OCCUPIER'S LIABILITY, LAW REFORM AND *DONOGHUE V. STEVENSON* – A MALAYAN TRILOGY?

In the recent case of *Yeap Cheng Hock* v. *Kajima-Taisei Joint Venture*[1], the High Court in Malaysia found itself entangled in the web of common law rules governing the liability of an occupier to those on his premises. Although the specialisation, technicality and rigid nature of those rules led to their downfall in the jurisdiction in which they were conceived,[2] the courts in Malaysia are bound by statute to apply those rules because they formed part of "the common law of England on the 7th day of April, 1956".[3]

The purpose of this comment is to note the decision in *Yeap* v. *Kajima*, to consider how accurately it reflects the rules it purports to apply, to assess critically the continuing utility of those rules and to propose an alternative basis of occupier's liability grounded in current notions of public policy in the law of tort. Such assessment and reform is now required in Malaysia. It is only the law of tort, of all the common law subjects, that remains largely unreconstructed. The courts still rely almost exclusively on English precedents, many of which are no longer good law in England as a result of the increasingly active role Parliament has played in law reform, particularly since the formation of the English Law Commission in 1965[4]

There is, moreover, a rising litigation consciousness in Malaysia which has paralled the rise in urban living, mobility, availability of motor cars and other dangerous instrumentalities, industrialisation and the institution of legal aid schemes. It is in respect to these considerations that the following observations are directed.

[1] [1973]2 M.L.J. 230.

[2] See the Occupier's Liability Act (1957), 23 *Halsbury's Statutes of England* 793 (3rd Ed.).

[3] Sec. 3(1)(a) of the Civil Law Act, 1956 (Act 67). Sec. 3(1)(b) and 3(1)(c) provide that the relevant dates for Sabah and Sarawak respectively are 1st December, 1951 and 12 December, 1949. For the effect of English statutes in Sabah and Sarawak see *infra* this Journal, p. 42.

[4] See for example: The Animals Act 1971; The Employers' Liability Acts 1969; The Factories Act 1969; the Housing Act 1961; Industrial Relations Act 1971. See also the Reports of the Law Commission on Civil Liability for Vendors and Lessors of Defective Premises 1970 (Law Comm. No. 40) and Civil Liability for Dangerous Things and Activities 1970 (Law Common No. 32).

The facts and holding in *Yeap* v. *Kajima* can be stated simply. The plaintiff was one of a group of geologists from the Geological Society of Malaysia visiting an irrigation tunnel being constructed by the defendant engineers in a mine in Kedah. Their purpose was to examine rocks and conduct a survey. The defendant's servants conducted the tour of the mine. Having descended to the tunnel floor, the group were taken by locomotive to a spot near the rock face, which is the inner most portion of the tunnel. From there they walked to the floor itself, passing a train loader which practically filled the tunnel. The train loader is a huge machine running on two rails used to load debris left behind by the blasting of the rock face. After examining the rock structure for a few minutes the party became concerned as the result of the sudden operation of machinery only a short distance from them. They began to retreat toward the tunnel entrance walking along the narrow passage between the train loader and the tunnel wall. After having proceeded a short way, the train loader suddenly started to move towards them. As they groped forward, one of the train loader's wheels jammed the legs of the plaintiff against a rock projection on the tunnel wall. In consequence he suffered a severe injury of the left leg just below the knee and his leg had to be amputated.

Syed Agil Barakbah J. in the High Court held: (1) the plaintiff was a licensee because he was visiting the tunnel for his own purposes; (2) the rock projection was a concealed danger which was known or ought to be known to the defendant and he was therefore liable for breach of his occupancy duty; (3) the performance of dangerous work imposed an alternative duty of care on the defendent under *Donoghue* v. *Stevenson*,[5] and the sudden operation of the train loader was a breach of this "activity" duty; (4) the sum of $40,470 was fair and reasonable damages for pain and suffering, loss of amenities and loss of future earnings.

I. THE ISSUES

A. *The knowledge requirement — objective or subjective?*

The first step in the convoluted process of establishing an occupier's liability at common law is to categorise the entrant to the premises as an invitee, licensee or trespasser. It is on the basis of this distinction that all other consequences flow. The Court made quick work of this determination, holding that the group of geologists who entered the tunnel site were licensees because their presence did not benefit the defendants in a pecuniary or material way. "The law," Barakbah J. rightly pointed out, "does not take account of the wordly advantage which the host remotely has in view".[6]

[5] [1932] A.C. 562; [1932] All E.R. Rep. 1.

[6] *Op. cit.* n. 1, p. 232, and see *Latham* v. *Johnson* [1913] 1 KB 398, 410.

Having accepted this distinction[7] the court embarked on a consideration of its ramifications. The first one was that because the defendant *ought to have known* that the rock projection on the tunnel wall constituted a concealed danger to the plaintiff, he breached his duty as a licensor. The Court relied on an unsorted mixture of authority, some of which directly contradicted this proposition, in coming to this conclusion. For example, Barakbah J. quotes a passage from *Charlesworth on Negligence* to the effect that whilst the duty of an invitor is to warn his invitee of "dangers of which he ought to have known as well as those of which he actually knew"[8], the licensor is "only bound to warn of traps of which he knew"[9]. He relies on this excerpt and a statement by Lord Sumner in *Mersey Docks and Harbour Board* v. *Proctor*[10], which is directed to the issue of what constitutes a trap as opposed to an obvious danger, to conclude that "in other words, the occupier is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, *but which is known or ought to be known, to the occupier*" (italics added).

The chief distinction between the duty owed to licensees and invitees traditionally was that in the former case the licensor had to have a subjective or actual knowledge of the danger, whereas in the latter case the invitor need only have objective or constructive knowledge of the hazard. Willes J. considered this to be settled law by 1866. He held in *Indermaur* v. *Dames* that, in respect to invitees, "the occupier shall on his part use reasonable care to prevent damage from unusual dangers, which he knows or ought to know about";[11] but in considering the duty owed to licensees, Willes J. commented "there is considerable resemblance though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to or concealed by the lender or giver"[12]. Again in *Gautret* v. *Egerton*, where the injured party was a licensee, Willes J. said that there "must be something like fraud" in order to ground the liability of a licensor.[13]

The rationale of the foregoing distinction lay in the nature and found-

[7]See *infra*, p. 63.

[8]*Charlesworth on Negligence*, 4th Ed. p. 202.

[9]*Ibid.*

[10][1923] A.C. 253, 274.

[11][1866] LR 1 CP 274, 288.

[12]*Ibid*, p. 287.

