in England by the *Occupiers Liability Act, 1957*[7] which

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[5] [1929] A.C. 258, 365.
[6] *Rowland* v. *Christian* 70 Cal.Rptr.97, 104 (1968).
[7] 5-6 Eliz.II, c.31 (U.K.).

has enabled English courts to decide cases on the basis of whether the plaintiff was lawfully on the defendant's grounds. Alberta has a similar Act.[8] The rest of Canada, however, does not have such legislation and Canadian courts continue to be guided by the distinction between licensee and invitee — in theory at least. It seems, however, that the gap between the two is being quickly closed. Over a decade ago, E. C. Harris said:

> [T]here has been a tendency to raise the level of the occupancy duty owed to licensees so as to make it nearly indistinguishable from that owed to invitees.[9]

In similar manner, it seems that the gap between trespassers and lawful visitors is also narrowing. Harris continues:

> It is true that the occupancy duty owed to trespassers is still very minimal under our law; yet this has been mitigated partly by a disposition on the part of many courts to imply a licence.[10]

Harris' article states the situation as it existed until recently — the trespasser's treatment differed from that of persons entering lawfully. To mitigate the harshness of the law towards the trespasser, Canadian (and English) courts created another category — the implied licensee. This is a tool which in the *Veinot* case was used by the Trial Judge when putting the question to the jury and again by Mr Justice Dickson of the Supreme Court in accepting the jury's findings. The law was further mitigated in the case of trespassing children. The theory of enticement was developed or else simply a tacit preference was given to children, and in most cases won by trespassers, the plaintiff was a child. A further refinement which sometimes mitigated in favour of the trespasser was the distinction made between injury resulting from a static condition of the property and one resulting from an activity by an occupier on his land;[11] the owner is held more responsible for his activities on the land than he is for its static condition. This distinction was maintained by Lord Denning M.R. in the *Videan* case,[12] but rejected by Pearson L.J.[13]

Originally, as mentioned above, the law with respect to trespassers was unequivocally in favour of the owner or occupier, in

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[8] *The Occupier's Liability Act*, S.A. 1973, c.79.

[9] E. C. Harris, "Occupiers' Liability in Canada" in A. M. Linden, *Studies in Canadian Tort Law* (1968), 250, 269.

[10] *Ibid.*

[11] *Winfield on Torts* 8th ed. (1967), edited by J. A. Jolowicz and T. Ellis Lewis, 173.

[12] *Videan* v. *B.T.C.* (1963) 2 Q.B. 650, 667.

[13] *Ibid.*, 678.

keeping with the sentiments of the nineteenth century. In Canada, the protection afforded the trespasser was summed up in *Grand Trunk Railway Company of Canada* v. *Barnett;*[14] it was a negative definition. The duty of the occupier consisted in not injuring the trespasser wilfully, and in not acting in reckless disregard of ordinary humanity. In England, it was the *Addie* case[15] which in 1929 reaffirmed the trespasser's disadvantaged position.

The position remained the same well into the sixties; examples are *Edwards* v. *Railway Executive*[16] and *Commissioner for Railways* v. *Quinlan.*[17] In the *Quinlan* case the Court ignored the statement of Lord Denning M.R. in *Videan* (which had been decided only a year before) to the effect that once the occupier foresees trespassers he must take reasonable care to protect them against injury. Instead they seized upon the principle of foreseeability expressed in that case and hardened it into the statement that an occupier has a duty of care only if "he actually knows" that a trespasser is there, or if his presence is "extremely likely".[18] Yet at this time in all common law countries there was a move to eradicate the distinction between trespasser and lawful visitor, although the English *Occupiers' Liability Act, 1957* still maintains the distinction:

> The Rules ... shall not alter the rules of the common law as to the persons ... to whom [a duty] is owed; and accordingly ... the persons who are to be treated as ... visitors are the same ... as the persons who would at common law be treated as ... invitees or licensees.[19]

Several critics have deplored the intransigence of this statute. Shortly after it was passed, the *Occupiers' Liability (Scotland) Act, 1960,* erased the common law distinction between visitors and trespassers:

> The care which an occupier of premises is required ... to show towards a *person entering* thereon in respect of dangers ... shall ... be such care as ... is reasonable to see that that person will not suffer injury or damage ... .[20]

On the other hand, the 1962 New Zealand *Occupiers' Liability Act*[21] follows the principles of the English Act and extends the common duty of care only to visitors. However, a report of the New Zealand

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[14] [1911] A.C. 361.
[15] *Supra,* note 5.
[16] [1952] A.C. 737.
[17] [1964] A.C. 1055.
[18] *Ibid.,* 1086.
[19] *Supra,* note 7, s.1(2).
[20] 8-9 Eliz.II, c.30, s.2(1) (U.K.).
[21] *Occupiers' Liability Act,* New Zealand Statutes, 1962, vol.1, No.31.

Torts and General Law Reform Committee issued in 1970 has recommended certain amendments which would impose a duty to treat trespassers with as much care as visitors.[22]

On the other hand, in Canada, *The Occupiers' Liability Act*[23] of Alberta which was passed as recently as 1973 maintains the distinction between visitors and trespassers, imposing no duty of care on the occupier towards the latter except in the case of wilful or reckless conduct. This ignores the move towards mitigating the harshness of the law *vis-à-vis* trespassers, and is reminiscent of the earlier attitude expressed in the *Addie* case.[24] However, the Alberta statute does make an exception for child trespassers, towards whom the occupier owes a limited duty of care.[25] In contrast to the Alberta statute, the trend of treating all persons entering the property of another alike is continued by the Ontario Law Reform Commission in *The Report on Occupiers' Liability*. It is recommended in section 2(1) that:

> The provisions of this Act apply in place of the rules of the common law for the purpose of determining the care that an occupier is required to show towards persons entering on the premises... .[26]

During the sixties is was suggested that

> ... there may be serious difficulties involved in attempting to legislate the categories out of existence, and it is possible and probably preferable, to reach the same goal by evolution through decided cases.[27]

The ruling in the *Veinot* case is another step in just such an evolution. It constitutes the logical sequel to the ruling in *Commissioners of Railway (N.S.W.)* v. *Cardy*[28] where a likelihood of trespassers was held to create a duty of care, to *Videan* v. *B.T.C.*[29] where foreseeability of the victim was essential, and of course to the famous case of *B.R.B.* v. *Herrington*. In this last case Lord Reid spoke of "a substantial probability"[30] that a child would touch the electric rail in question. A decision which improved the position of the trespasser still further by lessening the required degree of foresee-

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[22] Report of the Torts and General Law Reform Committee of New Zealand, *Occupiers' Liability to Trespassers* (1970).

[23] *Supra*, note 8.

[24] *Supra*, note 5.

[25] *Supra*, note 8, s.13.

[26] Ontario Law Reform Commission, *The Report on Occupiers' Liability* (1972), 11.

[27] *Supra*, note 9, 268.

[28] (1960) 104 C.L.R. 274.

[29] *Supra*, note 12.

[30] *Supra*, note 2, 899.

ability was *Southern Portland Cement* v. *Cooper* where "a chance that trespassers may come that way"[31] was considered sufficient to place the duty of care on the occupier.

Another aspect of ordinary negligence law was expressed in the *Cooper* case when Lord Reid referred to the relative difficulty involved in making the premises safe for trespassers.[32] This is a consideration not really dealt with in the case under discussion although it was felt by the majority of the Supreme Court that safety would not have been difficult to achieve by the defendant mining company. Concerning the problem of feasibility of protective measures, Graham Hughes claims that treating trespassers under ordinary negligence law would not greatly increase the responsibilities of the owner.[33] The owner usually cannot be expected to know when and where a trespasser will step on his property. Due to the uncertainty of the time and place of the trespasser's appearance, quite often the precautions necessary to protect him will be so out of proportion as not to be reasonable. The Report of the Ontario Law Reform Commission implied this in section 3(1) (a): The duty is one "to take care ... to see the person will be reasonably safe in using the premises for the purposes contemplated by the occupier".[34]

The continued adherence to the distinction between those lawfully and unlawfully on the property of another tends to lead to the use of fictions, a point made in a recent American case, *Rowland* v. *Christian*.[35] One such fiction was the notion of the implied licensee which was the consequence of treating alike all persons who were not invited or tacitly tolerated. It was this concept which was upheld by the Supreme Court in *Veinot* and which was the main ground of the decision in favour of the plaintiff in that case.