[13][1867] LR 2 CP 371, 375.

ation of the two relationships. Whereas the invitee conferred some economic benefit on his invitor and was therefore entitled to expect that reasonable care would be taken to provide a safe premises for him, the bare licensee gratuitously received a benefit from his licensor so that any complaint by him "may be said to wear the colour of ingratitude as long as there [was] no design to injure him".[14] It was only when the licensor became aware of a hidden danger of which the licensee was unaware that he was obligated to take reasonable precautions.

As long as the law continued to distinguish the two categories it appeared unlikely that the courts would proceed to assimilate the duties owed to each one. To do so might appear to obviate the need for such a distinction. Yet this is precisely what the courts in England proceeded to do. In *Ellis* v. *Fulham Borough Council*[15], a quantity of sand had been placed at one side of a public road maintained by the defendant. The plaintiff, a child, stepped upon a piece of glass hidden in the sand and cut his toe. After describing the relationship between the parties as that of licensor-licensee, Greer L.J. stated the knowledge requirement of the licensors' conventionally: "any liability of the council could only arise if there was a danger known to them and not known to the plaintiff which he could not be expected to avoid"[16]. In applying the law to the facts however, he widened its ambit by holding: "it does not seem to me to matter that the council officials did not know that the actual piece of glass was there; the question is, did not the council know that there was a danger to children that it ought to provide against?"[17] The court then found a breach of duty because the defendant knew of the risk that glass from broken bottles could find its way into the sand even if he was not actually aware of the presence of glass on the particular occasion in question. This formulation is wider than the formulation in *Gautret* v. *Egerton*[18] because in that case only actual knowledge of the facts giving rise to the risk was required. There was nothing in the conduct of the defendant in *Ellis* v. *Fulham* that could be characterised as "something like fraud"[19] in the words of Willes J.

Almost imperceptibly the duty owed to licensees had been modified from a requirement of subjective knowledge of facts to one of objective knowledge of facts and subjective knowledge of danger. The nature of this departure was clarified and adopted by the Court of Appeal in *Pearson* v.

[14] *Indermaur* v. *Dames*, *op. cit.* n. 11, p. 285.

[15] [1938] 1 K.B. 212; [1937] 3 All E.R. 454.

[16] *Ibid.* [1937] 3 All E.R. 454, 457.

[17] *Ibid.*

[18] *Op. cit.*, n. 13.

[19] *Ibid.*, p. 375.

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Lambreth B.C.[20] The plaintiff in that case entered a public convenience provided by the defendant. On leaving the convenience he bumped his head against an overhead grille which had been lowered by some children while the plaintiff was inside. The defendant's servant knew that children were in the habit of swinging on the grille, although he was not aware that they were doing so on this particular occasion. After classifying the plaintiff as a licensee the court held that the defendant was liable because his servant had actual knowledge of the danger that children might pull down the grille. The fact that the defendant had no actual knowledge of the position of the grille did not defeat the plaintiff's claim. Asquith L.J. commented that "it is sufficient if the defendant knows – (a) that there is present a physical object capable of being put in a dangerous condition; (b) by the action of third persons; (c) who are quite likely to act in such a way as to put it in a dangerous condition, having regard to their past behaviour or inherent qualities."[21]

Although the chief distinction between invitees and licensees had so far been narrowed, it had not yet been obliterated. It remained for *Hawkins* v. *Coulsdon Purley Urban District Council*[22] to accomplish that task. The plaintiff in that case was a visitor to a house that the defendant had requisitioned some years earlier. He fell and broke his leg while descending the steps from the front door after dark. One of the steps was broken and it was found that the defendant had actual knowledge of that fact, but that he did not appreciate that the broken step constituted a danger to the plaintiff. Nevertheless the Court of Appeal unanimously decided that the licensor was liable, holding that where he had actual knowledge of the facts giving rise to the danger and a reasonable man would have realised that it was a danger, a duty arises. If one puts the decision in *Pearson* v. *Lambreth*, that subjective knowledge of facts giving rise to danger is not required, together with the decision in *Hawkins* v. *Coulsdon*, the conclusion that there is no longer any difference between the duty owed to invitees and licensees in relation to the knowledge requirement is an inescapable one. Lord Denning, M.R., recognised this development when he commented in *Hawkins* v. *Coulsdon* that "counsel for the defendant's said that if we affirm the judge's view of the law – as we do – there will be little difference left between an invitee and a licensee. I think there is some truth in this, but it is not a matter for regret . . . it can fairly be said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage."[23]

[20] [1950] 2 K.B. 353; [1950] 1 All E.R. 682.

[21] [1950] 1 All E.R. 682, 686. See also *Coates* v. *Rawtenstall Corp.* [1937] 3 All E.R. 682.

[22] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[23] *Ibid.*, p. 106.

It is on this basis that the result in *Yeap* v. *Kajima* can be justified. A reasonable man in the position of the defendant contractor would have known that the rock projected into the tunnel and that this constituted a danger to the plaintiff geologist. This same result, it should be noted could have been achieved by reference to the ordinary principles of negligence instead of the tortuous reasoning the court felt obligated to employ. It is no exaggeration to say that the correct result was achieved in spite of the law and not because of it.

B. *Unusual* v. *concealed dangers*

Barakbah J. took barely two sentences to conclude that the rock projection in the tunnel constituted a concealed danger and therefore this requirement presented no stumbling block to the plaintiff's claim that the defendant owed him a duty. To a court whose sensibilities have been conditioned by the ordinary principles of negligence embodying the "reasonable man" concept, it is understandable that the almost imperceptible and seemingly arbitrary distinction between a "concealed" danger, giving rise to a duty to licensees and an "unusual" danger, which suffices for invitees, is not a substantive one. In applying the law to the facts Barakbah J. seized on the fact that a visitor in the position of the plaintiff would not notice the rock edge, concluding that he had "no hesitation in holding that the rock was hidden or concealed from the plaintiff."[24]

With respect it is submitted that a survey of judicial authority supports a narrower interpretation of what constitutes a concealed danger than the Court indicated. In *Gautret* v. *Egerton*[25] the defendants were possessed of land with a canal and of bridges across the canal. The plaintiff, a licensee who fell into the canal, was held not entitled to recover, Willes J. stating that "it is quite consistent with the declaration in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action something like fraud must be shown."[26] This comment applies with equal accuracy to the rock projection in *Yeap* v. *Kajima*. Thus it has been held that a licensee who walks across a piece of wasteland in the dark and falls into an unfenced quarry,[27] a licensee who falls into a trench dug in an unfinished road not yet dedicated to the public,[28] or who

[24] *Op. cit.*, n. 1, p. 233.

[25] [1867] L.R. 2 C.P. 371.

[26] *Ibid.*, p. 375.

[27] *Houndsell* v. *Smyth* [1860] 7 C.B. (NS) 731

[28] *Coleshill* v. *Manchester Corp.* [1928] 1 K.B. 776.

catches his foot in a depression in a flight of steps,[29] cannot recover. The rock projection in *Yeap* v. *Kajima* would have more easily fit within the broader classification of "unusual dangers", a term reserved to describe the duty owed to an invitee at common law. A danger is unusual if it is unknown to the invitee and could not reasonably be expected to give rise to the danger. Accordingly, in *Indermaur* v. *Dames*[30] a gasoline fitter servant who fell through an unfenced opening in one of the upper floors of a factory was held entitled to recover. Similarly, a visitor to a patient in a hospital who slipped on a mat put on a highly polished floor was entitled to recover.[31]

Once again, a survey of the authorities reveals the ambiguity of the common law position. Unlike the knowledge issue however, there has been no serious attempt to reconcile those ambiguities. Only by glossing over the issue was Barakbah J. able to achieve a result that did not do violence to generally accepted notions of the basis of responsibility in tort.

C. *Liability for current operations*

In addition to holding the defendant liable for breach of his occupancy duty by maintaining a concealed danger which he ought to have known about, Barakbah J. formulated an alternative basis of liability based on the defendant's "performance of dangerous work and possession and use of dangerous things"[32] to impose a duty of care according to the general principles of negligence. This so called "activity" duty or liability for "current operations" mitigated the rigidity of the common law rules relating to occupier's liability when the entrant was injured as a result of negligently carrying out operations on the premises. In *Yeap* v. *Kajima* the operation was the sudden movement of the train loader and the High Court rightly distinguished the basis of liability for that movement from the duty owed for the static condition of the tunnel.

Although this distinction can be traced back to pre-*Donoghue* v. *Stevenson*[33] cases, its modern rationale was first enunciated fully by Lord Denning, MR., in *Dunster* v. *Abbott*[34]. The defendant was the owner and occupier of premises bordered by an unlighted country road. The plaintiff entered the premises after dark with a view to selling advertising space to

[29] *Fairman* v. *Perpetual Investment Bldg. Soc.* [1923] A.C. 74.

[30] [1886] L.R. 1 C.P. 274.

[31] *Weigall* v. *Westminster Hospital* [1936] T.L.R. 301.

[32] *Op. cit.*, n. 1, p. 233.

[33] [1932] A.C. 562; [1932] All ER Rep. 1; see *Tolhousen v. Davies* [1888] 57 LJ QB 392, and *Tebbutt v. Bristol & Exeter Ry* [1870] L.R. 6 QB 73.

[34] [1953] 2 All E.R. 1572.

the defendent. The defendant refused to do business with the plaintiff and as he left the premises he tripped and fell into a ditch allegedly because the defendant had turned off a light too soon. In holding the defendant not liable, Denning L.J., as he then was, said it was irrelevant to the determination of the case whether the plaintiff was an invitee, a licensee or a trespasser or even whether the danger was unusual or concealed. He explained, "that distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else."[35] He went on to hold that the duty of the defendant was simply to use reasonable care in all the circumstances, and on the present facts the defendant was clearly in no breach of duty by turning off the lights. The Court of Appeal relied on this same rationale to achieve an opposite result in *Slater* v. *Clay Cross Ltd.*[36] In that case the plaintiff, a local resident, had habitually used a railway tunnel as a pathway providing a shortcut to the village. While walking through the tunnel he was struck by the defendant's train. The court found it unnecessary to determine the plaintiff's status as entrant holding that the defendant's duty was to take reasonable case to see that the premises were reasonably safe for people lawfully coming onto them and the defendant in this case breached that duty. The scope of the current operations doctrine and its relationship to occupier's liability was enunciated by the House of Lords in *Perkowski* v. *Wellington Corp.*[37] The plaintiff in that case died as a result of injuries suffered when he dived into shallow water from a spring board at low tide. The defendant had erected the spring board some years ago. Lord Somervell held that the current operations duty did not apply to the defendant distinguishing *Slater* v. *Clay Cross Ltd.* on the ground that the danger in that case arose from the negligent driving of the defendant's train and not out of the condition of the tunnel. In *Perkowski*, on the other hand, the spring board had been erected years ago and the complaint was based on its present condition and not its use. As the spring board did not constitute a concealed danger the defendant was held not liable for breach of his duty as licensor.

In the present case the danger resulted from a combination of a positive act, i.e. the negligent operation of machinery, and the static condition of the premises, i.e. the rock projection. The High Court took the view that this situation required an analysis of the facts in terms of both duties.

[35] *Ibid.*, p. 1574.

[36] [1956] 2 Q.B. 264; [1956] 2 All E.R. 625.

[37] [1959] A.C. 53; [1958] 3 All E.R. 368.

Presumably the decision of the Court would have been for the plaintiff if there was a breach of either duty. The Privy Council in *Commissioner for Railways* v. *Mc Dermott*[38], a decision that the High Court was apparently not referred to, lends its support to an alternative approach. In *McDermott*, the plaintiff was injured when she tripped on the defendant's railway line owing to the defective state of the sleepers. Before she could escape, the defendant's train, approaching the crossing at 40 mph and unable to stop in time, amputated her foot. The plaintiff alleged that the defendant was negligent in operating trains over a defective unlit crossing. The defendants argued that the plaintiff was a mere licensee on the tracks and the limited duty owed to her was not breached. The view of Lord Gardiner, L.C., speaking for the Privy Council, is particularly apposite: "whenever there is a relationship of occupier and licensee, the special duty of care which arises from that relationship exists. If there is no other relevant relationship, there is no further or other duty of care. But there is no exemption from any other duty of care which may arise from other elements creating an additional relationship between the two persons concerned."[39] Having decided that the two duties can exist concurrently, he went on to characterise the facts in *McDermott* as giving rise to a breach of the activity duty only. Although the danger resulted from a combination of positive acts and dangerous condition, in the same way it did in *Yeap* v. *Kajima* the Privy Council placed prime importance on the positive acts. Lord Gardiner, L.C., said, "it can be contended that the general duty of care applies only in respect of such positive operations, whereas the limited duty applies to the static condition of the crossing. This contention however is, on the facts of the present case, too artificial and unrealistic to be acceptable. The positive operations and the static condition interact, and the grave danger is due to the combination of both."[40]

Perhaps the key to understanding why the Privy Council adopted this approach is that the facts in *McDermott* did not give rise to a breach of the licensor's duty. The Privy Council was anxious to avoid holding that there was a breach of one duty but not the other without any rational basis for the distinction so it lumped the two duties together. The need to adopt such a fiction is a direct result of the rigid categorisation of entrants and arbitrary gradation of duties promulgated by the courts for so many years.

D. *Duty to trespassers*

In seeking to buttress its conclusion on the activity duty issue further the

[38] [1967] 1 A.C. 169; [1966] 2 All E.R. 162.