Until quite recently little was said about essentially different forms of trespassers — the prowler at one end of the spectrum and the innocent wanderer who lost his way at the other. In between are a number of situations which reflect various degrees of mischievousness or innocence on the part of the trespasser. The reluctance of the courts to give much weight to the mental state of the trespasser may be based on the frequently encountered difficulty

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[31] [1974] 1 All E.R. 87, 98.

[32] *Ibid.*

[33] G. Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation* (1959) 68 Yale L.J. 633.

[34] *Supra,* note 26, 13.

[35] *Supra,* note 6.

of proving what was in the trespasser's mind when he stepped onto someone's property, and on the concern of tort law with acts and not with mental states. The implied license was a device used to give better treatment to the unintentional trespasser. The result was that a person entering the property of another might fall within one of four categories: trespasser, trespasser with implied license, invitee or licensee. The corollary was four degrees of increasing responsibility owed by the occupier.

In the *Veinot* case the majority of the Supreme Court held that the jury's verdict of implied license should be accepted. The second circumstance creating liability on the part of the defendants if the plaintiff was assumed to have an implied license, was the finding that the pipe gate was a hidden danger because it was unmarked and unlighted. Admittedly, it was a danger only to snowmobilers, but once snowmobiles existed and might appear on the road, it could be classified as such. However, even if Mr Veinot was regarded as a trespasser, the Court held that it was very likely that he or some other snowmobiler might find himself on the ploughed road at night. This conclusion was drawn from snowmobile tracks that had been found in this area by employees of the mining company. Moreover, snowmobilers are now ubiquitous in winter and must be expected where there were formerly neither vehicles nor persons on foot. Mr Justice Dickson reviewed the jurisprudence and noted the "two distinct, not easy to reconcile" lines of authority which emerged: One regarded the right of ownership as paramount; the other "gave effect to changing ideas of social responsibility" and imposed a duty of care on the occupier *vis-à-vis* the trespasser.[36] The Supreme Court in a close decision (5-4), came down in favour of the second argument.

The minority opinion, as expressed by Mr Justice Martland, agreed with the Court of Appeal in its view that there was no evidence of implied license to go to the jury since the private road was physically separated into a more frequented part and into an untravelled section on which the accident happened. This is in line with *Edwards* v. *Railway Executive*[37] where children had been known to break through the fence around the railway embankment, and though the jury found a tacit permission, the House of Lords did not agree. In the *Veinot* case, the minority held that the owners, to

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[36] *Supra*, note 4, 549.

[37] *Supra*, note 16.

be liable on the basis of an implied license, must have been aware of such intrusions and permitted them — not just tolerated them.

Mr Justice Martland went on to consider in the alternative whether a duty was owed to the plaintiff *qua* trespasser. He distinguished the leading cases in favour of trespassers on a point canvassed above — they all have children as injured plaintiffs: the *Cardy* case,[38] *Herrington* case,[39] and *Cooper* case,[40] to some extent even the *Videan* case[41] and back in 1930 the *Excelsior Wire Rope* case,[42] where no effort was made to determine whether children were trespassers or licensees (or permittees). It appears that the extended duty of the occupier was only towards child trespassers up to now. Lord Wilberforce elaborated on this fact in the *Herrington* case, as did Lord Reid in the *Cooper* case.

The minority in *Veinot* felt that in a situation where the occupier was not actually aware of trespassers, he must know of "facts which show a substantial chance that they might come there"[43] before he could be found liable. Such facts did not exist in the present case.