[39] *Ibid.*, p. 186, 197.

[40] *Ibid.*, p. 189.

High Court referred to the controversial and now effectively overruled House of Lords decision in *Robt. Addie Sons Ltd.* v. *Dumbreck*[41] Barakbah J. understood that case to hold that "even in the case of a trespasser there is a duty to abstain from doing an act which if done carelessly must be reasonably contemplated as likely to injure [a trespasser] when he is known to be present".[42] It is respectfully submitted that the occupier's duty laid down in *Addie's* case had nothing whatever to do with the ordinary principles of negligence that comprise the activity duty. In *Addie's* case a boy aged four years was killed while playing on a wheel, part of a haulage system, in a field occupied by the defendant. The field was surrounded by a hedge which was quite inadequate to keep out the public and was habitually used by young children as a playground to the knowledge of the defendant's officials. The wheel was not visible from the electric motor which set it in motion and the accident occurred owing to the wheel being set in motion by the defendant's servants without taking special precautions to avoid accidents to persons frequenting the wheel. The court found that the defendant was an occupier of the land and the plaintiff was a trespasser. It held that the occupier owed no duty to a trespasser other than that of not inflicting damage intentionally or recklessly on a trespasser known to be present. The plaintiff was therefore not entitled to recover. Any idea that there might be an alternative basis of liability when injury resulted from current operations as opposed to the static conditions of the premises can be rebutted by reference to the facts of the case, which disclose that the plaintiff's complaint related to the current operation of the machinery and not its static condition. Furthermore, the distinction was specifically denied by Lord Hailsham, L.C., who said that "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 onto the premises at his own risk".[43]

The thrust of Barakbah J.'s analogy appears to be that under the rule in *Addie's* case an occupier owes an activity duty to trespassers but that the standard of liability for breach of that duty is reckless conduct. It is difficult to find judicial support for this view. In *Videan* v. *British Transport Commission*[44], Lord Denning, M.R., argued that after *Donoghue* v. *Stevenson* the rule in *Addie's* case should be limited to cases concerning the static condition of premises. In relation to activities on the land the true test is forseeability and reasonable care. In *Commissioner*

[41] [1929] A.C. 358; [1929] All E.R. Rep. 1.

[42] *Op. cit.* n. 1, p. 233.

[43] *Op. cit.* n. 41, [1929] A.C. 358, 395.

[44] [1963] 2 Q.B. 665; [1963] 2 All E.R. 860.

of Railways v. *Quinlan*[45], however, the Privy Council rejected this distinction holding that the formula in *Addie's* case cannot legitimately be regarded as confined to the situation where injury arises from the static condition of the land. The purpose of the rule, Viscount Radcliffe argued, was "to prescribe not merely that a trespasser must take the land as he finds it, but also that he must take the occupier's activities as he finds them, subject to the restriction that the occupier must not wilfully or recklessly conduct them to his harm."[46]

It is a symptom of the confused state of the law relating to occupier's liability that in regard to invitees and licensees the law recognises the existence of an alternative basis of liability for current operations, but not in the case of trespassers. This anomolous situation has been perpetuated by the recent decision of the House of Lords in *B.R.B.* v. *Herrington*[47], which overhauled the law in this area. The defendant in that case owned an electrified railway line which was fenced off from a meadow where children lawfully played. The defendant's station master, who was responsible for that stretch of line, knew that the fence was in a dilapidated condition and had been notified that children had been seen playing on it. The plaintiff then aged six, was injured by a live wire while trespassing on the line. The House of Lords took this opportunity to review the law relating to trespassers and then formulated a new basis of liability called the "common humanity" standard, for both activity and occupancy duties. It appears to represent a half way house between the two rejected alternatives of the narrow "reckless disregard" test in *Addie* v. *Dumbreck* and the *Donoghue* v. *Stevenson* requirement of acting with reasonable care. Lord Morris emphasized that the occupier is not required "to make surveys of his land in order to decide whether dangers exist of which he is unaware",[48] but that once he is aware of the danger he is under a duty to "take such steps as common sense and common humanity would dictate . . to exclude or to warn or otherwise within reasonable and practical limits reduce or avert [it]".[49] In this way the new standard narrowed the gap between the various bases of liability relevant to occupiers without closing it. It seems to have ruled out for the forseeable future any chance that the activity/occupancy duties distinction will be extended to this area of the law.

[45] [1964] A.C. 1054; [1965] 1 All E.R. 897.

[46] *Ibid.*, [1964] 1 All E.R. 897, 906.

[47] [1972] A.C. 877; [1972] 1 All E.R. 749.

[48] *Ibid.*, [1972] 1 All E.R. 749, 767.

[49] *Ibid.*

II. THE OCCUPIER'S LIABILITY ACT, 1957[50]

Before proceeding in the final section of this comment to canvass a proposal for reform of the law relating to occupier's liability in Malaysia, it may be instructive to outline the solution to the issues raised in *Yeap* v. *Kajima* under the Occupier's Liability Act now in force in England.

The specialisation and technicality of the common law rules as well as their perpetuation of rigid distinctions between the categories of entrants led to a general feeling of unrest. As one writer put it, "the facts are made to fit the conception instead of having the conception fit the facts. By this procrustean method, the three categories are preserved intact even though reason and experience be sacrificed in the process."[52] In 1952 the Lord Chancellor, Viscount Simonds, invited the Law Reform Committee to consider the improvement, elucidation and simplification of the law relating to the liability of occupiers of land or other property. The Committee reported in 1954[53]. The defects they pointed out were noted and their suggested remedies were virtually all implemented by the Occupier's Liability Act, 1957.[54]

The effect of the legislation, *inter alia*, is to abrogate the distinction between invitees and licensees and the differing duties owed to each class. In their place the Act provides for one uniform duty of care owed to all lawful visitors – the "common duty of care". Section 2(2) of the Act explains the nature of the duty: "the common duty of care is a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there." Paragraphs 3 and 4 of Section 2 stipulate the circumstances relevant for determining if the common duty of care has been breached. They include the age of the visitor, his expertise in guarding against special risks incidental to his calling, the effect of a prior warning by the occupier and the fact that the injury was caused by the occupier's independent contractor. The rest of the Act relates to specialised areas of concern over occupiers bound by contract, third parties, the obligation of non-occupiers, landlords and subtenants. Its scope did not extend to the reform of the law relating to trespassers.

It is submitted that the result in *Yeap* v. *Kajima* would have been the same under the Act as it was at common law. The most striking statement in support of this conclusion was that of Lord Denning, M.R., in *Slater* v.

[50]See further North, *Occupiers' Liability* (1971).

[51]For further discussion of this issue in the context of a new proposal, see *infra* p.70.