Mr Justice Martland further distinguished the above cases from *Veinot* on account of the type of danger involved. In the *Herrington* case Lord Diplock referred to the lethal character of a danger which holds the threat of serious injury. This lethal character may be attributed to the live electric rail in *Herrington,* to the high tension line in *Cooper,* and the mounds of hot ash in *Cardy.* There was no such inherent danger in the pipe gate. The specific danger here was that of high explosives used by the defendant mining company, of which due warning was given; in fact, the pipe gate itself was part of the warning system. It had not constituted a danger of any kind for nearly twenty years, until the invention of snowmobiles. It finally became "a danger because of the special use made of the Company's land by Veinot in the operation of his snowmobile".[44] Mr Justice Martland further emphasized that the jury's finding that the pipe constituted a *hidden* danger was of no concern once the question of an implied license was negated.

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[38] *Supra,* note 28.

[39] *Supra,* note 2.

[40] *Supra,* note 31.

[41] *Supra,* note 12.

[42] *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404.

[43] *Supra,* note 4, 546-7.

[44] *Ibid.,* 547.

The strongest argument in favour of the minority opinion is the reference to Lord Atkin's judgment in the *Hillen* case[45] which was quoted by Lord Pearson in *Herrington*:

> [T]his duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he was invited.[46]

This would *a fortiori* apply to trespassers whose specific means of transportation, speed, *etc.*, may be wholly unorthodox and, therefore, unpredictable and unforeseeable. The minority felt that the presence of snowmobilers on the defendants' property was just such an unforeseeable situation.

The majority were able to come to a different conclusion partly because they felt that on the facts the defendant should have anticipated snowmobilers. The opinion of Mr Justice Dickson mirrors the modern trend towards improving the lot of the trespasser; in this case the trespasser does better than the invitee in *London Graving Dock Co.* v. *Horton*;[47] he also does better than the licensees in *Phipps* v. *Rochester*[48] and *Ottawa* v. *Munroe*[49] (in both cases the licensees were children). In Canada, it can now be said with some degree of certainty that the occupier has a duty towards the trespasser. It is not necessary that the occupier know with certainty of the trespasser's presence, it is sufficient that this "could reasonably have been anticipated".[50] Once this test is met a duty arises to treat the trespasser "with common humanity".[51] While this duty has been held to be less onerous than the duty owed to a lawful visitor,[52] the Supreme Court has gone a long way towards closing the gap between the two.

Finally it should be noted that the Supreme Court remarked on the ease with which the defendants could have averted the danger by painting the pipe or hanging a sign from it.[53] As Lord Wilberforce observed in *Herrington*:

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[45] *Hillen* v. *I.C.I. Alkali Ltd* [1936] A.C. 65.
[46] *Supra*, note 2, 924.
[47] Although there the plaintiff had knowledge of the danger; [1951] A.C. 737.
[48] [1955] 1 Q.B. 450.
[49] [1955] 1 D.L.R. 465.
[50] *Supra*, note 4, 544.
[51] *Supra*, note 12, 680.
[52] *Supra*, note 2, 922, quoted in *Veinot* v. *Kerr-Addison Mines Ltd, supra*, note 4, 550-551.
[53] *Supra*, note 4, 555.

> [A] compromise must be reached between the demands of humanity [towards trespassers] and the necessity to avoid placing undue burdens on occupiers .... The law takes account of the means and resources of the occupier ... what is reasonable for a railway company may be unreasonable for a farmer.[54]

This principle may also have been a tacit but decisive factor in *Veinot*. But will it be respected in future cases? The adult trespasser Veinot replaced the children in *Cardy, Herrington* and *Cooper*. Supposing the next step is that the mining company or Railway Commission is replaced by an occupier who is a private individual? The erosion of private property rights will continue.

Alberta may have found a solution by maintaining the distinction between trespasser and lawful visitor, while demanding special care towards children; and — what is equally important — by laying it down in a statute, thereby giving the present generally acceptable compromise a degree of certainty and durability.

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[54] *Supra*, note 2, 920.

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