[52]Mac Donald, [1927] 7 Can. Bar Rev. 665, 668.

[53]Cmnd. 9305 (1954): For comment see Odgers [1955] C.L.J. 1; Heuston (1955) 18 M.L.R. 271 (1955).

[54]See Odgers [1957] C.L.J. 39; Newark [1958] 12 N.I.L.Q. 203; Payne [1958] 21 M.L.R. 359 (1958).

Clay Cross Ltd.[55] He said:

> "The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decision of the courts . . . this distinction has now been reduced to the vanishing point. The duty of the occupier nowadays is simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them, and it makes no difference whether they are invitees or licensees."

An analysis of the issues raised in *Yeap* v. *Kajima* in relation to the Act confirm this process. The defendant contractor in *Yeap* is undoubtedly an occupier within the meaning put on those words by the House of Lords in *Wheat* v. *Lacon.*[56] He had "a sufficient degree of control over the premises to put him under a duty of care towards those who lawfully come on the land. The word occupier in the Act therefore is used in the same sense as it was used at common law."[57] Lord Denning in *Wheat* v. *Lacon* singled out independent contractors as being sufficiently in control of the place where they worked to give rise to the common duty of care. Assuming that the geologists in *Yeap* v. *Kajima* were lawful visitors, the next question is to determine whether the contractors fulfilled their duty to the plaintiff. The most relevant circumstance on these facts was that the plaintiff was unfamiliar with the tunnel. There was no evidence to suggest that he was able to appreciate or guard against the special risks to which he was exposed. It is submitted therefore that the defendant in *Yeap* v. *Kajima* breached the common duty of care in that both the rock projection and the unexpected operation of machinery were not consistent with the defendant's obligation "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 . . ."[58] Thus a relatively simple analysis, based on criteria not unlike those relevant to a solution under the ordinary principles of duty and breach of duty, leads to a conclusion identical to the one reached by the court after an elaborate, intricate and in some places inaccurate exposition of the common law principles of occupier's liability.

With respect to the controversy surrounding the distinction between activity and occupancy duties, the Act unfortunately provides no clear cut answer. It still remains an open question whether the Act applies to

[55] [1956] 2 Q.B. 264, 269; [1956] 2 All E.R. 625.

[56] [1966] A.C. 552, 557; [1965] 2 All E.R. 700.

[57] *Ibid.*

[58] Sec. 2(2).

cases of breaches of both types of duties, or only to the latter. There is a division of opinion among the commentators on this issue[59], but the better view, it is submitted, is that Section 1(2) of the Act limits its scope to regulating "the nature of the duty imposed by law in consequence of a person's *occupation or control* of premises" (emphasis added). On any view, however, the question no longer retains its former importance because the difference between the two duties of care is not substantive.[60] If the High Court in *Yeap* v. *Kajima* had applied either standard to the defendant's operation of the train loader the result would undoubtedly have been the same.

III. A REFORM PROPOSAL BASED ON DONOGHUE v. STEVENSON

It is the conclusion of this observer that there exist no functional reasons for foreclosing the application of the ordinary principles of negligence to cases of occupier's liability. The classic formulation of these principles, of course, is found in the famous dictum of Lord Atkin in *Donoghue* v. *Stevenson*[61]. Its central notion is the identification of duty with foresight by reliance on the "neighbor" analogy. This pronouncement, as developed in *Bourhill* v. *Young*[62], *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)*[63], *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.*[64] and *Dorset Yacht Co. Ltd.* v. *Home Office*[65], is now the unchallanged model for moudling the shape of the law of negligence. It provides a yardstick for appraising novel claims,[66] and has been utilised on more than one occasion to overrule other and inconsistent precedents.[67] Implementing a change of this magnitude in Malaysia presents no insurmountable difficulties. A short statute would be

[59]See *Salmond on Torts* 15th Ed., by R.F.V. Heuston (1969), p. 337 (fn. 4), who supports the view that the distinction has been abolished by reference to the long title of the Act, which extends its scope to "occupiers and others". Jolowiez, on the other hand, argues that the Act does not affect the activity duty for its principal purpose was to rid the law of the distinction between invitees and licensees, and the activity duty is not relevant to that determination. *Winfield and Joloweiz on Tort* (9th Ed.) (1971).

[60]For the common duty of care, see Clerk & Lindsell, *Torts*, 13th Ed., (1969), p. 596.

[61][1932] A.C. 562, 580; [1932] All E.R. Rep. 1.

[62][1943] A.C. 92; [1942] 2 All E.R. 396.

[63][1961] A.C. 388; [1961] 1 All E.R. 404.

[64][1964] A.C. 465; [1963] 2 All E.R. 375.

[65][1970] A.C. 1004; [1970] 2 All E.R. 294.

[66]See [1967] 2 Q.B. 1: and [1945] 1 All E.R. 280

[67]*Hedley Byrne* v. *Heller*, *op. cit.*, n. 64; *Dorset Yacht* v. *Home Office*, *op. cit.*, n. 45.

required to abolish all the common law rules relating to an occupier's liability for the condition of his land and structures as far as they deviate from the ordinary principles of negligence at common law as currently interpreted and applied by the civil courts in Malaysia.

It is submitted that the recent decision of the House of Lords in *Dorest Yacht*, which of course the Law Reform Committee on Occupiers Liability in England did not have the benefit of considering, lends strong support to this proposal. In *Dorset Yacht* the duty issue was clearly framed: could the Home Office, acting through its borstal officers, under any circumstances owe a duty to any member of the public to take care to prevent trainees under its control or supervision from causing injury to person or property? The arguments for the Home Office were first that there was virtually no authority for imposing a duty of this kind, and second that reasons of public policy, especially the freedom of the Home Office to continue its progressive reform programs, required that these officers should be immune from liability. With the exception of Viscount Dilhorne, all the judges on both the Court of Appeal and in the House of Lords rejected these arguments. Lord Reid said:

> "About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence each with its own rules and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the courts had from time to time recognised new duties and new grounds of action. But the heroic age was over, it was time to cultivate certainty and security in the law; the categories of negligence were virtually closed. The learned attorney general invited us to return to those halcyon days, but attractive though it may be, I cannot accede to this invitation.
>
> ". . . *Donoghue* v. *Stevenson* may be regarded as a milestone, and the well known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it was a statutory definition. It will require qualification in new circumstances. *But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.*"[68]

The effect of this decision is to shift the burden of persuasion to those who argue for exemption from *Donoghue* v. *Stevenson* based liability unless there is a sound policy rationale to base such an exemption. In *S.C.M. (United Kingdom), Ltd.* v. *W.J. Whittall E Sons Ltd*[69] and *Spartan Steel Ltd.* v. *Martin*[70], the Court of Appeal concluded that in the case of

[68] [1970] 2 All E.R. 294, 297; emphasis added.

[69] [1971] 1 Q.B. 337; [1970] 3 All E.R. 325 (C.A.).

economic loss not consequential on physical injury, such a policy basis did exist based on the nature of the loss, the unlimited number of claims it would give rise to and legislative policy[71]. In *Hedley Byrne*, the House of Lords was confronted with a situation that is closely analogous to the present one. A long line of cases dating back to *Derry v. Peek* in 1889[72] had held that no cause of action lies for damage resulting from negligent misstatements. In deciding that the courts should henceforth impose a limited duty of care for words as well as acts, the House of Lords make it plain that apart from questions of precedent, which now no longer bind the House, the only valid reason for not applying *Donoghue v. Stevenson.* was one of public policy. Quite careful people often express definite opinions on social and or informal occasions without taking that care which they would exercise if asked for their professional opinions[73]. Another difference was that a negligent act or negligently made article will normally cause damage only once whereas words are more volatile. How far they are relied on must in many cases be a matter of doubt. If statements were held to create the necessary proximity to give rise to a "neighbour" relationship, there might be no limit to the persons to whom the speaker or write would be liable.[74] In these circumstances the House formulated a duty of care for negligent misstatements that departs from *Donoghue v. Stevenson* only where those policy reasons compelled it to do so.

It now falls to determine whether there exist any policy reasons for excluding the principle of proximity to cases of occupier's liability. The policy considerations underlying the common law in this area can be separated into two categories. The first one involves the traditional concept that the landowner was sovereign within his own boundaries and as such might do what he pleased on or with his own domain.[75] In the middle of the nineteenth century, not coincidentally at the same time Willes J. decided *Indermaur v. Dames,*[76] the privileged position of the land owner and members of his class generally, was taken for granted. Taken together with the fact that juries played an important role in civil cases, this meant that judges had to formulate precise rules and establish rigid categories of

[70] [1972] 3 All E.R. 561 (C.A.).

[71] But see the powerful dissenting judgement of Davies.L.J. in *Spartan Steel*; he argues that the policy basis is largely fictional, *ibid.*, p. 566-567.

[72] 14 App. Cas. 337; 61 L.T. 265.

[73] Per Lord Reid, p. 580.

[74] Per Lord Pearce, p. 614-615.

[75] Bohlen, *Studies in the Law of Tort* (1929), p. 156, 181.

[76] *Op. cit.*, n. 11.

entrants in order to narrow questions of fact and thereby keep the law in their own hands.[77] The alternative was to leave the landowner's interests to the discretion of the jury who belonged as a general rule to the class of potential entrants rather than landowners.[78] Nor did Willes J. and his colleagues on the bench perceive that there was a conflict between the sanctity of landed property and the yet to be formulated general principle that members of the community should be protected from physical injury caused by another's negligence. The result of this process was that the freedom of the landowner was given greater legal recognition than the physical welfare of the community. It is submitted that the advent of the competing and now universally accepted principle that one should be responsible for the damage which he ought reasonably to forsee, together with the revolutionary changes in social and economic attitudes in this century reveal that this policy objection to the imposition of *Donoghue* v. *Stevenson* standards to questions of occupiers' liability is an anachronism.

The second policy consideration underlying the divergence was the distinction between wrongs of commission and wrongs of omission. In *Southcote* v. *Stanley*[79], decided in 1856, the plaintiff was a visitor to, but not a guest at a hotel. When he opened a door on the premises on his way out, a piece of glass fell on him. Bramwell B. said:

> "In this case my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring guns or man traps, and the latter not being aware of it, was thereby injured that would be an act of commission. But if a person asked a visitor to sleep at his house and the former omitted to see that the sheet's were properly aired, whereby the visitor caught cold, he could maintain no action for there was no act of commission, but simply an act of omission . . .and under these circumstances the action is not maintainable"[80]

The early common law was too preoccupied with suppressing flagrant violations of the peace to worry about complaints that harm had ensued from what someone had failed to do rather than what he had actually done. The line of demarcation between active misconduct and passive inaction was never easy to draw. In *Dunster* v. *Abbott*[81] for example, was it an omission not to leave the light on for the plaintiff as he was leaving

[77] Marsh, "The History and Comparative Law of Invitees, Licensees and Trespassers", [1953] 69 L.Q.R. 182, 185.

[78] *Ibid.*

[79] 1 H & N, 247.

[80] *Ibid.* p. 250.

[81] [1953] 2 All E.R. 1572.

the premises, or an act of commission to turn it off too soon? Critical to this assessment of where the line should be drawn is the fact that in the case of commission the defendant is charged with having worsened the plaintiff's position or having created the risk, whereas in the case of a true omission the worst that can be said of the defendant is that he failed to confer a benefit on the plaintiff by saving him from a detriment[82]. On this analysis virtually all occupier's liability cases would fall outside the scope of acts of omissions because the position of the plaintiff has been materially worsened by the occupier's conduct. This was certainly the case in both *Southcote* v. *Stanley* and *Dunster* v. *Abbott* as well as in *Yeap* v. *Kajima*.

The historical reasons for the mistaken inclusion of these cases under the rubric of acts of omission were reviewed by Lord Denning in *Hawkins v. Coulsdon & Purley U.D.C.*[83], the facts of which have already been stated[84]. He explained that when the issue was first raised, nearly 100 years ago, the courts said the licensee was in the same position as a servant and could not sue at all. Later, the courts abandoned that analogy and instead adopted the analogy of a gift. Willes J. held in *Gautret* v. *Egerton*[85] that the occupier of premises was liable to a licensee only if he actually knew of the danger. He commented that "the principle of law as to gifts is, that the giver is not responsible for damages resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donor"[86]. Lord Denning proceeded to point out that the law relating to gifts has changed in the last 100 years and the analogy is therefore no longer apt. He concluded:

> "I propose therefore to put the law of gifts on one side and to consider the law about licensees, and as to them I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission. It always was an illogical distinction. Many acts of commission can be regarded as acts of omission and vice versa. It all depends on how you look at them.
>
> "... when we come to consider the matter on principle it is clear that there should be no difference between an act of commission and an act of omission. If an occupier actually knows of a state of affairs on his land which a reasonable man would realise was a danger, he should not be allowed to escape from his responsibilities on the plea

[82] See Fleming, *An Introduction to the Law of Torts* (1967), p. 61; and *East Suffolk River Catchment Board v. Kent* [1941] A.C.74; [1940] 4 All E.R. 527.

[83] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97, 103 – 105.

[84] See *supra*, p. 52.

[85] [1867] 2 L.R. 2 C.P. 375.

[86] *Ibid.*

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that he was not a reasonable man and did not realise it. I ought to add that when I speak of the 'actual knowledge' of the occupier of the existing state of affairs, I include also his presumed knowledge of it"[87].

Thus, on close scrutiny, neither the special position of landowners nor the distinction between acts of omission and commission present a barrier to the incorporation of this branch of the law into the general principles of negligence. The conclusion appears inescapable to this observer that after the decision of the House of Lords in *Dorset Yacht*, there remains no sound bases in public policy for excluding occupier's liability from the principles of proximity enunciated by Lord Atkin.

It may be inquired how much impact such a radical departure from traditional conceptions would have on the law. The answer is this: not much in terms of the holding in a case like *Yeap* v. *Kajima* because, as the first part of this comment demonstrated, the common law distinctions between invitees and licensees on the one hand and between both categories and the ordinary principles of negligence on the other have been all but eliminated. The most significant change would be in the *ratio* of the cases. It would no longer be necessary to rationalise outmoded decisions and make arbitrary distinctions in order to achieve a just result. The law would be vastly simplified and brought into line with developing notions of duty and function in the law of tort. There would be only one basis of liability in negligence unless reasons of policy demanded that it be curtailed in specific instances.

It should be noted in this regard that the concept of reasonable forseeability and the reasonable man are flexible. The introduction of a uniform basis of liability does not mean that the occupier's duty will be the same in each case. The status of the entrant and the likelihood of his visit would be relevant factors in determining what dangers were forseeable. In deciding whether the occupier satisfied the duty owed it would be necessary to balance a number of other factors including, *inter alia*, the magnitude of the risk, the gravity of the injury, the feasibility of warning, the practicability of taking precautions, the obviousness of the danger, the generally accepted standard of maintenance for the type of premises in question and the social utility in keeping the premises open. Applying the formula to the facts in *Yeap* v. *Kajima*, it is clear that the presence of the plaintiff in the tunnel was reasonably forseeable because he was one of a party from the Geological Society of Malaysia being shown around the mine by the defendant for the purpose of making a survey and examining rocks. It is equally clear that the defendant breached his duty of care. The rock projection, and more especially the moving train loader created a grave risk of danger that was in no way obvious. Although

[87] *Op. cit.*, n. 83, p. 106.

there is probably no practicable way to eliminate rock projections in a mine, it is reasonable to ensure that dangerous machinery will remain stationary and a warning about both hazards was in order.

Although it is beyond the scope of this comment to consider the ramifications of this proposal on all the rules of occupier's liability in detail, a brief survey of its impact in these other areas will be attempted. First, the question of whether the defendant is an occupier[88] subject to the rules of occupiers' liability, a non-occupier in the position for example of a landlord[89], or an independent contractor[90], would become a moot point. On any assumption the basis of liability would be the same – to take reasonable care in the circumstances. Second, the vexing question of whether the occupier is liable for all the acts of his independent contractor[91] or only when it can be shown that he was negligent in entrusting the work to an independent contractor[92], would also be eliminated. The cases would henceforth be analysed in terms of the employer's vicarious liability for acts of his independent contractor; the general rule being that the employer is not liable unless the nature of the work gives rise to a non-delegable duty on his part to see that reasonable care is taken[93]. Third, that cumbersome class of persons called "visitors entering as of right" which includes police officers, firemen, inspectors and persons using public premises provided by a public authority, and whose status at common law has never been made entirely clear,[94] would be assimilated into the category of visitors to whom the occupier owes a duty to take that amount of care that a reasonable man in his circumstances would take. Fourth, it is submitted that the now discredited decision of the House of Lords in *London Graving Dock Co.* v. *Horton*[95] would no longer be good law. That case decided that it was a complete defence for an occupier to show, without more, that his invitee knew or had been warned of the dangerous condition which subsequently injured him. As the Court of Appeal pointed out in *Roles* v. *Nathan*[96], a decision inter-

[88] See generally Hwang (1968) 10 *Malaya L.R.* 68.

[89] See *Cavalier* v. *Pope* [1906] A.C. 428; *Bottomly* v. *Bannister* [1932] 1 K.B. 116; [1939] 4 All E.R. 4.

[90] *Billings (A.C.) Ltd.* v. *Riden* [1958] A.C. 240; [1957] 3 All E.R. 1.

[93] See generally G. Williams, "Liability for Independent Contractors" [1956] CLJ 180 and *Honeywill Stein Ltd.* v. *Larkin Bros. Ltd.* [1943] 1 K.B. 191; [1933] All E.R. Rep. 77.

[94] In *Pearson v. Lambreth B.C.* [1950] 2 K.B. 353, the user of a public lavatory was classified as a licensee, but in *Hartley v. Mayoh & Co.*, [1954] 1 Q.B. 383, [1954] 1 All E.R. 375, a fireman was treated as an invitee. Compare Sec. 2(a) of the Occupier's Liability Act.

[95] [1951] A.C. 737; [1951] 2 All E.R. 1.

[96] [1963] 2 All E.R. 908.

preting the Occupier's Liability Act, the effect of *Horton* was that "the occupier could escape liability to any visitor by putting up a notice: 'This bridge is dangerous', even though there was no other way by which the visitor could get in or out and he had no option but to go over the bridge"[97]. This result is clearly unsatisfactory. Section 2(4)(a) of the Occupier's Liability Act in England was drafted specificallv to clear up this situation and bring the law into line with what would constitute a reasonable warning under the general principles of negligence. The Court of Appeal in *Roles v. Nathan* agreed that it succeeded in its purpose. Subsection 4(a) states that "where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

Fifth, the common law recognises the right of the occupier to escape liability by excluding his duty altogether[98]. This right was codified in section 2(1) of the Occupier's Liability Act and is consistent with the general principle that it is competent for a defendant in a negligence action to exclude his liability by disclaimer[99]. It is difficult to refute the argument on which this competence is based. If the occupier can exclude the visitor from his property altogether why should he not be able to set the terms on which the visitor enters?[100] It is suggested, however, that this rationale limits the scope of visitors to whom the occupier can exclude his duty. He cannot do so, under this rationale, tó a person entering as of right, and the application of the doctrine to a current operation, like the negligent operation of a train loader, is not justifiable on this ground.[101]

Sixth, and perhaps most importantly, it is necessary to consider the impact of this proposal on the rules relating to trespassers as laid down by the House of Lords in *Herrington v. B.R.B.*[102] At the time of writing it remains unclear whether the "common humanity" basis of liability enunciated by the House is different in kind than the reasonable forseeability test enunciated by the same Tribunal in *Donoghue v. Stevenson.* If there is a difference in substance between the two, it is this: first, the

[97] *Ibid.*, per Lord Denning at p. 913.

[98] *Ashdown v. Samuel Williams & Sons* [1957] 1 Q.B. 409; [1957] 1 All E.R. 35.

[99] See for example, the wide effect given to the disclaimer in *Hedley Byrne v. Heller, op. cit.*, n. 64.

[100] See *Winfield & Jolowicz on Tort* 9th Ed., (1971), p. 185. Cf. Gower, "A Tortfeasors Charter?" [1956] 19 M.L.R. 582.

[101] But see *Benner v. Tugwell* [1971] 1 W.L.R. 847.

[102] See discussion *supra*, p. 58.

approach permits of a greater degree of control by the courts. Lord Morris emphasized that the occupier was not required to "make surveys of his land in order to decide whether dangers exist of which he is unaware."[103] Only once he is aware of such danger does he come under an obligation to take "such steps as common sense and common humanity dictate. . . to exclude or to warn or to otherwise within reasonable and practicable limits to reduce or avert it."[104] The occupier cannot, as a matter of law, be said to have acted in a culpable or inhumane manner unless ke knew both of the existence of facts rendering it likely that a trespasser would be present and of facts constituting a serious danger to him[105]. The second possible difference in substance is that in determining whether or not a duty of humanity arises, the resources of the occupier is a relevant consideration. Lord Reid said "an impecunious occupier with a little assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do."[106] The inclusion of these two criteria,which are subjective in nature, may appear to deviate from the objective formulation of the duty principle in *Donoghue* v. *Stevenson.* In practice, however, the difference between the two will probably be negligible. Simply because, under the terms of the present proposal, the duties owed to invitees, licensees and trespassers would be expressed in terms of the familiar requirement of acting with reasonable care does not necessarily mean that the three categories of entrants are being equated. The standard is a flexible one. In *McGlone* v. *B.R.B.*,[107] an appeal to the House of Lords from Scotland, where the Occupier's Liability Act, 1960 provides that the "common duty of care" is owed to trespassers as well as lawful entrants, Lord Reid observed that it may "often be reasonable to hold that an occupier must do more to protect a person whom he permits to be on his property than he need do to protect a person who enters his property without his permission."[108] It is helpful in this regard to refer to Lord Denning's judgement in the recent case of *Pannett* v. *P. McGuiness & Co. Ltd.*,[109] a post-*Herrington* decision of the Court of Appeal. The issue in *Pannett* was whether an independent contractor, who was assumed to be an occupier, breached his duty of care to trespassing children injured by fire on the premises. To aid

[103] [1972] 2 All E.R. 749, 767.

[104] *Ibid.*

[105] (1972) 35 M.L.R. 409, 414.

[106] [1972] 2 All E.R. 749, 758.

[107] [1966] S.C. (H.L.) 1.

[108] *Ibid.*, p. 11.

[109] [1972] 2 Q.B. 600; [1972] 3 All E.R. 137.

in applying the new standard, Lord Denning formulated a number of criteria.[110] Their similarity to the criteria usually associated with the "reasonable man" standard for determining a breach of a *Donoghue* v. *Stevenson* duty is striking. They include (1) the occupier's knowledge of the likelihood of a trespasser being present, (2) the character of the intrusion, (3) the gravity and likelihood of the probable injury, and (4) the nature of the premises. Lord Denning then proceeded to run the two tests together by characterising the attitude of the House of Lords in *Herrington* in these terms: "there was nothing subjective about [the railway's] fault. It was all objective. . . In short they did not take such reasonable care as the circumstances of the case demanded."[111]

IV. CONCLUSIONS

Finally, it is pertinent to inquire why a satisfactory result could not be achieved by reproducing the Occupier's Liability Act in Malaysia. First, the 1957 Act was based on the Report of the Law Reform Committee who carried out their research in 1953 without the benefit of having seen the decision of a number of important cases since that date including *Ashdown* v. *Samuel William's & Sons*,[112] *A.C. Billings & Sons Ltd.* v. *Riden*,[113] *Hedley Byrne* v. *Heller*,[114] and *Dorset Yacht* v. *Home Office*.[115] The first two cases brought important sections of occupier's liability into line with the general principles of negligence,[116] and the last three established the compelling logic of adhering to those principles in the absence of sound policy reasons for not doing so. This process has been facilitated by the Lord Chancellor's decision in 1966 to free the House of Lords from the shackles of the doctrine of binding precedent. Furthermore, in 1953 the duty concept had not yet attained the position of prominence or reached the state of development it now has. It is of course a matter for speculation, but it is arguable that if the committee had met today, its recommendations would have incorporated or have been closely modelled on the precepts of the common law principles of duty and breach of duty. Second, in so far as the "common duty of care" standard is relevant, there can be little difference between the statute and the principles of negligence at common law.[117] In *Simms* v. *Leigh Rugby*

[110] *Ibid.* [1972] 2 All E.R. 137, 141.

[111] *Ibid.* p. 140.

[112] [1957] 1 Q.B. 409; [1957] 1 All E.R. 35.

[113] [1958] A.C. 240; [1957] 3 All E.R. 1.

[114] [1964] A.C. 465; [1963] 3 All E.R. 575.

[115] [1970] A.C. 1004; [1970] 2 All E.R. 294.

[116] See *supra*, p. 67-68.

[117] *Winfield & Jolowicz on Tort, op. cit.* n. 100, p. 173; and Clerk and Lindsell,

Football Club,[118] Wrangham J. used the case of *Bolton* v. *Stone*[119] as the touchstone in deciding whether the common duty of care had been breached by the occupier of a rugby football ground. This relationship supports the view that the cases in this area ought to be analysed by reference to familiar principles and not that occupier's liability should be made the subject of an independent action for breach of statute.

Third, in so far as the Act departs from the principles of negligence as currently interpreted, it does so primarily to set out its scope by either defining who is an occupier[120] and what are premises[121], or to modify binding precedent.[122] Fourth, the Act did not deal with the important area of duty to trespassers. It seems anomalous to promulgate a statutory scheme which purports to detail the obligations of the occupier in both tort and contract, but which is not comprehensive and therefore requires the courts to decide a substantial number of cases by reference to common law principles. In the final analysis, the real thrust of Lord Atkin's exhortation is that "there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are instances."[123]

H.L. Dickstein*

Torts 13th Ed., (1969); p. 595-596; *Wheat* v. *Lacon & Co.* [1966] A.C. 552; (1966) 1 All E.R. 582.

[118] [1969] 2 All E.R. 923.

[119] [1951] A.C. 850; [1951] 1 All E.R. 1078.

[120] Sec. 1(2).

[121] Sec. 1(3).

[122] Sec. 4 of the Act modifies the law relating to a landlord's duty to third parties, which had previously been governed by the decision of the House of Lords in *Cavalier* v. *Pope*, [1906] A.C. 428.

[123] *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

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